Mr Dascombe
A 6192.a.1.

A GENERAL ABRIDGMENT OF Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES TO THE WHOLE.

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(M. a) *LEAGUE and TRUCE.

Fol. 174. bis.

* The *difference between a* league and a truce is, that a truce is a ceſſation from war for a certain time, but a league is an abſolute ſtriking of peace. 4 Inſt. 156. ——— A truce *is* an agreement, whereby, though the war continues, yet all hoſtilities do for a while ceaſe; for between war and peace there is no medium. It is but a bare ſuſpenſion of the acts of war. 1 Molloy, 138. cap. 9. ſ. 1.

[1. † IT *is a breach* of a truce for one realm *to baniſh the commodities of the other realm*, there being a truce between them.]

† A *league* may be *broken* by levying of war, or by ambaſſador or herald. 4 Inſt. 152. cap. 26. ——— And ſays, that Brian held opinion in 19 E. 2. 6. b. That *if all the ſubjects* of England would *make war with a king in league with the king of England, without his aſſent*, that ſuch a war is no breach of the league. And in the DUKE OF NORFOLK'S CASE, Hill. 14 Eliz. the queſtion was, whether the LORD HERISE, and other ſubjects of the king of Scots, that without his aſſent had waſted and burnt divers towns in England, and proclaimed enemies, were enemies in law, within the ſtatute of 25 E. 3. the league being between the king and the Scots; and reſolved that they were enemies. 4 Inſt. 152. cap. 26.

Paſch. 36 Eliz. HENRY DE WALE and other *Frenchmen imported divers manufactures*, as cloth of tiſſue, cawles, points, &c. *Whereupon* TOMLINSON and other good *merchants* of London, *exhibited divers informations upon the ſtatute* 19 *H.* 7. *which prohibits the ſame*; of whom *the Frenchmen complained at the council table.* And it was reſolved by the Lord Treaſurer Burleigh and the whole council, that it was no breach of the league between this kingdom and France; for that *in the articles of the league the laws of either kingdom are excepted*; and therefore if Tomlinſon the ſubject being a French merchant, ſhould trade into France, he muſt obſerve the laws and cuſtoms of France. 4 Inſt. 153, 154.

[2. 27 *H.* 6. *cap.* 1. 28 *H.* 6. *cap.* 1. 4 *E.* 4. *cap.* 5. between the duke of Burgundy, and the king of England.]

[3. 1 Eliz. cap. 13. recites, that where by divers ſtatutes before it had been enacted, that no ſubjects of the king of England ſhould *export or import any merchandizes but in ſhips of the king's ſubjects, &c.* Since the making of which ſtatute other foreign princes finding themſelves aggrieved with the ſaid ſeveral acts, as thinking that the ſame were made to the hurt and prejudice of their country and navy, have made like penal laws againſt ſuch as ſhould ſhip out of their countries in any other veſſels than of their ſeveral countries and dominions; by reaſon whereof, there hath not only grown great diſpleaſure betwixt the foreign princes and the kings of this realm, but alſo the merchants have been ſore grieved; for remedy thereof be it enacted, that the act of 5 R. 2. cap. 3. and 4 H. 7. cap. ſhall be void, &c.]

[4. Rot. Parl. 8 H. 5. N. 5. Where before accord was made between the kings of England and Flanders, that *no wools but of England ſhould be ſold in Flanders, and* that *no cloths of England ſhould be ſold in Flanders*, upon pain of forfeiture of them, which ordinance of cloths holds yet in Flanders, and yet there are brought the wools of Scotland, Arragon and Catalonia, and Spain, the commons pray remedy. Anſwer, It ſhall be ſearched in the treaſury of the king, and in other places, if any ſuch alliance can be found.]

[5. Rot. Parl. 9 H. 5. N. 5. Pray the commons, that where very great plenty of *wools* of Scotland, Catalonia, and Spain is brought into Flanders, and there worked more cuſtomably than uſual, by which the price of Engliſh wools is lowered; pleaſe the king to make ſuch treaty and requeſt to the Duke of Burgundy, that the ſaid wools, &c. be not there worked, or otherwiſe that the cloths made in England may be ſold in Flanders as they are in Brabant, Holland, and other countries adjacent. Anſwer, That he will ſpeak that the cloths of England may be ſold there.]

[2]

By this ſtatute robbery, ſpoiling, breaking of truces, and ſafe-conducts, by any of the king's liege people and ſubjects within England, Ireland, and Wales, or upon the main ſea, was adjudged and determined to be high treaſon. But this branch concerning high treaſon is repealed by ſtatute 20 H. 6. 11. But by the ſaid act of 2 H. 5. for the better obſervation of truces and ſafe-conducts, a *conſervator induciarum*, & ſalvorum regis conductum, was raiſed and appointed in every port of the ſea by letters patents. His office was to inquire of all offences done againſt the king's truces and ſafe conducts upon the main ſea out of the counties and out of the liberties of the cinque ports, as admirals of cuſtom were wont. 4 Inſt. 152. cap. 26.

[6. 2 H. 5. cap. 6. The *breach* of truce and leagues *made treaſon*. 29 H. 6. cap. 2. enlarged.]

[7. By force of the ſtatute 27 *E.* 3. *Statute-ſtaple*, *cap.* 13. *the chancellor alone without any juſtice*, *has power to relieve merchants who are robbed upon the ſea.* 2 R. 3. 2. Per all the juſtices.]

[8. *Speedy remedy given to ſtrangers upon the violation of truce and ſafe-conduct.* 31 *H.* 6. *cap.* 4. 14 *E.* 4. *cap.* 4. Where it is ſaid that offences againſt the amities and leagues, &c. are to the great ſlander of the king, and the univerſal damage of all the realm, &c.]

S.P. Arg. 2 Show. 369.

9. All leagues or ſafe-conducts ought to be of record, viz. *inrolled in Chancery*, to the end the ſubject may know who are in amity with the king, and who not. 4 Inſt. 152.

10. In all treaties, the *power of the one party and the other ought to be equal.* 4 Inſt. 152.

11. There are *four kinds of leagues*, viz. 1ſt, Fœdus *pacis*. And a Chriſtian prince may have this with an infidel. 2dly, Fœdus *congratulationis ſive conſolationis*, which may likewiſe be with an infidel. 3dly, Fœdus *commutationis mercium ſive commercii*; and this may likewiſe be with an infidel. 4thly, Fœdus *mutui auxilii*; but this cannot be with an infidel or idolater. And as concerning theſe four leagues, the laws of England are grounded upon the laws of God. 4 Inſt. 155.

12. A league made *between two kings without naming of ſucceſſors*, does not extend to ſucceſſors, though by our law rex non intermoritur. 4 Inſt. 156. (d) cites 9 E. 4. 2. a.

S. C. Keb. 514. pl. 94. ſays, That upon the ambaſſador's complaint to the council, he ſubmitted to pay all duties, and

13. One, who *came with merchandizes from the Brazils*, *did not pay cuſtom there*, but promiſed to touch at Liſbon and to pay it there, which he did not do, but *came here into England*, *and offered to ſell the merchandize*; whereupon the *Portugal ambaſſador here complained* to the king's counſel, who for this and his refuſing ſtill to pay the cuſtom, committed him. Upon a motion to bail him, the king's counſel oppoſed it, becauſe it would ſeem as a countenancing him

him in his obſtinacy againſt the king of Portugal, which *might occaſion a breach between the two crowns.* But the Court thought he ſhould be bailed, and that if they could prove any ſuch matter againſt him, they *might indict him for it;* but upon praying to inſpect the return before it be filed, he was remanded. Sid. 143. pl. 23. Paſch. 15 Car. 2. The King v. Indicalmois.

now refuſed, and the ambaſſador having gone without libelling in the admiralty, the king's counſel conceived it a matter of ſtate, and the king would ſend him into Portugal; and that the Court would not let him go [bail him] without ſufficient ſecurity to anſwer information in the king's court for cheating the king, in regard the *king of Portugal intends to repriſe and defaulk it out of the queen's portion.* Adjornatur. The King v. Judaicum Mayes.

14. Though there be *no actual war, yet if* there be *no league,* they may take up arms and fight one another, for they are in ſtatu belli. Arg. 2 Show. 369. in caſe of Eaſt-India Company v. Sands.

15. If a league be *broken,* let the *ſubject's right* be what it will, it *is gone;* for on breach of the league they become as enemies. Arg. 2 Show. 370.

16. The law veſts the *ſole power of making leagues* in the king alone. Arg. 2 Show. 369.

17. In all leagues the *municipal laws of each realm* are excepted. Arg. 2 Show. 369. [3]

For more of **League** and **Truce**, ſee 1 Molloy, cap. 7, 8, 9.

(N. a) *Letters of Marque and Reprizal.*

Fol. 175. bis.

[1. IN the Regiſter, fol. 129. there is *a writ to the earl of Flanders to do right to J. and upon default* of right, *a writ for an arreſt here of the goods and body of him who did the wrong, by taking or ſpoiling of the goods of the Engliſh.* F. N. 114. b.]

See Admiralty.—See Prizes.

[2. 1 E. 1. Rot. Fin. Memb. 6. *Rex ballivis ſuis novi caſtri ſuper T. Salut,* &c. Becauſe the burgeſſes of the ſaid vill have received great damage in Flanders, and becauſe he would do juſtice he commands them *quod bona & mercimonia Flanders de ceteris in Portu Villæ veſtræ predictæ inventa arreſtari faciatis ita quod,* the burgeſſes ſhall have the third part of the ſaid goods for their damage, and the other two parts they ſhall keep *donec aliud a nobis receperitis in mandat.*]

[3. 28 E. 1. Rot. Pat. M. 13. *Bernardus Civis Baion. depræd. de bonis* ad valent. 7000l. in Portugal habuit licenc. per Jo. de Britania lieutenant de Aquitaine quod ipſe gents de regno Portugal, & eorum bona ubicunque infra diſtrict. noſtrum contigerit ſecundum legem mercatoriam marcare retinere & appropriare poſſit quoſque eidem reſtitutio facta fuerit; which letters of marque the king confirmed.]

If any perſon ſhall be killed, wounded, or any ways damaged in a hoſtile manner, in the territories or places of any king or potentate, to whom letters of requeſt are tranſmitted, and no ſatisfaction ſhall be made to the perſon injured, there is no compulſion to reſort to the ordinary proſecution, but letters of repriſal ſhall be iſſued. But where misfortunes happen to perſons or their goods, reſiding in a foreign country in time of war, repriſals are not to be granted; in this caſe they muſt be contented to ſit down under the

the loſs, for they are at their liberty to relinquiſh the place on the approach of the enemy, when they foreſee the country is ſubject to ſpoil and devaſtation; and if they continue, they muſt partake of the common calamity. Gen. Treat. of Trade, 213, 214.

[4. 17 E. 1. Rot. Fin. Memb. 3. *De bonis & mercimoniis civium burd. arreſtandis ob tranſgreſſionis regi factas, &c.*]

[5. 22 E. 1. Rot. Fin. Memb. 3. *De bonis mercatorum de regno & poteſtate regis Franciæ in Hibern. invent. arreſtand. & vendend.* for cauſe of the war, &c.]

See pl. 10. [6. 29 E. 1. Rot. Fin. Memb. 12. *Arreſt of goods* of merchants de Provence, *for having ſtayed in London ultra* 40 *dies contra libertates, &c.*]

[7. 33 E. 3. Rot. Fin. Memb. 8. *De bonis mercatorum, &c. arreſtandis, &c.*]

[8. 14 E. 2. lib. Parl. 91. Some *ſhips of Calais arreſted here for robbery done to the Engliſh*, and delivered upon the letter of the king of France to have it reſpited; and upon petition to the king by the Engliſh merchants, it is anſwered, That the letters ſhall be ſeen, and the anſwer of the king to them; and if the time of reſpite be paſſed, then let the Chancellor do to the merchants that which reaſon and law will.]

[9. Rot. Pat. 27 E. 1. Memb. 5. Licence to P. of Spain to come into England with merchandizes, &c. Nolentes quod occaſione cujuſdam arreſte, quod vocatur *le marque*, quod nuper fieri conceſſimus pro hominibus ducatus noſtri Aquitaine occaſionetur.]

[4] [10. 27 E. 3. cap. 17. ſtat. 2. Provided always that if our liege people, *merchants or other*, be *indamaged by any lords of ſtrange lands*, or their ſubjects, *and* the ſaid lords, *(duly required,) fail of right to our ſaid ſubjects*, we ſhall have the law of marque and of taking them again, as hath been uſed in times paſt, without fraud or deceit; and *if debate ariſe* between us and other lords, &c. *the people* and merchants *of ſuch lords ſhall* not be preſently ſubdued, but ſhall *have* * 40 *days after proclamation*, or more, if need be, *to depart the land*, as appears by the ſtatute more largely.]

* See pl. 6.

Letters of *reprisal* were *granted long before* † Fol. 176. bis. *theſe ſtatutes by the king's of England, by virtue of their prerogatives*, nor was the king's prerogative in the leaſt diminiſhed by them, but remained at common law.

[11. 4 *H.* 5. cap. 7. If the ſubjects of another king do contrary to the tenor of the truce made to any ſubject of England, *the keeper of the privy ſeal* [ſhall] *make to the party grieved letters of requeſt under the privy ſeal in a due form; and if after ſuch requeſt made, the party required do not make* † *within a convenient time due reſtitution and ſatisfaction to the party grieved, then the Chancellor ſhall grant letters of marque* to him in a due form. And if any be ſo grieved by thoſe of Scotland, the wardens of the eaſt and weſt marches ſhall have power to make letters of requeſt to him who does the wrong, or to the wardens of the marches, or conſervator of the truce of Scotland, if he can well do it; or otherwiſe to *make proclamation in open places upon the marches*, that the wrong-doer ſhall make reſtitution to the party grieved; and if they do not do it in a convenient time, the party grieved ſhall have letters of marque in due form, &c.]

Gen. Treatiſe of Trade, &c. 212.——And this ſtatute does in no reſpect

ſpect reſtrain the king's prerogative and authority which he had at the common law, in judging the conveniency and time when to be executed. Molloy, 30. cap. 2. ſ. 9.

[12. Rot. Parl. 2 H. 5. 1 Part. N. 34. Letters of marque againſt the merchants of * Jeane confirmed, and how the prizes brought in ſhall be ordered.]

* Orig. is (Janvoies). Pryn n es Abr. of Cotton's Records, 541, 542. No. 34.

[13. Rot. Parl. 3 H. 5. 1 Part. N. 27. An *impoſition put upon cloths* by the city of Baion; and for this prays remedy by repriſal here to the double upon theirs, [to be] taken here, if they do not reform it. But it is not enacted. Vide accordingly 3 H. 5. 2. Part of the laſt petition.]

Prynne's Co t. Rec. Abr. 546. No. 27. The anſwer was, that the officers of Bayon ſhall be driven to ſhew the cauſes, whereupon redreſs ſhall be made.

[14. A merchant of England ſhall not have any writ of repriſal *for debt due to him by merchant ſtranger upon contract made beyond ſea*, if the merchant ſtranger comes into England, or his goods. F. N. B. 114. b. tamen quere.]

[15. 10 *H.* 6. *cap.* 3. It was complained that the goods of divers of the ſubjects of England were taken by the king of Denmark and his lieges, being in amity of the king, whereof they have not any remedy of the ſaid king nor any other, inaſmuch as none of them come to England, or have nothing there; and therefore it is enacted that the *keeper of the privy ſeal* for the time being, *ſhall* have power to *make* to the party grieved, *letters of requeſt* under the privy ſeal, without any other purſuit to be made to any *for reſtitution* to be had of the goods ſo taken and to be taken; *and if reſtitution be not made* by ſuch letters, *the king*, by the advice of his council, *ſhall provide* to the party grieved his *covenable remedy* according as the caſe requireth.] Expired.

[16. 20 *H.* 6. *cap.* 3. A kind of repriſal *in Wales*.] Expired.

17. *In the proſecution* of letters of marque and repriſal, *there muſt be*, 1*ſt*, The *oath of the party* injured, *or other ſufficient proof* touching the pretended injury, and of the certain loſs and damage thereby ſuſtained. 2*dly*, *A proof of the due proſecution for the obtaining of ſatisfaction in a legal way.* 3*dly*, *A delaying* or denial *of juſtice.* 4*thly*, *A complaint to his own prince* or ſtate. 5*thly*, *Requiſition of juſtice by him* or them, made *to the ſupreme head or ſtate, where juſtice in the ordinary courſe was denied.* 6*thly*, *Perſiſtency* ſtill *in the denial of* juſtice. All which being done, letters of reprizal under ſuch cautions, reſtrictions and limitations as are conſonant to law, and as the ſpecial caſe may require, may iſſue not only by the jus gentium & civile, but by the ancient and municipal laws of the kingdom. Molloy, 28. cap. 2. ſ. 6.

[5] S. P. And then the prince of that country againſt whom the ſame are awarded, muſt repair the damage out of his or their effects who committed the injuries, or if that proves deficient, it ought to fall as a common debt on his country. 2 Gen. Treat. of Com. 210. cap. 10.

18. Repriſals granted by the laws of England are of *two ſorts*, *ordinary and extraordinary.* The *ordinary*, are either *within the realm or without*, and are always granted where any Engliſh merchants or their goods, are ſpoiled or taken from them in parts beyond

2 Gen. Treat. of Trade, 211. &c. S. P.

beyond the ſea by merchant ſtrangers, and cannot, upon ſuit or the king's demanding juſtice for him, obtain the ſame; he ſhall have, upon teſtimony of ſuch proſecution, a writ out of the Chancery to arreſt the merchant ſtrangers of that nation, [or] their goods here in England; the which is grantable to the ſubject oppreſſed, of common right, by the Chancellor or Keeper of England, who always in ſuch caſe hath the approbation of the king or council, or both, for his ſo doing. The other, which is for ſatisfaction out of the realm, is always under the great ſeal. Molloy, 28. cap. 2. ſ. 7.

2 Gen. Treat. of Trade, 211. &c. S. P.

19. The *extraordinary*, are by letters of marque for reparation at ſea, or any place out of the realm, grantable by the ſecretaries of ſtate, with the like approbation of the king or council, or both; but they are only during the king's pleaſure, and to weaken the enemy during the time of war, and may at any time be revoked. Molloy, 31. cap. 2. ſ. 10.

* Prynne's Cott. Rec. Abr. N° 66. is, that John Cowley of Bridgwater prayeth, that he may take letters of marque and privy ſeal of all Frenchmen's goods, having no ſafe-conduct of the king, to a certain value, for certain his ſhips and other goods taken by the French in time of truce. The anſwer was, that upon his ſuit to the king, he ſhall have ſuch letters requiſitory as are needful; and if the French refuſe to do him right, the king will then ſhew his right.

20. A. had letters of repriſal *granted* to him by the king *for a great ſum of money*, and therein was a *clauſe, that no treaty of peace ſhould prejudice them.* The king, by ſeveral treaties of peace with the Dutch, had expreſsly articled, that they ſhould not be prejudiced by theſe letters patents. Lord Chancellor refuſed to let the point be argued, and ſaid, that nothing could be ſaid for it, and that the caſe was very proper in Chancery for the *repealing theſe letters patents;* for though the bar was not ſo well apprized of it, the Chancery had admiral juriſdiction by the ſtatute 31 H. 6. N° 66 or 68. which was never printed. And in proof that a *treaty of peace may revoke and amortize letters of reprizal*, his lordſhip ſaid, that *the ſame may be done by a truce, or by letters of ſafe conduct;* and as to this laſt point, cited * 11 H. 4. Rot. 66. and a judgment of the like nature given in the parliament of France, and the like in the parliament of England † 2 H. 5. N° 34. And for authority that a truce had like effect upon letter of reprizal, he cited the Roll of Parliament 10 H. 6. N° 34. where the Danes, after a truce made with them, had ſeized Engliſh ſhips by colour of letters of reprizal, there being no proviſion made againſt them in the truce, and the parliament there petitioned the king for letters of marque againſt the Danes. Vern. 54. Paſch. 1682. The King v. Carew.

† Prynne's Cot. Rec. Abr. 541. N° 34. Drue Barentine and others of London pray, that the letters of mart or reprizal granted by the king againſt the goods of the merchants of Jeane may be confirmed. Anſwer, The which the king granteth, and thereby provideth for the ſafe keeping and well ordering of the ſaid goods.

‡[6]

21. Some Engliſhmen having fitted out a privateer got a commiſſion by *letter of marque from the duke of Savoy*, and took a French ſhip in which were ſeveral *Turks* and Tripolins. It was ſentenced in the admiralty, that the capture was not good in reſpect of ſuch commiſſion, and alſo becauſe the Tripolins being in peace with England, their goods were not to be ſeiſed by Engliſh ſhips or men. 2 Vern. 592. Mich. 1707. Walton v. Hanbury.

22. By

22. By the admiralty law, the *property of a ſhip taken without letters of marque veſts in the king upon the taking*; and this upon the high ſea. Reſolved per tot. Cur. 12 Mod. 135. Trin. 9 W. 3. B. R. in caſe of the King v. Brown. Carth. 399. Hill. 8 W. 3. B. R. & C.

(O. a) *Contempts.*

See (P. a) &c.

[1. INQUISITION apud Lanceſton 6 E. 1. in the Exchequer. A. qui ſequitur pro rege ſaith, that dominus rex ratione regie dignitatis & corone ſue habet privilege quod *nullus* in regno ſuo de aliquo qui ſit de regno Anglie alicui *homagium ſive fidelitatem alicui facere debeat vel aliquis hujuſmodi homagium, vel fidel. ab aliquo recipere debeat niſi facta mentione de fidel. domino regi debita eidem domino regi fidelit. obſervand.* Epiſcopus Exon. has done contrarium, &c. in contemptum, &c. And the biſhop put to anſwer; and refuſed; and upon this was condemned, &c.] Tenure by homage is taken away by the ſtatute of 12 Car. 2. cap. 24. ſ. 1.

[2. Et ibidem comes Cornub. complains of the biſhop of Exon for *excommunicating of the men of the vill of* Eſhe *for taking his duty due for the paſſage over the river* of Eſhe of the paſſengers, which he has had time out of mind, &c.]

[3. Rot. Parl. 17 E. 3. N. 26. Richard Heiron late of London merchant, being a liege-man of our king, and born in England, ſued John Walden mayor of the ſtaple of Calais and other merchants of the ſtaple, and *cauſed* them *to be arreſted in Flanders in the court of the duke of Burgundy held in Bruges, for certain injuries ſuppoſed by him to be done within the juriſdiction of the king of England at Calais; and after the* * *defendants appealed to the parliament of Paris*, where they were diſmiſſed by ſentence judicial, becauſe the ſuits were grounded upon matters ſuppoſed to be done in places within the juriſdiction of the king of England, and the parties plaintiffs and defendants were ſubjects to the ſame king of England, *and after the ſame plaintiff ſues them again in a foreign court*; and therefore upon all this matter ſhewn, it is enacted that *a writ of proclamation ſhall iſſue, commanding him to ſurceaſe his ſaid actions, and that if he hereafter ſues the ſaid defendants out of the realm of England, for any matter determinable under the obedience of the king of England, or where he has juriſdiction*, then *he ſhall be put out of the king's protection, and ſhall forfeit all his lands and tenements, goods and chattels, and that no pardon ſhall be available to him.*] * Fol. 177. bis.

4. The *refuſing to be examined before a committee of council* is a great contempt. 12 Rep. 94. The Counteſs of Shrewſbury's caſe.

5. As to this head of contempts, ſo far as it concerns this title of prerogative, Mr. Serjeant Hawkins divides it into four parts. 1. Contempts * *againſt his palace or courts of juſtice.* 2dly, Againſt *his* *See Indictment (B) (C) (D)— And ſee Striking, infra.—

† Hawk. Pl. C. 59. cap. 22.

his † *prerogative.* 3dly, Againſt *his* ‡ *perſon or government.* 4thly, Contempts againſt ‖ *his title.* Hawk. Pl. C. 56. cap. 21.

divides this into three parts, viz. 1. Refuſing to aſſiſt the king for the public good. 2dly, Preferring the intereſt of a foreign prince to that of our own. 3dly, Diſobeying the king's lawful commands or prohibitions.

‡ Ibid. 60. cap. 23. All contempts againſt the king's perſon or government are very highly criminal, and puniſhable with fine and impriſonment, and ſometimes with the pillory, by the diſcretion of the judges, upon conſideration of all the circumſtances of the caſe; but inaſmuch as it is generally obvious to common ſenſe, in what caſes, and to what degree a man is guilty of this offence, and it would be endleſs to enumerate all the particulars, the Serjeant ſays he ſhall content himſelf with glancing at ſome of the moſt general heads; which the reader may ſee there.

‖ The Serjeant divides this into two kinds, viz. 1. *Denying his title.* 2dly, *Refuſing* to take *the oaths required by law for the ſupport of his government.* Hawk. Pl C. 61. cap. 24. In which ſaid ſeveral chapters the reader may ſee the ſaid ſeveral matters more fully treated of and explained.

(P. a) * *Premunire at the Common Law.*

* *Some hold* an opinion that this writ is *called* a premunire *becauſe it doth fortify juriſdictionem jurium regiorum coronæ ſuæ*, of the kingly laws of the crown, *againſt foreign juriſdiction*, and againſt the uſurpers upon them, as by divers acts of parliament appears. *But in truth* it is ſo called from a word in the writ; for the words of the writ be, præmunire facias præfatum A. B. &c. quod tunc ſit coram nobis, &c. where *premunire is uſed for præmonere*, and ſo do divers interpreters of the civil and canon law uſe it; for they are præmuniti that are præmoniti. Co. Litt. 129. b.——S. P. 3 Inſt. 120.

[1. H. 24 E. 3. B. R. Rot. 13. The king miſit hic 4 literas ſuas diverſis clericis ſuis *dimorantibus apud Romam* qui quamplurima fecerunt ibid. in derogationem corone regie *præcipiendi quod viſis literis ſuis immediate feſtinarent in Angliam*, & preſentent ſe coram concilio regis reſponſur. ad ea que ex parte regis objicerentur, &c. And Roger Holme, for not coming according to the command, committitur Mariſchal, and after to the Tower of London, & *quod omnia bona quam ſpiritualia tam temporalia in manus regis capiantur, &c.* Poſtea pardonatur. (It ſeems this was a premunire, for he had not any lands.)]

A. is *ſued in the ſpiritual court for maintaining* that it is lawful for ſecular judges to convene before them and proceed againſt clerks for offences againſt the peace; and *that the exemption of the clergy from the ſecular juriſdiction is not founded upon the law of God:* The promoter and abettors of the ſuit incur a premunire, and ſo do the judges of the ſpiritual court who retain the cauſe; by all the judges of England. Jenk. 198. pl. 10. cites 7 H. 8.

[2. 29 E. 3. B. R. Rot. 19. The biſhop of Hereford indicted in a premunire *for excommunicating all, qui in boſcis, parcis, chaceis & warennis ſuis apud Malvern & alibi in dioceſi ſua fugaverunt* & feras de boſcis ſuis ac lepores, cuniculos & phaſianos de waren. ſuis ceperunt, generaliter per totam dioceſim ſuam fulminavit contra jus regni, &c. and found guilty by jury, but adviſed of the judgment. (It ſeems that this indictment was not upon any ſtatute, for it ſeems 27 E. 3. does not extend to it, not being done to the king, nor after judgment at the common law.)]

He who *brought writ of excommunicatione into England* in

[3. Rot. Parl. 20 E. 3. N. 41, 42. The commons pray that if any *bring the bull or letter of the pope, touching the buſineſs of alien biſhops, abbots, &c.* that he be out of the law. Anſwer, Be it forbid, that none bring letters of aliens from over the ſea into the realm,

realm, if he does not ſhew them to the chancellor or the warden of the ports, upon pain of 500l. forfeiture to the king.] the time of E. 1. *abjured the realm, and the king would have had him drawn and hanged*; but the chancellor and treaſurer fell upon their knees for him before the king, by which he forejured the realm only. And ſo ſee the puniſhment thereof before any ſtatute of premunire; quod nota bene. Br. Premunire, pl. 10. cites 30 Aſſ. 19.

4. *At* the *common law before* the ſtatute 5 *Eliz. cap.* 1. *it was no felony to kill a man attainted of premunire;* for he was out of the king's * protection, and every man might do with him as with an enemy of the king. Jenk. 199. pl. 17. cites 24 H. 8. S. P. Hawk. Pl. C. 55. cap. 19. ſ. 46. —S. P. Co. Litt. 131. b. * [8]

(P. a. 2) Premunire *by Statute.*

1. ATTACHMENT upon a prohibition was brought by the king and the incumbent, for that the *king had preſented the incumbent* to a benefice, *and the other defendant brought bulls from Rome in diſturbance thereof*, contra formam ſtatuti, &c. And the defendant confeſſed it; by which the *Court awarded* that the *defendant* ſhall go *to perpetual priſon, and that the plaintiff recover his damages*, as he has counted; and the Court would not tax the damages in this caſe. And ſo it ſeems that this *action was brought* by the incumbent *qui tam* pro domino rege quam pro ſeipſo ſequitur. Br. Præmunire, pl. 7. cites 21 E. 3. 40.

2. 27 *E.* 3. *ſtat.* 1. *cap.* 1. *Whereas divers people are drawn out of the realm to anſwer things, the cognizance whereof belongeth to the king's court, and the judgments given in the king's court are impeached in another court, in prejudice and diſheriſon of the king, his crown and people, and to the deſtruction of the common law of this realm, it is aſſented and accorded by the king, the great men, and commons, that whoſoever ſhall draw any out of the realm in plea whereof the cognizance belongeth to the king's court, or in matters where judgment hath been given in the king's court. And whoever ſhall ſue in any* * other court, *to defeat or impeach the judgments given in the king's court, ſhall be ſummoned to appear before the king and his* † *council, or in his chancery, &c. to anſwer ſuch contempt within two months; and if they ſhall not* ‡ *appear in perſon at the day, to be at the law, they ſhall be put* ‖ *out of the king's protection, with their* § *procurators, attornies, executors, notaries and maintainers, and their* ¶ *lands, goods, and chattels forfeited to the king, and their* ** *bodies be impriſoned and ranſomed at the king's will; and if they cannot be found, they ſhall be outlawed.* The uſurpations of the biſhops of Rome were the cauſe of making this and all other ſtatutes of premunire. Arg. Mod. 60.—Before the making of this ſtatute there were *three* great *miſchiefs*. That the king's ſubjects have been *drawn out of the realm to anſwer things whereof the conuſance belonged to the king's court.* 2. Of things *whereof judgments have been given in the king's courts.* 3. That *after judgments* given *in the king's courts of common law*, of matters determinable by the common law, *ſuits were commenced in other courts within this realm*, to defeat or impeach thoſe judgments. And theſe three miſchiefs had three unſufferable effects. 1. The prejudice and diſheriſon of the king and of his crown. 2. The diſheriſon of all his ſubjects. And 3. The undoing and deſtruction of the common law of this realm. All which appears in the preamble of this act. 3 Inſt. 120.

* They are called *(other courts)* either becauſe they *proceed by the rules of other laws, as by the canon or civil law*, &c. or by other trials than the common law doth warrant; for the trial warranted by the law of England, for matters of fact, is by verdict of twelve men before the judges of the common law, of matters pertaining to the common law, and not upon examination of witneſſes in any court of equity;

equity; ſo as *alia curia* is either that which is governed per alium legem, or which draweth the party ad aliud examen: for if the freehold and inheritances, goods and chattels, debt and duties wherein the king or ſubject hath right or property by common law, ſhould be judged per aliam legem, or be drawn ad ſaliud examen, the three miſchiefs aforeſaid, expreſſed in the preamble and in this act, ſhould follow, viz. diſheriſon of the king and his crown, the diſheriſon of all his people, and the undoing and deſtruction of the common law at all times uſed: by which words of the act it appeareth, that all theſe miſchiefs were againſt the ancient common laws at all times uſed. 3 Inſt. 120.

† Here counſel cannot be taken, as moſt commonly it is, for his judges of his courts of juſtice, who are ſaid to be of his counſel for proceedings in courſe of juſtice, becauſe the courts of juſtice are hereafter in this act named; neither doth it *intend* the king's privy council, but *the king and the lords of parliament in parliament*, which is a court of juſtice. 3 Inſt. 125.

‡ *Premunire againſt an abbot* who was *a lord of parliament*; and therefore he prayed to be by attorney, and could not, becauſe the ſtatute is contrary; but by ſpecial writ out of Chancery he may. Br. Attorney, pl. 48. cites 15 H. 7. 9.——So of the *praying to be received*, this may be by ſpecial writ out of the Chancery. Ibid.

‖ By theſe words the perſons attainted in a writ of premunire are *diſabled to have any action or remedy by the king's laws*, or the king's writs; for the law and the king's writs are the things whereby a man is protected and aided, ſo as he, that is out of the king's protection, is out of the †† protection and aid of the law. 3 Inſt. 126.——S. P. And no one, knowing him guilty, can with ſafety give him aid, comfort, and relief. Hawk. Pl. C. 55. cap. 19. ſ. 47.

§ Note, by this act the *procurers, attornies, executors, notaries and maintainers* ſhall have the ſame puniſhment that the principal ſhall have. 3 Inſt. 125.

¶ See (P. a. 6)——This is a new kind of forfeiture given by this act, and is penal, and cannot by equity extend further than the records; and therefore this act extendeth not to the forfeiture of fairs, markets, rent-charges, rent-ſeck, warrens, annuities, or any other hereditament that is not within the word [lands]. 3 Inſt. 126.

** The greatneſs of the puniſhment ſhews the greatneſs of the offence. 3 Inſt. 126.

†† [9]

Provided, that if they come in before they be outlawed, and yield themſelves to priſon to be juſtified by the law, and ſubmit to the judgment of the Court, they ſhall be received.

3. If a man *leaſes his vicarage for life rendering rent*, and *ſues in the eccleſiaſtical court for the rent*, premunire lies; by which he tendered other iſſue; for now the rent reſerved is a lay thing. Br. Premunire, pl. 5. cites 44 E. 3. 36.

4. 16 *R.* 2. *cap.* 5. Enacts that * *if any purchaſe or proſecute, or cauſe to be purchaſed or proſecuted in the* † *court of Rome or elſewhere*, ‡ *any thing which touches the king, againſt him, his crown and his regality, or his realm, they, their* ‖ *notaries, procurators, maintainers, abetters, fautors, and counſellors, ſhall be put out of the king's protection, &c.*

* Theſe words *extend to all perſons* of what quality or ſex ſoever. 3 Inſt. 126.

† Theſe words *extend to all courts* of what juriſdiction ſoever, and whether holden by right or wrong. 3 Inſt. 126.——It is intended in the *biſhop's court*; and therefore if a man be excommunicated for a *thing which belongs to the common law*, premunire lies. Br. Premunire, pl. 12. cites 5 E. 4. 6.——It has been ſaid that *ſuits in the admiralty or eccleſiaſtical courts* within the realm are within this ſtatute by force of theſe words *(or elſewhere)* if they concern matters, the conuſance whereof belongs to the common law; as where a biſhop deprives an incumbent of a donative, or excommunicates a man for hunting in his parks, &c. or where commiſſioners of ſewers impriſon a man for not releaſing a judgment at law. Hawk. Pl. C. 51. cap. 19. ſ. 18.——But it ſeems that a ſuit in thoſe courts for a *matter which appears not* by the libel itſelf, *but only by* the defendant's plea, or other *matter ſubſequent, to be of temporal conuſance, (as* where a plaintiff *libels for tithes*, and the *defendant pleads* that they were *ſevered* from the nine parts, by which they became a lay fee) is not within the ſtatute, becauſe it *appears not that either the plaintiff or the judge knew that they were ſevered*. Hawk. Pl. C. 51. cap. 19. ſ. 19.——See (P. a. 7).

‡ Theſe words extend to all things whatſoever, and are as general as can be. 3 Inſt. 126.

‖ This act *extends* not only to procurers, abettors, maintainers, counſellors, &c. which are known words in law, but *to favourers* (fautores), which word was largely extended in the time of H. 8. whereby it is to be obſerved how dangerous it is to bring new words into an act of parliament, eſpecially into ſuch as be ſo penned; for there it appears that Cliff, being a parſon of a church, granted to the cardinal an annuity ſo long as he ſhould be legate, ut decentius & ſublimius ſe gerreret in authoritate ſua legantina, which the cardinal had by bull, and paid to him 10 marks in name of ſeiſin; and he was adjudged a fautor. 3 Inſt. 126. cites Mich. 21 H. 8. Cliff's caſe.

5. The

5. The *refuſing to elect or conſecrate* the perſon nominated by the king *to a biſhopric* is made a premunire by 25 H. 8. cap. 28. Hawk. Pl. C. 52. cap. 19. ſ. 22.

6. The exerciſing the juriſdiction of a *ſuffragan* without the appointment of the biſhop of the dioceſe, is made premunire by 26 H. 8. cap. 14. Hawk. Pl. C. 52. cap. 19. ſ. 21.

7. 5 *Eliz. cap.* 1. enacts that *if any ſubject of this realm, after the 1ſt of April* 1563, *ſhall by writing, cyphering, printing, preaching, or teaching, deed, or act, adviſedly and wittingly hold, or ſtand with to extol, ſet forth, maintain, or defend the authority, juriſdiction, or power claimed or uſurped by the biſhop or ſee of* Rome *within this realm, or wittingly attribute any ſuch juriſdiction, authority, or pre-eminence to the ſaid biſhop or ſee of* Rome, *ſuch offenders, their abettors, procurers, and counſellors, aiders, aſſiſters, and comforters, being indicted or preſented within one year after ſuch offence, and convicted or attainted at any time after, ſhall incur a* premunire.

Till this ſtatute any one might have *killed* a perſon attainted of premunire. Jenk. 199. pl. 17. cites 24 H. 8. Br. Caſes, 53. ——— Per Coke Ch. J. 2 Bulſt. 299.

——— 12 Rep. 38. the caſe of premunire. ——— The ſtatutes 27 *E.* 3. 1. 16 *R.* 2. 5. *&c.* of premunire *are yet in force*, and all ſuch proceedings by colour of eccleſiaſtical law, before any eccleſiaſtical judges * who were in danger of premunire before this act of 1 *Eliz.* are now in caſe of premunire after the ſaid act, be it before commiſſioners by force of high commiſſion, or before biſhops or other eccleſiaſtical judges; for the ſaid acts of premunire are not repealed by this act. Reſolved. 12 Rep. 37. caſe of premunire.

* [10]

8. The 5 Eliz. cap. 1. prohibits *books* to be publiſhed or printed, or uttered within the kingdom, which *maintain the ſupremacy of the pope* within the king's dominions. The approvers of ſuch books are within the ſaid ſtatute, and the danger of it, viz. premunire. By all the judges of England. Jenk. 235. pl. 12. cites 11 Eliz. Dyer, 282.

9. A. was indicted upon the ſtatute of 1 Eliz. cap. 1. for *aiding B. knowing him to be a principal maintainer of the authority of the ſee of Rome*; (the offender in ſuch caſe is liable by the ſaid ſtatute to the forfeiture of premunire. There are other offences mentioned in the ſaid ſtatute, with other penalties;) this offence in the ſaid ſtatute has the words *(upon purpoſe and to the intent to extol the power of that ſee)*. Theſe words were *omitted in the* ſaid *indictment*, for which cauſe the ſaid indictment was judged inſufficient by all the judges of England; for theſe words make the offence as to the forfeiture of premunire. Jenk. 243. pl. 27. cites 20 Eliz. D. 363.

10. The contributing to the *relief of a popiſh ſeminary* is made a premunire by 27 Eliz. 2. Par. 6. Hawk. Pl. C. 52. cap. 19. ſ. 26.

11. 16 *Car.* 1. *cap.* 21. enacts, that *if any perſon ſhall put in execution any letters patents, proclamation, &c. whereby the importation of gunpowder, ſaltpetre, brimſtone, or other materials for the making of gunpowder, ſhall be any ways prohibited or reſtrained, he ſhall incur a premunire.*

12. Green and others were indicted for *refuſing the oath of allegiance* contained in the act 3 Jac. cap. 4. and being convicted, judgment of premunire was given againſt them according to the directions of the ſaid ſtatute. Raym. 212. Mich. 23 Car. 2. B. R. Green's caſe.

1 Vent. 171. S. C. by name of the King v. Green & al'.

(P. a. 3) Premunire. *Notes.* And *for whom it lies.*

S.P.Hawk. Pl. C. 388. cap. 37. ſ. 26.

1. PREMUNIRE *is but a contempt;* and a *pardon* of all contempts pardons it. 12 Rep. 92. Paſch. 10 Jac. in Lord Vaux's caſe.

By the ſtatute 27 E. 3. it appears that a premunire lies *as well for the party as for the king*, cites S. C.

2. The king ſhall have premunire, and the *party grieved* by the ſuit of the proviſion may *have action.* Per Littleton. Quære what action he ſhall have; it ſeems action *upon the caſe;* but none can have premunire but the King, as it ſeems. Quære. Br. Premunire, pl. 13. cites 7 E. 4. 2.

and they both may join in one writ. 3 Inſt. 125. —— Br. Action Popular, pl. 9.

3. The *biſhop of Durham* has jura regalia there, and therefore may hold plea of premunire; quere, for it is given by ſtatute, and there was no ſuch ſuit at common law. Br. Premunire, pl. 15. cites 14 H. 4. 14. and 9 E. 4. 2.

Serjeant Hawkins ſays it has been queſtioned,

4. A man attainted in a premunire is diſabled to *bring any action;* for he is extra legem poſitus, and is accounted in law civiliter mortuus. Co. Litt. 130. a.

whether a man attainted of premunire has a *right to ſurety of the peace* or not. Hawk. Pl. C. 126. cap. 60. ſ. 3.

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5. Upon an indictment of premunire, a *peer* of the realm ſhall *not be tried by his peers.* 12 Rep. 92. Lord Vaux's caſe.

(P. a. 4) Premunire. *In what Caſes it lies, or a Prohibition.*

And in this caſe was * BARLOO, BISHOP OF BATH, in the time of

1. SOME hold that a benefice donative by the patron only *is a lay thing*, and the *biſhop ſhall not viſit*, and therefore ſhall not deprive; and then *if he meddles in it, he is in the caſe of premunire.* Br. Premunire, pl. 21. cites 8 Aſſ. 29.

E. 6. and was compelled to obtain a pardon, inaſmuch as he had deprived the dean of Wells, which was a donative by letters patents of the king, by act of parliament therefore made. But 8 E. 3. above is not adjudged. Ibid. —— * S. C. cited 3 Inſt. 122.

But where it is *of a lay-thing*, or of a thing which never belonged to the ſpiritual

2. Prohibition lies always where premunire does not lie as *of tithes of great trees*, or *for tithes of the ſeventh part* prohibition lies, and not premunire; for the *nature of the action* belongs to the ſpiritual court, but *not the cauſe* in this form. Br. Premunire, pl. 16. cites 24 H. 8.

court, premunire lies thereof; as of *debt againſt executors upon a ſimple contract*, or for breach of faith upon a promiſe to pay 10 l. by ſuch a day. Br. Premunire, pl. 16. cites 24 H. 8. and Doct. & Stud. lib. 2. cap. 24.

3. Saint

3. Saint Germin in his Book of Doctor and Student, who wrote after 26 H. 8. holdeth, that if a man makes a *promiſe for a temporal thing, and ſwears to perform it*, and does it not, if he be ſued for perjury in the ſpiritual court, a prohibition or a premunire lies in that caſe. Alſo he ſays; if a man be *excommunicate* in the ſpiritual court *for treſpaſs*, or ſuch other thing as belongs to the king's crown and his royal dignity, &c. the party, if he will, may have a premunire fac. againſt him. 3 Inſt. 122.

4. In all caſes, when the *cauſe originally belongs to the* cognizance of the *eccleſiaſtical court, and the ſuit is proſecuted there in the ſame nature, as the cognizance belongs to them* (*though in truth* the cauſe, all circumſtances being diſcloſed, *belongs to the court of the king*, and to be determined by the common law), yet no premunire lies in that caſe, but a prohibition; *as* if *tithes ſevered* from the nine parts, *are carried away*, if the parſon ſues for the *ſubſtraction* of theſe tithes in the ſpiritual court, this is not in the caſe of premunire; for it may be that the plaintiff did not know of the ſeverance, nor that they were carried away, nor may the eccleſiaſtical judge know it; and though the defendant pleads this, yet the eccleſiaſtical court may proceed to try the truth of it without danger. And *ſo* in caſe of *ſylva cædua*, though the wood perhaps may be *above* 20 *years growth*. 12 Rep. 39. the caſe of premunire.

But though the cauſe may originally belong to the eccleſiaſtical court, *yet if he ſues for it in the nature of a ſuit which doth not belong to that court, but to the common law*, a premunire lies; *as if a mortuary be delivered to the parſon*, and after the *party retakes it*, if the *parſon ſues for this as a mortuary to him delivered and carried away*, (and ſo of tithes ſevered,) he is in caſe of premunire. *But after the retaking, if he ſues for it as a mortuary not executed in nature of a ſuit which belongs to the eccleſiaſtical court*, upon the truth of the caſe there is cauſe of prohibition, and no premunire lies: *ſo* if he ſues for *tithes of wood above* 20 *years* growth, ſo that it *appears by the libel that the cauſe does not belong to the eccleſiaſtical court*, the premunire lies, *but* if the ſuit be *pro ſylva cædua*, &c. ſo that as the ſuit is framed, the cognizance belongs to the eccleſiaſtical court, though the truth be otherwiſe, a prohibition lies, and no premunire. 12 Rep. 39. caſe of premunire.——For *when* the cauſe *originally belongs* to the eccleſiaſtical court, *though it holds plea of any incident* to it, *which belongs to the common law*, a prohibition lies, and not a premunire. 12 Rep. 39. 40. caſe of premunire.

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5. When the *cauſe originally belongs to* the cognizance of *the common law and not to the eccleſiaſtical court*, there *though they libel* for it *according to the courſe of the eccleſiaſtical law*, yet the premunire lies, becauſe it draws the cauſe ad aliud examen, and ſo deprives the ſubject of the benefit of the common law, which is his birth-right. 12 Rep. 40. caſe of premunire.

Sid. 463. S. C. Mod. 59 to 61. S. C. Adjornatur.

6. Action upon the ſtatute 27 E. 3. of premunire, and declared that Paſch. 18 Car. 2. he *recovered* 200 *l. debt againſt the defendant in B. R.* and that after, the *defendant exhibited his bill in Chancery*, and obtained a *decree for the vacating of the judgment*. The defendant demurred. This caſe depended from Trin. 20 to Trin. 22 Car. 2. when Hale Ch. J. held, that this caſe was not within the ſtatute, and ſo he ſaid it appeared by the petition upon which the ſtatute was founded. And no more was done thereupon. Lev. 24 to 243. Trin. 20 and 22 Car 2. B. R. King v. Standiſh.

See Amercement, (C. a).

(P. a. 5) Premunire. *Proceedings, Pleadings and Judgment.*

* See pl. 9. and in notis there.—— † S. P. For it ſhall be *intended that it is well ſerved according to law*; for other writs ought to be ſerved 15 days before the return, and yet no mention thereof is in the return; and if the ſheriff does not warn him, or ſerve the writ as he ought, if the party be damnified, he may have writ of diſceit. Br. Retorn de Brief, pl. 56. cites S. C.

1. IN premunire, the defendant *appeared by* * *attorney*, and becauſe he did not come in perſon, he was condemned, and the *ſheriff returned the writ*, prout breve exigit, &c. † *and did not make mention that he warned him by two months* according to the ſtatutes, and yet well; quod nota. Br. Premunire, pl. 18. cites 39 E. 3. 7.

Br. Premunire, pl. 2. cites 42 E. 3. 7. Contra, that where the *ſheriff returned the defendant warned* and returned *no day*; and therefore ill, becauſe by the *ſtatute they ſhall be warned two months before the day of the return*, which cannot be counted where no day of garniſhment is returned, for which reaſon ſicut alias iſſued. Br. Retorn de Brief, pl. 103. cites S. C.

If the *defendant come not at the day*, &c. by the expreſs letter of the law, judgment ſhall be given againſt him, according to the act 27 E. 3. 3 Inſt. 125.

2. In premunire the defendant was *reaſonably warned* according to the ſtatute, and did not come; by which it was adjudged that he ſhall be put out of protection, &c. Br. Premunire, pl. 3. cites 43 E. 3. 6.

And there it was admitted, that the *judgment by their default, that they ſhall be out of the king's protection, is no attainder*; for Thorp Ch. J. ſaid, it is only a pain given by the ſtatute, that if they do not come the firſt day they ſhall be out of the protection of the king, and their lands and chattels forfeited: but this is no attainder, *for capias ſhall iſſue* againſt them; *and if they do not appear at the capias, exigent ſhall iſſue*; and ſo the ſtatute proves that they have anſwer; for otherwiſe it ſhall be in vain to award proceſs; quod nota. Ibid.

3. Premunire *againſt divers, ſome as principal and ſome as acceſſaries*; and at the day of return the *principal did not come*, by which they were out of the protection of the king, and their lands and chattels forfeited; and the plaintiff prayed that the *acceſſaries* who appeared ſhould anſwer: but per Fencote, they *ſhall not anſwer till the principal be attainted*. Br. Premunire, pl. 4. cites 44 E. 3. 7.

4. And ſeveral admitted there, that *there may be principal and acceſſary in premunire; but* Candiſh ſaid, that *if* he who is called *principal dies*, yet *the other ſhall anſwer*: contra in felony; but Finch. ſaid that *it is more like to treſpaſs than to felony*; for in treſpaſs he who firſt comes ſhall anſwer, and if he be convicted of damages, and after another comes and pleads, and is convicted, he ſhall be [13] charged of the firſt damages; and if he be acquitted, yet the firſt ſhall be charged; and the writ was that ſuch manutenentes & abettatores ipſum expulerunt: and after Finch. awarded, that the defendants who appeared ſhould anſwer; and ſo *it ſeems that all are principals*. Br. Premunire, pl. 4. cites 44 E. 3. 7.

5. Premunire by an abbot *againſt two*; the *one made default*, and was *put out of protection* of the king, *and his goods* and chattels *forfeited*; and this *at the firſt day* as it ſeems. Rolfe defended the tort and force, and demanded judgment if the court would take conuſance; for he *ſaid that the abbot plaintiff was depoſed at C. in the*

the county of Cheſter, where this court has no juriſdiction. Chauntrell ſaid, this goes to the action. Per Strange, at leaſt it goes to the writ; but if you agree to the iſſue, it ſhall be tried where the writ is brought, by the ſtatute, &c. of 9 E. 3. cap. 4. as it ſeems. And after Rolfe paſſed over, and pleaded excommunication. Brooke makes a quære, if the foreign plea above ſhall be tried where the writ is brought, where it goes to the writ; for the ſtatute mentions where it is pleaded in bar. Br. Premunire, pl. 8. cites 8 H. 6. 3.

6. Bill of premunire for the king was *brought* againſt J. N. *in B. R.* and he pleaded to the bill, becauſe *the ſtatute is that ſuch ſuit ſhall be by bill before the king and his council, or by premunire,* which bill before the king and his council, is *intended before him and his lords, and not before him in his bench;* and *premunire is intended by writ original,* and not by bill in B. R. wherefore plaintiff made bill of premunire againſt him in cuſtody of the marſhal, and then he was committed to anſwer. Br. Premunire, pl. 1. cites 27 H. 6. 5.

Br. Bill, pl. 1. cites S. C. —But in anno 22 H. 8. it was common that ſeveral clerks were compelled to anſwer to the bills of premunire in B. R. who were not in cuſtody of the marſhal; quod nota. Ibid.

7. Premunire *againſt three, one as procurator, another as counſellor, and the third as attorney;* the *damages ſhall be ſevered.* Per three juſtices. Br. Premunire, pl. 17. cites 36 H. 6. 29.

The defendant may *chuſe,* whether he will *make them all principals, or* the *one principal and the others acceſſaries*; but the damages ſhall be ſeverally taxed. 3 Inſt. 125.

8. Premunire *againſt four; two appeared* and *two not;* and the writ was abated for default therein; and therefore no judgment was given againſt the two who made default, inaſmuch as the writ was ill and abated. Br. Premunire, pl. 11. cites 5 E. 4. 6.

9. In premunire the *defendant appeared, and took exception;* and the Court for divers conſiderations permitted him to make attorney. Br. Attorney, pl. 53. cites 9 E. 4. 2.

A man ſhall *not make attorney* in premunire, *unleſs in ſpecial caſe.* Br. Attorney, pl. 82. —S. P. Br. Attorney, pl. 104. cites 39 E. 3. 7. —Defendant cannot *appear* by attorney, but *in perſon* in this ſuit, though he be a lord of parliament, unleſs by ſpecial writ of the Chancery. Br. Premunire, pl. 15. cites 15 H. 7. 9. —S. P. And this by the ſtatute 38 E. 3. cap. 2. 3 Inſt. 125. —S. P. Whether the defendant be a *peer* or commoner. It is ſaid indeed in Roll's Reports, that Sir Anthony Mildmay was ſuffered to *plead a pardon to a premunire by attorney,* and no mention is made of any ſuch writ or grant; but Serjeant Hawkins ſays, he preſumes there was a clauſe to this effect in the pardon. 2 Hawk. Pl. C. 273. cap. 26. ſ. 53.

10. In premunire a man may have proceſs *by proclamation only, and* may have *exigent if he will.* Br. Proceſs, pl. 80. cites 9 E. 4. 2.

†[14]

11. A man brought * *bill againſt J. N. in cuſtody of the marſhal,* and *counted upon the premunire, that he had ſued the plaintiff in the Arches for goods of J. S. and had appealed to Rome;* and it lies well by bill without original; for this is to give him day in court, and *when he is in cuſtody of the marſhal he is always in court:* quod nota per Cur. †But where the ſtatute gives the proceſs or form of the original, there this ſhall be only obſerved; upon which the defendant

Br. Parliament, pl. 94. cites S. C. — Br. Action ſur le Statute, pl. 37. cites S. C. — * This ſuit need not be

againſt them by *original writ*; but if the defendant be *in cuſtodia mareſchalli*, the ſuit may be againſt him *by bill*, becauſe the end of the giving of the

ant ſaid that he ſued in the ſpiritual court as executor of J. S. to have the will proved, where the plaintiff claimed alſo to be executor by another will, and had citation thereof, abſque hoc that he is guilty in other manner. And per Huſſey and Fairfax, this is no plea, and therefore nothing ſhall be entered but not guilty; for the plea does not anſwer any thing to the ſuit of the goods. And ſo ſee that *not guilty* is a good plea in this action, and that *executors cannot ſue for the goods of the teſtator in the ſpiritual court*, but at common law. Br. Premunire, pl. 12. cites 2 R. 3. 17.

two months was, that they ſhould have notice, which is ſatisfied; and therewith agrees the precedents; and the defendant cannot be ſued in any other court when they are in cuſtodia mareſchalli. See the ſtatute of 18 Eliz. cap. 5. but that ſtatute extends to common informers, and not when the ſuit is commenced by the party grieved. 3 Inſt. 125. ——— *But if the defendant appears and pleads*, and the iſſue be *found againſt him*, or if he demur in law, &c. *judgment* ſhall be given againſt him, *that he ſhall be out of protection*, &c. And ſo has the ſtatute 27 E. 3. been interpreted; and judgment given accordingly. 3 Inſt. 125.

S. P. If he be in priſon; *but if* the defendant be *condemned upon his default in not appearing*,

12. The judgment in premunire is, *that the defendant ſhall be* from thenceforth *out of the king's protection*, and his *lands* and tenements, goods *and chattels*, *forfeited* to the king, and that his *body* ſhall *remain in priſon at the king's pleaſure*. Co. Litt. 131. b.

whether at the ſuit of the king or the party, the *ſame judgment* ſhall be given as to the being out of the king's protection, *and the forfeiture*; but inſtead of the clauſe that the body ſhall remain in priſon, there ſhall be an award of a *capiatur*. 2 Hawk. Pl. C. 445. cap. 48. ſ. 9.

3 Le. 139. pl. 189. Mich. 28 Eliz. B. R. S. R. by name of Parret v. Dr. Matthews.

13. The attorney-general proſecuted a premunire for the Queen and P. againſt Doctor M. and others, becauſe they procured the ſaid P. to be *ſued in the city of Oxford before the commiſſary* there *in an action of treſpaſs by libel according to the eccleſiaſtical law*, *in which ſuit P. pleaded ſon franktenement*, and ſo to the juriſdiction of the Court, *and yet they proceeded*, and P. was condemned and impriſoned. And after that ſuit depended, the queen's attorney withdrew the ſuit for the queen; and it was moved if, notwithſtanding that, the party grieved might proceed. But it was held, by the whole Court, that *if the king's attorney will not further proſecute*, the *party grieved cannot* maintain this ſuit; for the principal matter in the premunire is the conviction, and the putting of the party out of the protection of the king, and the *damages are but acceſſary*, and then the principal being releaſed, the damages are gone. Le. 292. pl. 399. Mich. 26 & 27 Eliz. B. R. The Queen v. the Dean of Chriſtchurch.

14. The king brought a prohibition againſt the prior of W. that where the *king* had *recovered in quare impedit*, the *defendant ſent his frere to Rome with an appeal*, and ſued there to avoid the judgment, according to the ſtatute of premunire. And upon not guilty pleaded, all this was found againſt the defendant; and judgment was prayed for the king upon the ſtatute of 27 E. 3. c. 1. in caſe of premunire; and it was adjudged that he ſhall not have it, becauſe the *judgment ought to be conformable to the original*, and this ſuit was not taken according to the ſtatute, but by a writ of prohibition at the common law. 9 Rep. 74. a. Trin. 9 Jac. in Doctor Huſſey's caſe, cited as 30 E. 3. 11. b. The King v. the Prior of Woburne.

15. Error

15. Error to reverſe a judgment in premunire given by the juſtices of aſſiſe and gaol-delivery in the county of Somerſet againſt Perin, for *refuſing to take the oath of obedience* mentioned in the ſtatute 3 Jac. cap. 3. Perin pleaded not guilty to the indictment, and the *iſſue was joined* between him and the clerk of aſſizes, and the *award of the venire* facias was *certified* upon the record thus, viz. *ſuper quo precept. fuit* * *vic.* com. Somers. præd. *quod venire faciat*, &c. where it ought to be *præcept. eſt*, and *not* præceptum *fuit*, in the preterperfect tenſe; for it is rather a hiſtory of a matter which was acted before the iſſue joined, than the record of the Court of an act done by the Court in præſenti, which always ought to be recorded in the preſent tenſe, and for this error the judgment was reverſed, and the party reſtored. 2 Sand. 393. Mich. 23 Car. 2. The King v. Perin.

The reporter adds, nota, for the ſame fault ſuch a judgment in premunire againſt one Dixon was reverſed. Trin. ult. Ibid.—S.P. Vent. 172. Mich. 23 Car. 2. B. R. The King v. Green & al.

* [15]

16. The defendants were indicted for *refuſing the oaths* of obedience enjoined by 3 Jac. cap. 4. And the *indictment* was, *that at the aſſizes and general gaol-delivery held before Sir R. A.* &c. *and Z. B. gent. eidem R. A. and T. L. hac vice aſſociat. per ſacramentum ſuum*, &c. *præſentat. exiſtit modo ſequen.* viz. *jur. præſentant quod*, at the general quarter ſeſſions for the county of Hereford, 14 January, anno 30. *the juſtices of peace did tender* the ſaid oath to the defendants, and they refuſed; *and afterwards ad aſſiſas tent. pro com. Hereford prædict. apud Hereford prædict. in com. Hereford præd.* 31 Martii 31 Car. 2. *coram Roberto Atkins milite Balnei un juſtic. dicti domini regis de Banco, & Z. B. gen. eidem R. A. & T. L. mil. un baron. Scaccarii dicti domini regis ad aſſiſas in com. Hereford præd. capiend. aſſign.* per formam ſtatut. *the ſaid juſtices A. and Z. B. again tendered the ſaid oath, and they refuſed* to take the ſame. *And upon not guilty pleaded, the defendants relicta verificatione confeſs the judgment;* and judgment was given againſt them: and upon a writ of *error* the error *aſſigned* was, *that the ſecond tender* of the oath *was by the juſtices of aſſiſe only;* whereas the *ſtatute* 3 *Jac. ſays*, it muſt be *by juſtices of aſſiſe and gaol-delivery;* and this ſeemed not to be allowed by Dolben, but by the other two it was not ſpoke to; but Raymond conceived it was error, and that the juſtices of aſſiſe cannot by virtue of that commiſſion barely tender the ſaid oath; for the *ſtatute ſays*, that *in caſe they refuſe to take the ſaid oath tendered them by the juſtices of peace*, then *the ſaid juſtices ſhall and may commit the ſame perſons to the common gaol, there to remain* without bail or mainprize *until the next aſſiſes, where the ſaid oath ſhall be again in the ſaid open aſſiſes required of them by the ſaid juſtices of aſſiſe and gaol-delivery in their open aſſiſes;* and every perſon ſo refuſing ſhall incur the danger and penalty of a premunire, by which it appears that they being committed to gaol by judgment of the juſtices of peace, none can deliver them but they who have power to deliver the gaol; and though the ſtatute de finibus 27 E. 1. gives juſtices of aſſiſe power to deliver the gaol, that is intended only of felons, as appears by Staunf. Pl. Cor. 57 & 58. But the judgment was reverſed for an *incurable error*, which *was* the *miſreciting of the oath contained in the act.* Raym. 374, 375. Trin. 32 Car. 2. B. R. The King v. Mounſon.

(P. a. 6) Premunire. *Forfeiture of what, and by whom.*

* [16]

† Br. Forfeitures de Terre, pl. 12. cites 8 H. 4. 7. accordingly. ——S. P. And theſe are *lands which he had at the time of the act done, and after*, if it be upon verdict, as by felony or treaſon. Br. Premunire, pl. 20. cites 8 H. 4. 7. per Gaſcoigne.

1. PREMUNIRE *againſt ſeveral* upon the ſtatute 27 E. 3. cap. 1. They were *found guilty, the one as principal and the others as acceſſaries*, and the damages were ſevered; and per Hals, there may be principal and acceſſory in premunire, and he would have ſevered the damages; but Gaſcoyne ſaw the record, which ſuppoſed that they were coadjutors, procurors, and abettors to him who made the bull, by which it was awarded that they recover damages in common; and the attorney of the king prayed that they may forfeit their land and chattels, becauſe they were attainted as above. Gaſcoyne ſaid, *the ſtatute does not will that he ſhall forfeit* his *land*, &c. *unleſs for contumacy* for making default at the day of the premunire returned and ſued, by * which, &c. † But ſee, that there are other ſtatutes in the time of R. 2. that they ſhall forfeit lands and chattels, if they are attainted, but not by the ſtatute 27 E. 3. quod nota. Br. Premunire, pl. 6. cites 8 H. 4. 6.

Br. Premunire, pl. 19. cites S. C. Brooke ſays, and ſo ſee, that it is not only a forfeiture for term of life, as in an attaint; for the one is by ſtatute, and the other is by common law. ——*But* if *tenant in tail* is attainted in a premunire, he *ſhall forfeit* the land *but during his life*; for albeit the ſtatute of 16 *R.* 2. *cap.* 5. enacts, That their lands and tenements, goods and chattels, ſhall be forfeit to the king, that muſt be underſtood of ſuch an eſtate as he may lawfully forfeit, and that is during his own life. And theſe *general words do not take away the force of the ſtatute de donis* conditionalibus; but he ſhall forfeit all his fee-ſimple lands, eſtates for life, goods and chattels. And ſo it was reſolved in ‡ TRUDGIN's caſe. Co. Litt. 130. a. ——S. P. But the 26 *H.* 8. has the words, *all manner of inheritance to be forfeited*: the offence is greater within the 26 H. 8. and the words more peremptory than in the other. Jenk. 287. in pl. 21. ——‡ S. C. cited, as reſolved by all the judges of England. Paſch. 21 Eliz. 11 Rep. 63. b. in Dr. Foſter's caſe. ——3 Inſt. 126. cites S. C. —— Serjeant Hawkins ſays it is agreed, that the ſtatutes of premunire, which give a general forfeiture of all the lands and tenements of the offender, extend not to lands in tail. 2 Hawk. Pl. C. 454. cap. 49. ſ. 28.

2. Richard Fermor of London was attainted in a premunire in the time of H. 8. and his *lands* were forfeited *in fee*, and not only for term of life; quod nota. Br. Forfeiture de Terres, pl. 101. cites 34 H. 8.

3. He *that procures one to ſue in the* court chriſtian, ſhall forfeit as much as he that ſueth, and is principal as well as the other, and is *in equal degree of premunire; but if* they *both be indicted*, the *one of the act*, and *the other of the procurement*, and *he that is charged with the procurement is found guilty, and* the *other by another inqueſt* is found *not guilty*, judgment ſhall never be given againſt him who was indicted of the procurement, becauſe he cannot be an offender but in reſpect of the offence of the other. 3 Inſt. 125, 126.

Cro. C. 172. S. C.

4. One Trugion was *ſeiſed in fee* of lands, and ſo ſeiſed was indicted of premunire, and *before his trial he gave them in tail*; and afterwards he was attainted of premunire, and an office under the ſeal of the Exchequer found it; and Queen Elizabeth under the great ſeal granted them to G. C.; and this grant by the Queen was

was within the time of the purview of the ſtatute *of* 18 *Eliz.* for confirmation of grants of the king: and the queſtion was, *whether the attainder in the premunire ſhall avoid a grant made by the party, meſne between the indictment and the trial*, and judgment thereupon. And this was argued ſeveral times; but it being a great point of doubt and conſequence, the juſtices did not give any opinion or reſolution. But it was reſolved that the grant was not good at the common law; becauſe upon the attainder the eſtate of frankte-nement was not diveſted, and veſted in the Queen till an office thereof found, and *the office ought to be an office to intitle*, and not to inform the Queen of the particulars of the land; and therefore inaſmuch as it was by commiſſion under the ſeal of the Exchequer, and not the great ſeal, therefore the ſaid office was inſufficient to intitle the Queen, as it is reſolved in PAGE's caſe. 5 Co. Jo. 217. Mich. 5 Car. B. R. Groſſe v. Gayne.

(P. a. 7) Premunire. Suing in other Courts. *What ſhall be ſaid* to be *other Courts.*

1. AFTER judgment given before Roger Loveday and Walter Winborn, juſtices of oyer and terminer, againſt Walter biſhop of Exeter and his tenants, the ſaid biſhop procured the biſhop of Landaff in the pariſh churches of Cornwall and Devon-ſhire, to pronounce ſentence of *excommunication* by ſentence of the archbiſhop of Canterbury, (which ſentence was had by the pro-curement of the ſaid biſhop of Exeter,) *againſt all* perſons of what eſtate, degree, or dignity ſoever, *that dealt in the proceedings, &c. againſt the biſhop and his tenants before the ſaid juſtices.* And in this part of the record, being in French, it is ſaid, la corone & la dig-nity noſtre ſeignieur le roy ne doit per autre eſtre juſtice ne guyne, &c. Et les choſes que ſont paſſes en ſa court per judgment, ou en auter manner ne devient eſtre en autri court recrecees, &c. Out of this record Lord Coke ſays, we may obſerve three things. 1ſt, What the *ancient law* of this realm was *before the* making the act 27 *E.* 3. 2dly, That (en autri court), which are the words of this act, was taken to be *another court within the realm.* 3dly, That the miſchief before this act was for ſuits in other courts within this realm *after judgment given in the king's courts.* 3 Inſt. 123. cites 6 E. 1. The Earl of Cornwall's caſe. [17]

2. J. W. exhibited a bill of premunire againſt W. P. upon the ſtatute of 16 R. 2. for *ſuing in the admiral court* before John earl of Huntingdon, admiral of England, *for a cauſe which belonged to the common law*, whereunto the defendant pleaded not guilty. 3 Inſt. 121. cites Mich. 9 H. 7. coram rege.

So R. B. and T. P. and others were charged with the of-fence of pre-munire, be-cauſe they *ſued* J. C. *before* Henry duke of Exeter, *admiral of England, for taking away a croſs of gold and other goods, ſuppoſing the ſame to be taken ſuper altum mare, where in truth they were taken at Stafford* in the county of Eſſex, and the ſtatute of 16 R. 2. was recited, that none ſhould ſue in curia Romana ſeu alibi, &c. and that the conuſance of this plea belonged to the common law, and not to the court of the admiral. And ſo it is *of the conſtable and marſhall*; if they hold plea of a matter determinable by the common law. 3 Inſt. 121. cites 38 H. 6. coram rege.

3. A ſuit in the *eccleſiaſtical court* within the realm for a temporal cauſe was a cauſe of premunire. 3 Inſt. 120. cites it as adjudged by the whole court, Mich. 11 H. 7.

4. In Raſt. pl. 429. b. and 430. there is a precedent of a premunire for ſuing in the eccleſiaſtical court *for debt*. 3 Inſt. 121.

5. It was reſolved, that he that ſued in the eccleſiaſtical court for the *forgery of a laſt will* and teſtament, incurred the danger of a premunire; becauſe the party grieved might have his remedy by the common law. 3 Inſt. 121. cites 17 H. 7.

The biſhop of Bangor was attainted in a premunire for *holding plea of an advowſon and of tithes ſevered* from the nine parts. 3 Inſt. 122. cites Trin. 36 H. 8. coram rege. Rot. 9. The Biſhop of Bangor's caſe.

6. And in the ſame year of 17 H. 7. Juſtice Spilman alſo reports that one Turbervile, as well for the king as himſelf, ſued a premunire againſt a parſon, for ſuing *for tithes* in the eccleſiaſtical court, *alleging the ſame to be ſevered* from the nine parts; and judgment given againſt the defendant. 3 Inſt. 121.

7. And the reaſon of all theſe caſes is, *becauſe they draw* matters triable by the common law *ad aliud examen*, and to be diſcuſſed per aliam legem. 3 Inſt. 121.

8. But ſome have made a *queſtion*, whether, *ſince the eccleſiaſtical juriſdiction was acknowledged to be in the crown*, an eccleſiaſtical judge holding plea of temporal matter belonging to the common law incurs the danger of a premunire? Though hereof there is no queſtion at all, yet leſt any man might be led into an error in a caſe ſo dangerous, we will clear this point by reaſon, precedent, and authority; the reaſon holdeth ſtill, to draw the matter ad aliud examen, &c. and the like queſtion might be made for the admiral court, which is and ever was the king's court, but governed per aliam legem; and ſo likewiſe of the court of the conſtable and marſhall. 3 Inſt. 121.

[18] 9. The biſhop of Norwich was attainted in a premunire at the king's ſuit, and his caſe was this: Within the town of Thetford there then was a *cuſtom, that all eccleſiaſtical cauſes* ariſing within the ſaid town *ſhould be determined before the dean* there, having a peculiar eccleſiaſtical juriſdiction, *and that no inhabitant* of the ſame town *ſhould be drawn before any other eccleſiaſtical judge, and that every perſon ſuing contrary* to that cuſtom, the ſame *being preſented before the mayor* of Thetford, *ſhould forfeit 6 s. 8 d.* and that an inhabitant of Thetford, for an eccleſiaſtical cauſe ariſing in Thetford, ſued another before the biſhop of Norwich, within his conſiſtory court at Norwich; and this was preſented before the mayor of Thetford, according to the cuſtom, whereby he forfeited 6s. 8d. The ſaid *biſhop cited the* ſaid mayor for taking the ſaid preſentment *pro ſalute animæ, to appear* before him at his houſe at Hoxton in Suffolk, where the mayor appeared, and *the biſhop ore tenus injoined*, upon pain of excommunication, *to annul the ſaid preſentment* before a day. And for this offence he was attainted in a premunire, upon his confeſſion before Fitzjames Ch. J. and the court of King's Bench, upon the ſtatute of 16 R. 2. the record whereof Lord Coke ſays he has ſeen. By which judgment two

points

points are cleared. 1ſt, That the ſtatute of premunire extends to eccleſiaſtical courts within the realm. 2dly, That after the king was in poſſeſſion of his ſupremacy, the biſhops incurred the danger of premunire. 3 Inſt. 121. cites 25 H. 8. coram rege, the Biſhop of Norwich's caſe.

10. A writ of premunire upon the ſtatute of 27 E. 3. for *ſuing before the preſident and council in Wales after judgment given in the court of Common Pleas in* an action of *debt* for 42l. 10s. in ſubverſione legum antiquarum, &c. 3 Inſt. 124. cites Trin. 21 Eliz. C. B. Rot. 319. Beans v. Loyd.

11. T. S. parſon of N. brought a writ of premunire againſt R. T. upon the ſtatute of 27 E. 3. for *ſuing in the court of audience* of the archbiſhop of Canterbury, *to impeach a judgment given in a quare impedit before the juſtices of aſſiſe* in the county of Suffolk, &c. The defendant pleaded not guilty, &c. 3 Inſt. 122. cites Trin. 29 Eliz. C. B. Thomas Stoughton's caſe.

12. An information upon the ſtatute 27 E. 3. againſt Sir Anthony Mildmay, for that he and other *commiſſioners of ſewers did impeach a judgment in the King's Bench.* He purchaſed a pardon from the king, and pleaded it. 3 Inſt. 125. cites Hill. 12 Jac. coram rege. S.P. Hawk. Pl. C. 51. cap. 19. ſ. 16.

(P. a. 8) * *Pardon.* The *ſeveral Kinds* of Pardons, and the Difference.

*The power of pardoning all offences is an *inſeparable incident to the crown* and its royal power; it is as much for the good of the people that the king ſhould pardon, as that he ſhould puniſh. Per Holt Ch. J. Show. 284. Mich. 3 W. & M. in caſe of the King v. Parſons. ——2 L. P. R. 269. tit. Pardon, cites S. C. ——† See (U. a. 12).

1. ALL pardons are *either general or ſpecial*, and are either *by act of parliament*, (whereof the Court in ſome caſes ſhall take notice,) *or* by *charter of the king* (which muſt always be pleaded). And theſe again are either abſolute, or under condition, exception, or qualification; for ſome of thoſe pardons laſt mentioned the party may have a † writ of allowance, or take an averment in certain caſes; in others the party may be aided by averment only, where no writ of allowance doth lie. 3 Inſt. 233.

2. A *ſpecial pardon* ſhall be taken *for the advantage of the king*, becauſe it comes *at the ſuit of the party*; but a *general* pardon ſhall be taken more for the *benefit of the party*, becauſe this proceeds from the king himſelf, and of his ſpecial grace, & ex mero motu. Adjudged. Latch. 22. in Boſton's caſe. [19]

3. Per Jones and Dodderidge juſtices, a *coronation pardon* is but in nature of a *particular* pardon, and differs from a general pardon in that, where no certain time is ſpecified as to the offences, it ſhall not diſcharge any previous offences for which judgment has been given, but a general pardon ſhall. Latch. 141. Davy's caſe.

4. A *coronation pardon* is no pardon till ſued out, and is not like a general pardon. Per Dodderidge J. Latch. 141. Davy's caſe.

(P. a. 9.) Pardon. *In what Caſes not neceſſary; and* in what *grantable of Courſe.*

Where a man is indicted of the death of a man, and it be found upon the arraignment that it was done *ſe defendendo*, upon a certificate of this indictment and arraignment found as aforeſaid, the *chancellor* in this caſe *ſhall grant a pardon* to the party for his life, *without applying to the king*. By all the judges of England Jenk. 188. pl. 87. cites 19 H. 7.——S. P. Hawk. Pl. C. 76. cap. 29. ſ. 25. —— S. P. Br. Charter de Pardon, pl. 65. cites 4 H. 7. 2.

1. *Stat. Glouceſter, cap. 9.* ENACTS that *in caſe it be found by the country, that a perſon tried for the death of a man, did it* in his defence, or by misfortune, *then by the report of the juſtices to the king, the king ſhall take him to his grace if it pleaſe him.*

Serjeant Hawkins ſays, By this ſtatute at firſt ſight it ſeems to be implied, that it is left to the diſcretion of the king, whether he will grant a pardon in ſuch caſe, or not. And agreeable hereto it is ſaid in four ſeveral notes in Fitzherbert's Abridgment of Caſes in the time of E. 3. that a perſon found guilty of homicide ſe defendendo, is to be remitted to priſon, in order to attend the king's grace. And yet in two other notes in the very ſame year, it is ſaid, that in ſuch caſe, if the priſoner cauſe the record to come into Chancery, the chancellor will make him a charter of pardon without ſpeaking to the king; and this ſeems to be ſettled at this day, and agreeable to the ancient common law, which ſhall not without expreſs words be reſtrained by a ſtatute which ſeems to be made in affirmance of it. And therefore theſe words in the ſtatute, (if it ſhall pleaſe the king), ſhall be taken to be ſpoken only out of reverence to him, and not as intended to make the right of the ſubject to ſuch a pardon precarious. And the caſes above-cited which ſeem to the contrary, may be reconciled with the others, by intending them to mean only the grant of the king's pardon to a perſon repreſented to him as guilty of homicide ſe defendendo, without any certificate of the verdict upon record; for none of thoſe caſes make any mention of ſuch certificate as the others do; and if there be no ſuch certificate it ſeems plain that the grant of a pardon is a mere matter of favour. And it has been adjudged, that ſuch a pardon is as neceſſary for one who is indicted only of homicide ſe defendendo, and confeſſes it, as for one who is found guilty of homicide ſe defendendo, on an indictment of murder. 2 Hawk. Pl. C. 381. cap. 37. ſ. 2.——S. P. 2 Inſt. 316, 317.

H. P. C. 38.

2. Where ſpecial *fact, amounting to juſtifiable homicide*, is found by the jury, the party is to be diſmiſſed without being obliged to purchaſe any pardon, &c. Hawk. Pl. C. 70. cap. 28. ſ. 3.

Fol. 178. bis.

(Q. a) *What* Thing *ſhall paſs* by a Pardon.

See (S. a) (U. a. 3) Travel v. Carteret.

[1. IF *A. be bound to B. in an obligation of* 100*l. and after B. is attaint of felony*, and after the king by his letters patents pardons him, by theſe words, ſcilicet, *pardonavit, remiſit & relaxavit prædict. B. ſectamque pacis ſuæ quæ ad ipſum dominum regem verſus ipſum pertinet de eo quod fecit* ſuch felony, &c. *& omnia quæ ad dominum regem pro felonia præd. verſus ipſum regem tunc pertinet, vel pertinere potuit, &c. firmamque pacem eidem B. inde conceſſit:* this does not reſtore B. to the ſaid *obligation;* for it was in the actual poſſeſſion of the king by the attainder before office found, and here are not any words of grant or reſtitution, but only of pardon. Trin. 23 Car. B. R. between DREW AND CHAPPEL, adjudged upon a demurrer. Intratur Hill. 11 Car. Rot. 921.]

[20]

2. A. was bound to the king in a recognizance of 1000*l.* and was *attainted of treaſon;* the king pardoned him, and reſtored to him all his goods and chattels which he forfeited by the attainder:

tainder: this debt to the king remains; for it was only ſuſpended by the delinquency of A. By all the judges of England. Jenk. 209. pl. 43. cites 1 Mar. D. 124.

3. In debt on bond defendant pleads, that after the making it the plaintiff was attainted for coining, which the plaintiff confeſſes, and ſays, that afterwards the queen did by pardon reſtore unto him *omnia bona & catalla ſua;* and on demurrer the queſtion was, whether debts by ſpecialty were included in thoſe words? Goldſb. 114. Adams v. Oglethorpe.

4. A. became felo de ſe in the year 1648, afterwards by the act of general pardon all felonies were pardoned, excepting murder; and then upon an inquiſition it was returned, that A. had a *term for years* of the yearly value of 100l. It was adjudged that this was pardoned by the general pardon; for *nothing is veſted in the king till inquiſition found;* and no inquiſition was found till after the general pardon, and ſo the term for years was gone before the inquiſition found. Sid. 150. 15 Car. 2. The King v. Warde.

Lev. 8. S. C.—— S. P. Hawk. Pl. C. 68. cap. 27. ſ. 9.—*But* in ſcire facias by an adminiſtrator, the defendant pleaded that the inteſtate in the year 1655, became a felo de ſe; and this was found by an inquiſition before the general act of pardon; plaintiff demurs. Adjudged that this *debt being veſted in the king before the general pardon,* was not pardoned thereby, and could not paſs without *words of reſtitution.* Per Cur. Sid. 168. Mich. 15 Car. 2. B. R. Tombes v. Etherington.——Saund. 361. S. C.——2 L. P. R. 269. tit. Pardon, cites S. C.——Lev. 120. S. C. ſays it was reſolved that the debt was *extinguiſhed* in the hands of the debtor, by the clauſe of the act, which pardons and releaſes *all cauſes, things, quarrels, ſuits, judgments and executions*; which is to be taken generally, as well *judgments and executions for debts of the king* as for *offences*; and as well for *debts due to the king by aſſignment or forfeiture,* as debts due to him *originally.*——S. P. 2 Hawk. Pl. C. 396. cap. 37. ſ. 55.

5. 12 *Car.* 2. pardoned *all debts, judgments, &c.* An inquiſition found one *felo de ſe* who *had a debt due by judgment* to him. This is pardoned by the ſaid general pardon. Sid. 264. Trin. 17 Car. 2. B. R. Lock v. Etherington.

6. The word *(pardon) includes* in itſelf the word *(releaſe);* and ſo are 1 H. 7. 10. 11 H. 7. 11. for all, that is not within the exception, is by the general words pardoned and gone; and the caſe of Sir GEORGE BINION of late time in the Exchequer, does not oppoſe it; for there Sir *G. B. being indebted to the king, and J. S. being indebted to him,* proceſs out of the Exchequer Chamber iſſued againſt J. S. and his goods ſeiſed for the king, and then came the act of oblivion; and adjudged that the debt of J. S. remained becauſe he was debtor to Sir G. B. and not to the king; but if he had been an *immediate debtor* to the king, the debt ſhould be gone, per Twiſden and Keeling J. againſt Windham J. upon conference with the barons of the Exchequer and other juſtices. Sid. 265. Trin. 17 Car. 2. B. R. in caſe of Lock v. Etherington.

7. The king preſented to a benefice which had become void by a ſimoniacal agreement, and afterwards by a general pardon reſtores *all goods and chattels forfeited* by reaſon of any offence done. Per Cur. the king's preſentee has a good title notwithſtanding the pardon; for here was an intereſt veſted in the king, which the pardon cannot diveſt; and the preſentation ſhall not paſs by the words (goods and chattels), which are things of a lower nature, and

all in the perſonalty, as was ſaid. Arg. 2 Mod. 52. Trin. 27 Car. 2. The King v. Turvil.

8. A pardon *of all forfeitures* will not *diveſt an intereſt veſted* in the king. Per Cur. 3 Mod. 100. Paſch. 2 Jac. 2. B. R. The King v. Saloway.

[21] See (Q. a. 3)

(Q. a. 2) Pardon of one, in what Caſes it ſhall be a Pardon of another.

Contra of death of appellor; there he may be arraigned upon the approvement. Ibid.

1. PARDON of the king granted *to an approver ſhall diſcharge the appellee.* Br. Charters de Pardon, pl. 62. cites 47 E. 3. 5.

2. If *twenty are indicted of felony*, and after the *king pardons the one, without making mention of the others*, this is good; for *felony is ſeveral*, and not joint, and it is as ſeveral indictments againſt every one by himſelf, and not joint. Br. Charters de Pardon, pl. 45. cites 6 E. 4. 5.

S. P. For it ſhall be intended to be of a ſole debt

3. If two are *joint-debtors* to the king, and he *pardons the one*, this ſhall not ſerve the other; quære. Br. Patents, pl. 90. cites 2 R. 3. 4.

due by him only, as it was ſaid; therefore quære. Br. Charters de Pardon, pl. 57. cites S. C. ——— *So* where *two are bound to the king, and both in toto*, and the *king releaſes* to the one, the other ſhall not take advantage. Br. Charters de Pardon, pl. 4. cites 34 H. 6. 3. & 50. 35 H. 6. 1. 25. ——— S. P. Br. Ibid. pl. 36. cites 1 H. 7. 10. ——— *Contra*, it ſeems, *of joint bond* by two, and he releaſes to the one. Per Aſhton; but per Danby and Priſot, it ſhall ſerve both, where they are bound both in toto. Brooke makes a quære. Br. Charters de Pardon, pl. 4. cites 34 H. 6. 3. & 50. 35 H. 6. 1. 25. ——— *For* it was ſaid there that in the Exchequer, if *two* are *accountants*, and the king releaſes to one, yet thoſe of the Exchequer will have the whole account of the other. Ibid.

It is agreed, that if a man be *bound* to the king *as ſurety* for another *for the payment of* a certain fine, or other *debt due to the crown*, the pardon of the principal is a diſcharge of the ſurety alſo. *But* it ſeems to have been holden as a general rule, that *where* a man is bound as ſurety for another, *for the performance of a future act*, the *diſcharge of the principal before the time of performance*, will not diſcharge the ſurety, becauſe nothing was due to the king at the time of ſuch diſcharge. But it ſeems *extremely nice*; neither do the caſes brought for the proof of it ſeem any way to come up to it; for as to the firſt of them, viz. that of the king's releaſe of a recognizance of the peace to the principal before it is forfeited, which ſhall not diſcharge the ſureties, it may be anſwered, that it will not ſo much as diſcharge the principal. And as to another caſe cited for this purpoſe, viz. that of the king's pardoning

4. If *a man and his ſureties* are *bound to pay fine to the king, or 20l. by a certain day*, and do not pay at the day, and the *king pardons the principal*, this ſhall diſcharge the ſureties. Br. Charters de Pardon, pl. 36. cites 1 H. 7. 10.

5. *Contra of ſureties of the peace;* for there nothing is due till the bond is forfeited; for there if the king *pardons the principal after forfeiture*, the ſureties are diſcharged. *Contra* of pardon *before the forfeiture.* Ibid.

6. *And* where a man is *bound that A. ſheriff of N. ſhall pay his profers ſuch a day*, releaſe of the king to the ſheriff after the day does not acquit the ſurety of the breach. Contra of pardon before the default. Per Townſend. Br. Charters de Pardon, pl. 36. cites 1 H. 7. 10.

pardoning J. N. the building of ſuch a houſe, for his building whereof J. S. is bound to the king, which ſhall be no diſcharge to J. S. it may be anſwered, that as this caſe is put, J. N. doth not ſeem to be bound at all, but only J. S. who therefore does not ſeem to come under the notion of a ſurety, but of a principal. 2 Hawk. Pl. C. 387. cap. 37. ſ. 23.

7. An *alienation without licence to* A. tenant *for life, remainder to B. in fee;* a pardon of alienation to A. will not ſerve B. Jenk. 222. pl. 77.

But where alienation is *to two joint-tenants in fee*, a pardon of all alienations to one will ſerve the other; for they make but one tenant. Jenk. 222. pl. 77. cites 14 H. 6. 26. ——This was as the law ſtood before the 12 Car. 2. cap. 24. which took away fines for alienations.

[22]

(Q. a. 3) Pardon of *Principal*, in what Caſes it pardons the *Acceſſary*.

See (Q. a. 2)

1. A. Was indicted as acceſſary to a burglary committed by one who had been *tried and attainted*, but *procured his pardon*, which had been *allowed;* and now A. prayed that ſhe might be diſcharged: but reſolved that ſhe *muſt plead to the indictment;* for though, if the principal have either his clergy, or be acquitted, or obtain his pardon before judgment, the acceſſary ſhall not be queſtioned; yet *if the principal be attainted* the *acceſſary muſt anſwer*, though the principal be pardoned. Raym. 477. Mich. 34 Car. 2. Anon.

2 L. P. R. 269. tit. Pardon, cites S. C.

2. It ſeems generally agreed, that notwithſtanding all felonies are ſeveral, and conſequently a pardon of one man cannot be a direct diſcharge of another, yet in ſome caſes the felony of one man may be ſo far dependent upon that of another, that the pardon of one will by a neceſſary conſequence enure to the benefit of the other: as where the *principal* pleaded *his pardon*, and was *allowed* it *at common law before his attainder*, *or* where he pleads, and is allowed it *at this day before his conviction;* in which caſe it ſeems that the acceſſary may by a neceſſary conſequence take benefit of it, becauſe he cannot be arraigned till after the principal is convicted. 2 Hawk. Pl. C. 387. cap. 37. ſ. 22.

(R. a) The Pardon of what Things incluſive, ſhall be Pardon of others.

See (S. a) (U. a).

[1. D. 8 Eliz. 249. 83. *Brereton.* Manor held in capite, being in leaſe for years, and rents reſerved deſcended to the heir, who entered and took the rents, and *before office found, general pardon* of 5 El. came and diſcharged *all intruſions and entries*, and by the court of wards Saunders and Dier, *conſequently meſne iſſues, and liveries* are diſcharged, and a precedent cited accordingly, by the opinion of 5 in the ſame caſe; but the land was not in leaſe. But by 2 the queen may have action of account againſt Brereton

as

as her bailiff or receiver, and alſo an action of debt againſt the leſſees, who both are excepted out of the pardon.]

[2. 3 H. 7. 3. b. Huſſey ſemed to be contra; for he ſaid that if pardon be made *to the heir of an intruder, of the intruſion*, office found after ſhall ſerve the king for *all the profits before* [but] not to [any] other * intent.]

* Orig. Is (entant).

[3. 16 E. 4. 1. cited in St. Prerogative, 40. b. the pardon *ought to be as well of the profits as of the entry*, or otherwiſe after office found, the king ſhall be anſwered of the profits.]

[4. St. Prerogative, 40. b. after death of the anceſtor the heir enters, the king pardons him *all entries with the profits before office found;* this pardons livery, and *is ſpecial livery*.]

5. If the king pardons outlawry, which is promulged upon *indictment of treſpaſs* at the ſuit of the king, and whatſoever belongs to the king, yet he ſhall make fine and ranſom; for *fine and ranſom are not pardoned unleſs by ſpecial words*. Br. Charters de Pardon, pl. 30. cites 22 Aſſ. 47.

6. Felony is ſaid to be included in high treaſon, and conſequently a *pardon of felony diſcharges* an *indictment of high treaſon*, if it want the word *proditiorie*. Hawk. Pl. C. 65. cap. 25. ſ. 2.

[23]

See (P. a. 8) (R. a) (U. a) — Parks, pl. 6. — Prohibition (S).

(S. a) What ſhall be [*ſaid to be*] pardoned [*by a General Pardon.*]

Cro. E. 198. S. C. — Jo. 227. S. C. by name of Cudrington v. Redman. — S. P. 2 Hawk. Pl. C. 394. cap. 37. ſ. 42. — In error of a judgment in debt, the defendant pleads that the plaintiff was *excommunicated*; to which the plaintiff in error pleads the general pardon. And the Court (as it ſeems) held, that by it the *excommunication was diſcharged*, for they awarded a reſpondeas ouſter. 8 Rep. 68. a. Mich. 6 Jac. Trollop's caſe. — It was doubted by the 2 Ch. Juſtices whether an excommunication might be diſcharged by the king's pardon, and the plaintiff reſtored to his ſuit, without abſolution and reconciliation to the church. Cro. J. 212. Trollop v. Richardſon. — The impriſonment upon the contempt is diſcharged, but not the taxation of coſts (being for the plaintiff's benefit); and by conſequence the excommunication is not diſcharged; for that depends upon the principal: wherefore he was remanded. Cro. J. 159. Banning v. Fryer.

[1. IF a man upon a ſuit *in the eccleſiaſtical court be condemned in coſts* to the party, *and thereupon is excommunicated*, and after comes the general pardon of 21 Jac. and after a *ſignificavit* is made, and he *taken upon a capias de excommunicato capiendo*, and this returned in B. R. he may come into B. R. without any *ſcire facias* againſt the party at whoſe ſuit he was taken, and plead the pardon in diſcharge of the *contempt;* and it ſhall be allowed; for the contempt of the excommunication was pardoned, though *not the coſts*, and the party ought to *begin again to compel him to pay the coſts*. P. 17 Car. B. R. between CODRINGTON AND RODMAN. Adjudged per Curiam, and there cited PARSLOWE'S CASE in B. R. Mich. 2 Car. adjudged.]

S. P. 2 Hawk. Pl. C. 383. cap. 37. ſ. 8. — S. P. Lat. 141. — S. P. But the particular crime for which he is convicted ought to be particularly mentioned. 2 L. P. R. 270. tit.

2. If a man be *attainted of felony by outlawry or verdict*, and the king *pardons* him *all felonies;* this ſhall not ſerve. Per Strange; for it ſhall be intended that the king had not conuſance, and was deceived in his grant. Br. Patents, pl. 15. cites 8 H. 6. 19.

tit. Pardon.——So a general pardon *of all robberies* is not good, where there is a *conviction by verdict* of one in particular. Sid. 430. Mich. 21 Car. 2. B. R. The King v. Maddocks.——A general pardon of all *felonies* does not extend to *piracy*. Hawk. Pl. C. 99. cap. 37. ſ. 6.——S. P. 2 Hawk. Pl. C. 384. cap. 37. ſ. 11.

Serjeant Hawkins ſays, it has been holden that *anciently* a pardon of all *felonies included* all *treaſons*, as well as felonies whatſoever; *and* it ſeems to be taken for granted in many books, that a *pardon of all felonies* in general, without deſcribing any one in particular, *may*, even at this day (if the party be neither attainted nor indicted), *be pleaded in bar of any felony* whatſoever, coming within the general limitations thereof, *except murder or rape*; and the reaſon why it cannot alſo be pleaded to murder or rape is, becauſe the ſtatute of 13 *R.* 2. *requires an expreſs mention of them*. But the Serjeant ſays, he finds this point no where ſolemnly debated, neither does it ſeem eaſy to reconcile it with the general rules concerning pardons, agreed to be good in other caſes; for if a felony cannot be well pardoned where it may be reaſonably intended that the king when he granted the pardon was not fully appriſed of the ſtate of the caſe, much leſs does it ſeem reaſonable that it ſhould be pardoned, where it may be well intended that he was not appriſed of it at all. And if a felony whereof a perſon is attainted cannot be well pardoned, even though it appear that the king was informed of all the circumſtances of the fact, unleſs it alſo appear that he was informed of the attainder, much leſs does it ſeem reaſonable that a felony ſhould be well pardoned, where it does not appear that he knew any thing of it; for by this means, where the king in truth intends only to pardon one felony, he may by conſequence pardon the greateſt number of the moſt heinous crimes. And for theſe reaſons he ſuppoſes general pardons are commonly made by act of parliament. As to the precedents of ſuch general pardons in Raſtal's Entries, it may be anſwered, that their authority ſeem to be of leſs weight, when compared with thoſe many precedents of pardons in the Regiſter, every one of which particularly deſcribes the offence which is pardoned, and even thoſe which relate to homicide by lunatics or infants, or in ſelf-defence, &c. except only one which pardons eſcapes, but expreſsly excepts all voluntary ones. And therefore where the books ſpeak of pardons of all felonies in general as good, perhaps it may be reaſonable for the moſt part to intend that they either ſpeak of a pardon by parliament, or that they ſuppoſe that the particular crime is mentioned in the pardon, though they do not expreſs it. 2 Hawk. Pl. C. 383. cap. 37. ſ. 9.

3. A pardon granted at the ſuit of the party, *ſhall be taken more ſtrong for the king, and more ſtrong againſt the party; but* a *general pardon, or* a pardon granted *ex mero motu*, ſhall be taken more ſtrong againſt the †king, and more ſtrong for the benefit of the party; for it is intended there that the king has knowledge of the matter: contra, where it comes by ſuit of the party, or by ſurmiſe. Br. Charters de Pardon, pl. 25. cites 37 H. 6. 21.

Br. Patents, pl. 24. cites S. C.—— Lat. 22. S. P. adjudged in Boſton's caſe.

†[24]

4. If it be *found by office, that the tenant of the king died ſeiſed, and that his heir intruded*, and after *intruſions are pardoned by parliament*, yet the *heir ſhall render the meſne profits*, but ſhall not be puniſhed for the intruſion, for this is pardoned, but not the profits; and the eſcheator ſhall be charged of the profits where the office is recorded. Br. Intruſion, pl. 21. cites 33 H. 8.

Br. Charter de pardon, pl. 71. cites S. C.—— *But* where intruſions are pardoned by parliament *before office found, where the heir has entered*, there the profits, the entry, and livery, and all are pardoned; and there, though the office comes after, which finds the intruſion of the heir, yet *all is gone* by the pardon. Br. Intruſion, pl. 21. cites 33 H. 8.—— Br. Charters de Pardon, pl. 71. cites S. C.—— Br. Intruſion, pl. 16. cites 3 H. 7. 3. S. P.—— Br. Office devant, pl. 31. cites S. C.—— Br. Livery, pl. 65. S. P.—— S. P. Dy. 241. adjudged.—— S. P. adjudged Ley, 48. SAINTLYGER's caſe, where lands were held in capite, and were deviſed from the right heir to B. the next heir, during whoſe *minority* J. S. entered and received the profits; and held, that though *intruſions* were excepted expreſsly in the pardon, yet this was within the pardon, becauſe *no office was found*.

5. A tenant by knight ſervice in capite dies, his *heir of full age*; he *enters and takes the profits before any office* found. 5 Eliz. an *act of parliament pardons all entries and intruſions*: this diſcharges the meſne iſſues taken, and juſtifies the entry, and amounts to a livery. *The entry* before the office *being pardoned, all the conſequences of it are pardoned*; livery is made to the heir to juſtify his entry; and an office found afterwards comes too late. By the court of wards, and

If there be an intruſion, and an office found of it, a pardon after the ſaid office ought to pardon the intruſion

and the meſne profits, or elſe

and all the judges aſſiſtants there. Jenk. 234. pl. 9. cites 8 Eliz. D. 249.

it will not diſcharge them; for they are veſted in the king, and being veſted, they cannot be diſcharged without being mentioned: in the principal caſe they were never veſted, for the ſaid pardon before the office found prevented the veſting of them. Jenk. 234. pl. 9.

So a general pardon of the king ſaved jurors, who had *eat at the plaintiff's charge*, from cenſure.

6. Jurors *eat* and drank *at their own coſts* before verdict, and after their departure from the bar; and this was certified upon the poſtea: and it was held that the jurors were fineable; but it was held clearly, that it was pardoned by the general pardon. Mo. 599. pl. 825. Hill. 37 Eliz. Hall v. Vaughan.

Freem. Rep. 79. Paſch. 1673. C. B. Bellamy v. Player.

7. If one *pleads a falſe plea*, for which he is fineable, and after and before the judgment there comes a general pardon, the judgment ſhall be that he is not in miſericordia quia pardonatur. Mo. 599. pl. 825. Hill. 37 Eliz. Hall v. Vaughan.

Mo. 394. S. C.—— Jenk. 258. pl. 54. cites S. C.

8. A writ of entry was brought, and before judgment came the general pardon, anno 35 Eliz. by which *all fines, amerciaments, contempts, &c.* were pardoned; after which there was judgment for the plaintiff, but the entry was, *ſed non miſericordia quia pardonatur*. Upon error brought, it was held a good judgment, and that by the pardon of the *original tort* the *amerciament* was diſcharged; for the cauſe of the amerciament was the *tort and contempt* of the tenant, in not rendering the land to the tenant, according to the king's writ; and though the judgment and amerciament were ſubſequent to the pardon, yet the original cauſe of action being pardoned, of conſequence the amerciament is pardoned likewiſe. Adjudged. 5 Rep. 49. Mich. 39 & 40 Eliz. B. R. Vaughan's caſe.

9. Sheriffs cannot collect *fines or iſſues* after a general pardon; and for ſo doing an under-ſheriff was puniſhed in the Star-chamber. Godb. 178. Marriot's caſe.

*[25]

The treſpaſs was ſaid to be done 21ſt June, with a continuando, &c. The entry was, viz. nihil de fine, quia pardonatur.

10. *Treſpaſs* was *brought the 25th September*, 1 Jac. *with a continuando to the 27th of November* after: upon not guilty pleaded by the *defendant, the *plaintiff had judgment*: the judgment was not, quod capiatur; for a *general pardon pardoned all offences until* 24 September, 1 Jac. and upon this the force, which gives a fine to the king, was pardoned. Judged and affirmed in error. Jenk. 303. pl. 76. cites P. 6 Jac. Strickland v. Thorp.

It was inſiſted that only part of the treſpaſs was pardoned, viz. from 21ſt June to 25th September, but that the treſpaſs from the 25th to the 6th November is not pardoned, and therefore as to that there ought to have been a capiatur: but the Court held the judgment well entered; for the firſt entry in a treſpaſs being only vi & armis, the pardon of this is a pardon of all depending upon it; for the *firſt entry only made the treſpaſs*; beſides, it appears by the declaration that the continuance of the treſpaſs is not laid in the entry, but only quoad depaſturationem & conſumptionem herbæ, which is added only to increaſe damages to the party, but not the fine to the king. Yelv. 126. S. C.——Cro. J. 207. S. C. ——Brownl. 211. S. C.

11. A. was *indicted* upon the ſtatute *of forcible entry*, and *reſtitution was awarded*. A. traverſed it, and a venire facias was awarded, and *diſtreſs with the niſi prius*; after which came a general pardon, which pardoned the force: the ſaid trial was ſtayed, by the opinion of

of all the judges of England; for the *king will not proceed againſt his pardon.* Jenk. 312. pl. 98. cites 1 Cro. 144.

12. A. exhibited a *libellous bill* againſt B. in the Star-chamber; after which came the general pardon of the 21ſt Jac. and then for want of cauſe being ſhewn, it was taken off the file, and the plaintiff fined 100l. to the king, and 100l. to B. and it was reſolved that the fine and coſts are diſcharged, upon the authority of Hutt. 79. Beverley's caſe, which did not at all differ from the preſent, though a *day* was here given *to ſhew cauſe*; for the plaintiff hath not any means to plead the pardon. Cro. Car. 68. Paſch. 3 Car. by all the judges at Serjeant's-inn.

13. If *coſts* in the eccleſiaſtical court are *not taxed*, a general pardon diſcharges them. Lat. 190. Palmer v. Warner.

Lat. 159. S. P. adjudged. —If *awarded* before the pardon, but *not taxed* till after the pardon, they are not diſcharged. Cro. Car. 9. Dr. Brickenden's caſe. —— Coſts were taxed *upon an attachment* againſt an attorney for male-practice, by way of *amends to the party grieved*, and then came out a general pardon, which diſcharged the contempt. The court inclined that the coſts were diſcharged, for they are *not coſts upon a judicial proceeding*, but a kind of *compoſition* with the offender, and ſo not like coſts taxed in the eccleſiaſtical court *pro reformatione morum*. 2 Vent. 194. Anon. cites 5 Rep. 51. Hall's caſe. —— 2 Hawk. Pl. C. 394. cap. 37. ſ. 43. —— A. was ſentenced for *defamation* in court chriſtian, and appealed to the arches, but, upon the act of general pardon of 21 Jac. 1. coming out, *quitted his appeal*; upon which the court of arches taxed coſts againſt him. The court held clearly, and it was admitted on both ſides, that after the pardon they had *no power to tax coſts*; and that the defendant did well in *dropping his appeal*, becauſe the ſentence on which it was founded was vacated by the pardon of the offence. Lat. 155. Lewis v. Whitton. —— For a *contempt in a court of equity*, if coſts are taxed to the *party grieved* before the pardon, they are not diſcharged, becauſe it is in a court of equity, where coſts are at the pleaſure of the judge. See 2 Vent. 194. ſays, it was held per Atkins Ch. E. and Vent J. in the dutchy court, that the coſts were not diſcharged. —— 2 Hawk. Pl. C. 394. cap. 37. ſ. 43. cites S. C. —— No coſts for a contempt diſcharged by the general pardon. Toth. 108. cites 27 Eliz. Fulwood v. Fulwood.

14. The coroner returned, that A. was *killed with a gun by miſadventure.* The Court held this not within the general pardon; for that it was *manſlaughter*, being occaſioned by an *unneceſſary act*; and the defendant muſt purchaſe a pardon. (So that it ſeems the act does not pardon manſlaughter.) Sty. 337. Trin. 1652. C. B. Anon.

15. General pardon does *not* pardon *ſimony*, though it concludes with ſuch general words, viz. *and all other offences which the king can pardon.* It is true he cannot be puniſhed for this ſimony upon the ſtatute, yet he ſhall be deprived; for in truth it makes the church void, though the king pardons it by expreſs words. Sid. 170. Mich. 15 Car. 2. C. B. Philips's caſe, cites Hob. 167.

2 L. P. R. 270. tit. Pardon, cites S. C. —It is not pardoned by thoſe words, becauſe it is *malum in ſe.*

Sid. 222. Snow v. Phillips. And ſays it was ſo adjudged in the delegates in S. C. —— But Serjeant Hawkins ſays, this ſeems to be no good reaſon; for barretry, and the injurious ſtriking of another, and generally all offences at common law, are alſo mala in ſe; and yet it ſeems clear, that unleſs they be capital, they may be pardoned by ſuch a pardon. 2 Hawk. Pl. C. 388. cap. 37. ſ. 26.

[26]

16. A *judgment for rent arrear*, which was diſcharged by the act of oblivion 1660, was decreed to be *vacated.* Chan. Caſes, 55. Trin. 16 Car. 2. Bolton v. Arme.

N. Ch. R. 95. Betton v. Ann, S.C.

17. *Money* not actually paid, but *retained*, was not diſcharged by the act of indemnity, as Lord Ch. J. Bridgman conceived; but it was referred to make a caſe. Chan. Caſes, 59. Mich. 16 Car. 2. Dickenſon v. Knowell.

18. A.

18. A. was indebted to B. and afterwards during the uſurpation, his eſtate was ſold by the ſequeſtrators to B. who deducted out of the purchaſe-money his debt. After the reſtoration and general act of pardon paſſed, A.'s heir brought a bill in equity againſt B.'s executor, praying an *account of the profits*. The Court would not compel an account; for that *all monies received by the profits*, are pardoned by the act; but upon B.'s executor conſenting to account, on paying back the purchaſe-money, and B.'s debt, it was decreed accordingly. Chan. Caſes, 172. Trin. 22 Car. 2. in Canc. Stowel v. Long.

19. The defendant was ſued in the ſpiritual court for *dilapidations*, and pleaded the general pardon, by which all offences, contempts, penalties, &c. were pardoned; and for this reaſon he prayed a prohibition; but it was denied, becauſe the ſtatute *never intended to pardon any ſatisfaction for damages*, but only to take away temporal puniſhments. 3 Mod. 56. Hill. 36 Car. 2. B. R. Pool v. Trumbal.

20. A. was convicted of barretry, and produced a pardon, which was of all treaſons, murders, felonies, and all penalties, forfeitures, and offences. The Court ſaid, the words *(all offences)* will pardon all that is not capital. 1 Mod. 102. Mich. 25 Car. 2. B. R. Angell's caſe.

21. By the act of general pardon 13 Car. 2. ſ. 5. *all debts* and ſums of money *due to the crown* are diſcharged, though they do not relate to the wars. But acts and actions *of ſubjects* are not diſcharged, unleſs they are ſuch as *concern the wars*. Reſolved per Cur. 3 Lev. 134. in caſe of Travell v. Carteret.

Serjeant Hawkins ſays, it ſeems to be a ſettled rule, that pardon by the king, *without expreſs words of reſtitution, ſhall not diveſt* either from the king, or ſubject *an intereſt*, either in lands or goods, veſted in them by an attainder or conviction precedent; yet it ſeems agreed, that a *pardon prior to a conviction, ſhall prevent any forfeitere* either of lands or goods. 2 Hawk. Pl. C. 396. cap. 37. ſ. 54.

22. A queſtion was, whether *after verdict* for the king, a pardon ſhall excuſe the *forfeiture?* But adjornatur. See the arguments on both ſides, 3 Mod. 241. to 243. Mich. 4 Jac. 2. B. R. The King v. Johnſon.

23. A. was indicted for keeping a glaſs-houſe, being a *nuſance*, and thereof convicted and fined; afterwards came the general pardon: the Court held upon conſideration, that he was diſcharged thereby only as to the *fine*, and not as to the *abatement of the nuſance*; for that is not a puniſhment to the party, but a removal of that which is a grievance to other people, and which any common perſon may abate. Salk. 458. Hill. 1 W. & M. B. R. The King and Queen v. Wilcox.

24. A. was *convicted of deer-ſtealing* in the ſum of 20l. The queſtion was, whether this was within the general act of pardon? Pengelly Serjeant argued that this was not pardoned, being a *final judgment* on which a writ of error lies; and that it was not ſuch an offence as could be pardoned, becauſe of the *forfeiture to the party grieved*, which is part of the judgment, ſo that he has an *intereſt in the penalty*, and becauſe the puniſhment is by way of *ſatisfaction* to the

the party, and not for *example*. Arg. Salk. 383. M. 9 Ann. B. R. The Queen v. Barret.

25. A general pardon pardons *public offences* done to the commonwealth, but *not private injuries* done to particular perſons; for if it ſhould, this would be to mix mercy and injuſtice together; to be pitiful to one, and cruel to another, in one and the ſame act. 2 L. P. R. 271. tit. Pardon.

26. Serjeant Hawkins ſays, it has been queſtioned whether a general pardon *of all treſpaſſes* extends to *champerty* or *confederacy*. 2 Hawk. Pl. C. 389. cap. 37. ſ. 27. [27]

(S. a. 2) What ſhall be ſaid within the Exception of a General Pardon.

1. A. Was *indicted for piracy;* and for ſtanding *mute*, was condemned to ſuffer the penalty of *peine fort & dure*. Before it was put in execution, came a general pardon of *all pains, contempts, and executions*, excepting *piracy:* and it was held, by the major part of the juſtices, that the party might be indicted again for the piracy, the judgment (which was pardoned) being only for the offence in ſtanding mute. Dy. 308. Paſch. 14 Eliz. B. R. Cobham's caſe.

2. To an information on the 5th Eliz. for *converting arable land into paſture*, and for *continuing the ſame three years*, the defendant pleaded not guilty as to the converſion, and to the continuance the general pardon of the 15th Eliz. and on demurrer it was argued on one ſide, that the act by excepting only this converſion, did not extend to the continuance, (they being diſtinct and ſeveral things,) and ſo the continuance was pardoned: and on the other ſide it was inſiſted, that the converſion being excepted, that includes the whole offence, and extends therefore to the continuance. Adjornatur. Le. 274. Mich. 26 Eliz. in Scacc. Cleypole's caſe.

S. C. argued Mo. 117. pl. 262. by name of DULAND v. CLEYROOLE, and ſays that the counſel with the defendant took divers exceptions to the information, which in truth were material; wherefore the Court could not give judgment with the plaintiff; but that the cauſe was ended by compoſition.

3. The general pardon of the 28th Eliz. is of all felonies, excepting *burglary*, &c. The queſtion was, whether an *attainder of burglary* be within this exception? It was reſolved by all the juſtices of England, that it was excepted, for if ſuch an exception would include burglary *before it was tried*, though it does not then appear to be ſo in the eye of the law, and ſtands a doubt left at the trial, whether burglary or not, a fortiori ought it to be excepted when the burglary appears of *record* by judgment at law; and ſince the burglary, which is the foundation, is excepted, therefore every thing conſequent thereupon is excepted likewiſe. 6 Rep. 13. a. Caſes of Pardons.

2 Hawk. Pl. C. 385. cap. 37. ſ. 13. cites S. C. and adds, that therefore it being within the letter of the exception, it cannot but be intended to be within the meaning of it alſo.

Neither does it follow, that becauſe a pardon of a felony whereof a perſon is attainted, is not good, without mentioning the attainder, therefore ſuch a general exception of all felonies, ſhall not extend to thoſe whereon there hath been an attainder; for the caſe of ſuch a pardon depends on this ſpecial reaſon, that the king ought to be fully apprized of the proceedings againſt the party before he pardons him. —— S. P. Jenk. 269. pl. 85. —— 3 Inſt. 234. cites Hill. 29 Eliz. S. C. —— S. P. 3 Inſt. 238.

4. A. was bound in a *recognizance to appear* before the high commiſſioners, *and not to depart without licence;* to which A. pleaded the general act of pardon, which excepts all recognizances, &c. except recognizances for *appearance.* Adjudged by all the barons of the Exchequer, that the departure without licence was not pardoned, but within the exception; for the *not departing without licence* was only mentioned in the recognizance, in order to continue her appearance; and though not mentioned in the exception, yet it is not a *collateral* thing, but within the ſenſe of it. 2 Le. 179. Trin. 31 Eliz. Paſchall's caſe.

[28]

A bill was brought in the Star-chamber, and then paſſed the general pardon; and afterwards the cauſe was tried, and a fine ſet on the defendant for part of the matter charged in the bill, and for other matter charged therein, the plaintiff was fined to the king and the party grieved, it being *ſcandalous, and not examinab'e by the Court.* The queſtion was, whether this fine and damages ſet upon the plaintiff were within the exception of the pardon, which is of *all offences, &c. whereof, or for which any bill within* 8 *years before was, and is now depending.* Adjudged that it was pardoned, for this ſhall not be ſaid to be a *bill depending* (according to the exception) *on the part of the plaintiff,* to charge *him* with the offence; for his bill can never be ſaid a bill depending againſt *himſelf,* on which the *plaintiff* is to be fined; but it was only intended to except bills depending, *with regard to the defendant,* and this contempt was *accidental and collateral* to the bill, which being pardoned, by conſequence the *fine* is pardoned likewiſe. By all the judges at Serjeants-Inn, in Fleet-ſtreet, except one. Hutt. 79. Hill. 1 Car. Beverly v. Powell. ——— Jo. 89. S. C.

5. A. brought his bill in the Star-chamber for riots and routs, &c. which was five years before the general pardon, in the reign of Q. Elizabeth, wherein were excepted *all penalties, &c. incurred for any offence, &c. for which any bill hath been exhibited within* 8 *years before, and now depending,* and alſo except *all offences, contempts, &c. for which any bill was exhibited within four years before, and now depending.* The queſtion was referred by the court of Star-chamber to Coke ſolicitor-general, who certified that the fine to the queen was not pardoned, but excepted; but the impriſonment and corporal puniſhment were pardoned; but if the bill had been exhibited *within the four years,* then the offence itſelf being excepted, by conſequence all incidents or dependents upon it, whether corporal or pecuniary, are excepted; and therefore in that caſe nothing is pardoned. And this certificate has been often confirmed by the opinion of the court of Star-chamber. 5 Rep. 46. b. Mich. 35 & 36 Eliz. Franklin's caſe.

6. In the general pardon of the 35 Eliz. there was an exception of *all offences for which any ſuit at any time within four years before, or upon the laſt day of this preſent parliament, and is, or ſhall be now, on the laſt day of the ſeſſions, depending in the Star-chamber.* And in this caſe a *bill was exhibited* in the term *before the parliament,* and proceſs awarded *returnable the term after* the ſeſſions ended. Adjudged that this was a ſuit depending before the return or ſerving of the ſubpœna, and ſo within the exception, this being a proceſs iſſuing out of, and returnable *into the ſame court* where the bill is exhibited, (viz.) the Star-chamber; and there is a great diverſity between this and an original iſſuing out of Chancery, and returnable in B. R. or C. B. for there the original comes out of *another court,* and there is no record in B. R. or C. B. before the return of it. Adjudged. 5 Rep. 47. Hill. 39 Eliz. G. Littleton's caſe.

7. A. was *outlawed on a recognizance* in nature of a ſtatute ſtaple, and after came the general pardon of the 39th Eliz. excepting *all debts due* to the queen *by recognizance,* &c. or otherwiſe, and except

cept all debts *already forfeited by reaſon of any outlawry*. It was reſolved, that by the laſt exception it appears to be the queen's intent not to include any debts which accrued due by outlawry within the firſt exception; for as to theſe there is a *ſpecial* ſaving, and in a ſpecial manner; and being a general pardon, it is to be taken moſt beneficially for the ſubject, and moſt ſtrongly againſt the crown. 5 Rep. 49. b. 50. a. Hill. 41 Eliz. in Scaccario. Wyrral's caſe.

8. The general pardon of the 21 Jac. was with an exception of *all tithes, and actions of quare impedit, other than ſuch* which the king may have by reaſon of any lapſe incurred ultra three years laſt paſt for any benefice *whereof any incumbent then was, or the laſt day of the parliament ſhould be, in poſſeſſion by preſentation or collation*. In this caſe the church became void by the incumbent's taking another benefice, and continuing ſo two years, the king made title to preſent by lapſe. Adjudged that the pardon extended not to this caſe; for that it was never the intent of it to *diſpenſe with pluralities*, and the defendant is not an incumbent within the proviſo of the exception, for he is an incumbent *by uſurpation and wrong*. [29] Cro. Car. 354. Hill. 9 Car. Per all the juſtices in the Exchequer Chamber, except two. The King v. the Archbiſhop of Canterbury and Pryſt. Het. 124. S. C.—Jo. 334. S. C.

9. A. being indebted to B. the king's receiver, gave him a bond, upon which his lands and goods were extended; and afterwards upon ſecurity given to abide the order of the Court, the goods of A. were reſtored, and for ſo doing A. and C. enter into a recognizance; and upon breach thereof judgment was had, and a writ of error brought, in which there was a nonſuit after the general act of pardon; and then, a ſcire facias being brought, the defendant pleaded the pardon thereto, in which were excepted all recognizances, obligations, &c. entered into by any receiver ſince the 25th March, 1640; and in another clauſe *all bonds taken in his late majeſty's name before May* 1642, *for ſecuring the proper debt of any receiver of the revenue*, were likewiſe excepted. This *recognizance* was held to be included within the exception under the word *obligation*; for though an obligation is not a recognizance in pleading, it may well be ſo within the meaning of an act of parliament, and this was given *in lieu* of the obligation entered into before, and is a *bond of record*; and ſo being both *obligatory*, it is in this caſe the ſame thing. Hard. 366. Mich. 16 Car. 2. in Scacc. The Attorney-general v. Ward.

10. A bill was filed by A. in the Exchequer againſt B. for wages due to him, as an officer under him in the Mint, B. having been made maſter of the Mint by the keepers of the liberties of England, and thereupon entered into articles with them for payment of the ſaid wages. Upon the reſtoration all public debts and ſecurities were veſted in the king, but became diſcharged by the act of oblivion, excepting *the accounts of perſons who have received any of the rents, &c. of any hereditaments of the crown, and all ſecurities entered into by any receiver or other accountant in the court of Exchequer*, and

excepting any the *goods, money, &c. of the late king, queen, or prince.* The defendant pleaded the pardon; and adjudged that this was a caſe within it, and not taken out of it by any of the exceptions; for the exception of the late king and queen's goods extends only to ſuch as they were *actually poſſeſſed of;* and as to the word *(accountants)* that relates only to common accountants in the Exchequer, whereas this is the caſe of a particular accountant in a collateral way; nor is this an account of the rents, &c. of any *hereditament* of the crown, properly ſpeaking, though it may be in a large ſenſe ſo called, but the product of the *office* or *trade* of the Mint. Per Cur. Hard. 371. Mich. 16 Car. 2. in Scacc. The Attorney-general v. Guerdon.

11. One G. in the year 1659. was *attainted* of murder, *and executed;* and it was found by inquiſition that the ſaid G. *had lent* 30*l. to the defendant*, and that the defendant was indebted to the ſaid G. for it. Whereupon a *ſcire facias iſſued againſt the defendant*, who pleaded that ſhe was not indebted to the ſaid G. modo & forma prout: and Hale Ch. B. held, that the act of general pardon *excepts only the offence, and not the forfeiture, but that that is pardoned.* Hard. 421. Trin. 17 Car. 2. in Scacc. The King v. Margery Bernard.

12. Upon an information againſt A. as heir and tertenant of the lands of B. the king's cofferer, for monies received to the king's uſe, the defendant pleaded the act of general pardon 12 Car. 2. in which were excepted *all fines, &c. and other public duties received by any ſheriff, &c. or other officer for the late king's uſe, and not accounted for and diſcharged;* and excepting all offences in *detaining, imbezilling, or purloining any goods, monies or chattels of the late king, queen, or prince.* Adjudged that this account was pardoned, and not within any of the exceptions; for the detaining the late * *king's goods and monies*, relates only to goods that were *once in his actual poſſeſſion*, and then taken † from him; and otherwiſe the whole pardon might be defeated by this exception, nor is it within the other exception; for a *cofferer* is a perſon of higher rank than any that are named in the act, and a ſuperior ſhall not be included where an inferior is firſt named; and ſo the plea was allowed per Curiam. Hardr. 441. Paſch. 19 Car. 2. The Attorney General v. Palmer.

* Hardr. 371. The Attorney General v. Guerdon. S. P. adjudged.

† [30]

13. If a general pardon be with an *exception of murder*, yet it does not except a *felo de ſe*, eſpecially where no inquiſition was found till after the general pardon. Sid. 150. Trin. 15 Car. 2. B. R. The King v. Warde.

S. P. For notwithſtanding his offence may in ſtrictneſs be called murder, and conſequently may ſeem naturally enough to come within the exception, yet ſince the general words of an act of parliament are to be expounded according to the common uſe of them, and the offences of felo de ſe and murder are generally underſtood as diſtinct offences, and as ſuch are diſtinctly treated by all authors, who when they uſe the word murder, as ſignifying a certain ſpecies of offence always mean by it the murder of another; and farther, ſince there is greater reaſon to except the murder of another out of a pardon, than that of a man's ſelf, becauſe both the law of God and nature ſeem generally to require blood for blood, which can be applied only to the murder of another, the word *murder* ſhall in ſuch an exception be taken *only to ſignify the murder of another.* 2 Hawk. Pl. C. 387. cap. 37. ſ. 20.

14. *Suits*

14. *Suits for dilapidations* were excepted out of the act of general pardon of 2 *W. & M. seſſ.* 1. *cap.* 10. *unleſs commenced and depending ſuch a day.*

A ſuit was commenced after the day in the ſpiritual court,

and a prohibition was moved for to ſtay the ſuit, which was by the ſucceſſor againſt the executor of the former incumbent; but the whole Court, upon hearing counſel, and conſideration of the matter, conceived that the parliament never intended to take away the ſucceſſor's remedy for dilapidations, for that was to eaſe the executor of the wrong-doer, and tranſlate the charge to the ſucceſſor. But they would intend this exception of ſuch ſuits as might be in the eccleſiaſtical court *againſt the dilapidator himſelf, to puniſh it as a crime againſt the eccleſiaſtical law, and to pardon it, unleſs there were proſecution before the day aforeſaid.* And ſo the prohibition was denied. 2 Vent. 216. Anon.

15. Information in nature of a *quo warranto*, and *judgment per nihil dicit*, and a *capiatur pro fine*; the queſtion was, whether this was pardoned by the late act? Holt Chief Juſtice delivered his opinion, that an interlocutory judgment is not within the exception of the act; for by a *judgment is meant a final judgment*, it *being coupled with ſentence and decree*, and a capiatur pro fine is only to bring them in to receive the judgment of the Court; but this being a matter of right, viz. in a quo warranto, though the fine be pardoned, yet the continuance of the crime is not. And he ſaid he remembered a caſe upon the act of parliament, in King William's time, where the fine for the nuſance was pardoned, but not the continuance of the nuſance. He ſaid, likewiſe, that where writs of error ſay, ſi judicium inde redditum ſit, it extends only to final judgments, and ſo does the exception in the act of parliament. And Powel, Powis, and Gould were of the ſame opinion; wherefore judgment was given, that the defendant ſhould be ouſted of his office for committing the offence, but that the fine is pardoned. 11 Mod. 235. Trin. 8 Ann. B. R. The Queen v. Tyrril and Barber.

16. *Marrying an infant ward committed by order of Chancery, and that without the privity of the committee*, is a contempt of the Court; but a general act of pardon coming afterwards, though with an *exception of all contempts* and offences, for which any proſecution was then depending, and which had been *proſecuted at the charge of any private perſon or perſons*, was held by Lord Ch. Parker to be pardoned, this offence or contempt ending only in the puniſhment of the party offending, and not in relieving or redreſſing the proſecutor. Wms.'s Rep. 696. Paſch. 1721. Phipps v. Earl of Angleſey.

Ibid. 697. the reporter ſays, that the lord chancellor made the like determination in the cauſe of KIFFIN v. KIFFIN; and alſo for a contempt of another nature, relating to a ward of Chancery, in Dr. Yalden's caſe.

[31]

17. It has been holden, that a *forfeiture due* to the king *by* force of a *conviction upon the ſtatutes* 29 *Eliz.* 6. *Par.* 5. *and* 3 *Jac.* 1. 4. *Par.* 7. ſhall not be taken to be within the exception of a general pardon, which *excepts all forfeitures*, &c. *converted to a debt by judgment.* Hawk. Pl. C. 16. cap. 10. ſ. 23.

18. It has been adjudged, that where a general act of pardon expreſsly pardons *all petit treaſons*, but *excepts murder*, it cannot be avoided by indicting one for murder only, without the word proditorie, &c. who has been guilty of petit treaſon; * for the leſs offence

* S. P. 2 Hawk. Pl. C. 165. cap. 23. ſ. 39.

offence being included, and consequently drowned in the greater, cannot but be pardoned by a pardon of it; and therefore the exception of murder in such a pardon *must be construed of such murder only as is specially so called*, and doth not amount to petit treason. 2 Hawk. Pl. C. 386. cap. 37. s. 19.

Fol. 179. bis.

* (U. a) Charter of Pardon. *What* Thing shall be pardoned *by Pardon of other* [*Thing*].

See (R. a) (S. a) — * N. B. There is no (T. a) — † Br. Charters de Pardon, pl. 12. cites S. C. — ‡ Br. Charters de Pardon, pl. 30. cites S. C.

[1.] IF a man be *outlawed in trespass*, and the king *pardons the outlawry, yet the fine remains*, for this shall not pass by any general word. † 7 H. 4. 17. b. ‡ 22 Ass. 47. adjudged.]

S. P. For the fine shall not be but where he is outlawed, or otherwise attainted. Br. Charters de Pardon, pl. 12. cites S. C.

[2. But pardon *of trespass before outlawry will bar the fine.* 7 H. 4. 17. b.]

S. P. For pardon *shall not give restitution of goods*, but only a restitution to the law. Br. Charters de Pardon, pl. 11. cites 7 H. 4. 4, 5.

[3. If a man outlawed at the suit of the party be pardoned of the *outlawry*, yet he *is not restored to his goods* thereby. 7 H. 4. 5.]

In error upon outlawry pronounced upon indictment of murder, it was assigned for error, *that at the capias the king pardoned him all that in him is, all chattels and possessions; and prayed that the outlawry be reversed, and that he may have his chattels:* and the judgment was reversed; but he did not *re-have his goods*; because it did not appear by record here, which was against the opinion of Hank. Quære; for it seems that it *ought to be by words of restitution, and not by words of pardon.* Br. Charters de Pardon, pl. 73. cites 9 H. 5. 14, 15. — ‖ Br. Charters de Pardon, pl. 12. cites S. C.

[4. If a man *outlawed of felony* purchase a *pardon of the outlawry*, yet his *goods and lands shall be forfeited.* ‖ 7 H. 4. 17. b.]

[5. If a *man bound in a recognizance for surety of the peace kills a man*, and is *pardoned of the felony*, yet he shall not be discharged of the recognizance. 7 H. 4. 35. b.]

Br. Corone, pl. 146. cites S. C. per Catesby.

6. If a man be *indicted of felony, and also of treason, and* after he is *outlawed of felony*, and then the *king pardons the felony*, he shall not be *arraigned of the treason*; for he cannot be dead but once. Per Catesby; but Brooke says the contrary is held for law. Br. Charters de Pardon, pl. 44. cites 6 E. 4. 4.

7. If *three bring several appeals of robbery against W. N.* and *he is found guilty at the suit of the one*, he shall not be arraigned at the suit of the others. Per Suliard; but Markham contra; quære. Br. Corone, pl. 146. cites 6 E. 4. 4.

3 Inst. 238. cites S. C. — S. P. 2 Hawk. Pl. C. 383. cap. 37. s. 8.

8. A man *abjured the realm for the death of a man*, and was taken afterwards, and pleaded *the king's pardon of all felonies*; and was disallowed; for it did not make mention of abjuring. Br. Charters de Pardon, pl. 23. cites 9 E. 4. 28.

9. One fined for trespass, and after the *trespass* is pardoned; the *fine* shall not be discharged; because the pardon has no relation to any certain time. Lat. 141. Davy's case.

[32]

10. If

10. If the *king has a verdict* againſt A. *for debts or damages, and before judgment* the king *pardons this debt and damages* to A. the king ſhall have judgment: ſo it is between common perſons; but becauſe neither a ſcire facias lies againſt the king for A. if he be in execution, nor an audita querela, if he be not in execution; this pardon and releaſe ſhall be *allowed to diſcharge the execution.* Jenk. 183. pl. 72. cites 11 H. 7. 10. by all the Judges in the Exchequer Chamber.

The king brought action of debt upon an obligation; the defendant pleaded non eſt factum, and at a niſi prius it was found the deed of the defendant, and before the day in Bank, the king pardoned the defendant all debts, quarrels, &c. and after the king had judgment, and ſued out execution. Albeit by the judgment a new title to the ſaid debt is accrued to the king of record after the pardon, the obligation at the time of the pardon being but a matter in fact, yet becauſe the obligation was the foundation of the debt, and the matter whereupon judgment was given, and by the pardon the debt due by the obligation was extinct, the judgment thereupon cannot bind, but is to be avoided by pleading the pardon. 3 Inſt. 236.

(U. a. 2) Charter of Pardon. *Relation.*

1. DEBT *by the king upon obligation;* the *defendant pleaded non eſt factum*, which *paſſed againſt him* by niſi prius, and *before the day in Bank the king pardoned him*, &c. this *diſcharges the debt, but not the fine*, which accrued by the judgment after the pardon, *by the denying of his own deed*, and ſo no relation of the fine to the action; for this incurred by the denying, which was before the pardon, and the judgment is by reaſon of it. Br. Relation, pl. 22. cites 34 H. 6. 3. and 35 H. 6. 1. 25. Br. Charters de Pardon, pl. 4. cites S. C.

2. Patent granted by the king, or pardon, and other matters of record, ſhall have relation *to the teſte or date* of it, and matter in fact to the time of the delivery only. Br. Patents, pl. 24. cites 37 H. 6. 21. Br. Charters de Pardon, pl. 24. cites S. C.—A *charter of pardon* ſhall have relation *to the date, and not to the livery*, being matter of *record*; otherwiſe of matter *in pais*. Adjudged. Latch. 22. in Boſton's caſe.

3. *Voluntary eſcape* cannot be pardoned before the act done. Br. Patents, pl. 51. cites 13 H. 7. 15.

4. If a man be *attainted of murder or felony by outlawry or otherwiſe*, and the king *pardons* him *all felonies, murders, and executions thereof, and outlawries and waivings, and ſuits of peace, and* pardons and releaſes *all forfeitures of lands and tenements, and of goods and chattels;* this ſhall ſerve only for the life and for the land, if no office be thereof found, but *it ſhall not ſerve for the goods without reſtitution or gift;* for the king is intitled to them by the outlawry without office, but the king is not intitled to the *land* till office be found; and if office be found afterwards, yet the pardon ſhall ſerve; for this ſhall have relation to the judgment, and then the pardon meſne ſhall ſerve well. Contra where *office* is *found before the pardon granted;* for then the king is ſeiſed by the office, and there a *releaſe or pardon* cannot give it, but there *ought to be a gift or grant;* note the diverſity. Br. Charters de Pardon, pl. 52. cites 29 H. 8.

5. A. being indicted for murder, pleaded a pardon of all felonies, offences, &c. *before and until the 14th day of February*, which 2 Hawk. Pl. C. 387. cap. 37. ſ. 21.

was ſubſequent to the time of the giving of the wound, but *antecedent to the party's death.* It was adjudged that the murder was pardoned; for the wound given by the priſoner was the *commencement of the felony*, and * was the offence and miſdemeanor againſt the queen, which is pardoned by the ſtatute, and for that reaſon *every thing conſequent* thereupon. Pl. C. 401. Mich. 13 Eliz. Cole's caſe.

S. C. cited Cro. E. 789. Mich. 42 & 43 Eliz. C. B. in caſe of Baker v. Rogers.—S. C. cited 2 Hawk. Pl. C. 395. cap. 37. f. 53.

6. Where a *miniſter* was *deprived* for an offence *tempore parliamenti*, and *the offence was* afterwards *pardoned* by parliament; and then the parliament ended. The *deprivation* was utterly *void*; for the pardon relateth to the firſt day, and the party need not ſue to reverſe the deprivation. Cro. E. 41. Trin. 27 Eliz. C. B. Fox's caſe.

S. P. But if the offence for which the ſuit was in the ſpiritual court be pardoned hanging an appeal, and ſuch pardon relate to a time precedent to the award of the coſts, and after ſuch pardon the appellant deſert his appeal, and the ſpiritual court award coſts againſt him; in reſpect of ſuch deſertion it ſeems that he may have a prohibition, becauſe the pardon having diſcharged the coſts, the firſt ſuit, as well as the offence, made the appeal to be to no purpoſe. 2 Hawk. Pl. C. 394. cap. 37. f. 43.

7. Upon an appeal to the arches court, there was a *ſentence given for defamatory words, and 12d. coſts*; and then came the general pardon; and then the defendant appealed to the *delegates*, who affirmed the laſt ſentence, with *greater coſts*, not allowing the defendant's plea of the pardon. Adjudged that theſe coſts given by the delegates were not taken away by the pardon, being for the *vexation* (which was ſubſequent thereto) though the *original offence* was pardoned. Winch. 125. Hill. 22 Jac. C. B. Davis v. Hawkins.

8. A. was libelled, and *ſentenced by the eccleſiaſtical commiſſioners, for aiding* and aſſiſting *B. to commit adultery with C.* and for this offence was *fined to the king, and injoined to do penance* in the church, &c. On which A. prayed a prohibition, and it was granted; for that by the *general pardon* (which *came before the ſentence paſſed*) the offence was diſcharged, and conſequently the ſentence and fine which came after were void; and it was held per Hutton J. that if *ſome of the offences* charged on the defendant were *committed after* the pardon, yet the ſentence and fine in this caſe being *intire*, the pardon ſhall be a diſcharge thereof. Cro. Car. 113. Trin. 4 Car. C. B. Peel's caſe.

And therefore if there be an *uſurious contract*, and after begins a ſeſſions of parliament and then a *judgment on an information* on the ſtatute of uſury is given, and then a *general pardon* comes; this pardon, by its relation to the 1ſt day of the ſeſſions, ſhall pardon the judgment, though *ſubſequent* thereto. Otherwiſe it is, if after judgment for the uſurious contract, a *ſpecial* pardon is procured. Per Cur. Lat. 22. in Boſton's caſe, cites 36 H. 2. 5.

9. A *general* pardon by *act of parliament*, though made the laſt day of the ſeſſions, ſhall, like other acts, *relate to the firſt day of ſeſſions.* But it is otherwiſe of a pardon *of grace*, and a *ſpecial pardon*, which ſhall relate only to the *ſeal and date of it.* Adjudged per Cur. Lat. 22. in Boſton's caſe.

10. The

10. The defendant was indicted, and convicted on the ſtatute of uſury; and on a certiorari pleaded the coronation pardon, which was general, of all uſurious takings and contracts, *without relation to any certain time*; for this reaſon it ſhall *not diſcharge the judgment* which was *given before* the pardon; but when the pardon is of all offences committed before ſuch a day, there, though a *judgment intervene*, it ſhall be diſcharged by the pardon. Per Cur. Lat. 141. Davy's caſe.

11. *Information for importing gloves* contra ſtat. 3 E. 4. cap. 4. the caſe was, that the gloves were imported before the 25th of March, to which time the general pardon extends, by which all unlawful importations were pardoned; and in April following the ſaid gloves were found in the hands of the defendant to be ſold. The *queſtion* was, *whether this forfeiture was diſcharged by the general pardon intervening between the importation, and the finding them to be ſold?* But the barons were divided. Turner Ch. B. held, that the forfeiture was not gone by the pardon; for he ſaid, the [34] importation was not unlawful, and by it there is no offence againſt the ſtatute, but it is the ſelling or deſign to ſell which gives the forfeiture; but the other barons ſeemed to be of the contrary opinion, inaſmuch as the ſelling is not the principal offence, but it is evidentia facti that the importation was to that intent, and ſo the importation being pardoned, the goods ſhould not be forfeited. And Thurland compared it to the caſe where a man is ſtruck, and dies in a week after, the death ſhall have relation to the ſtroke. And Sawyer put the caſe, ſuppoſing theſe goods had been ſeiſed, and then the king had reſtored them, or ſuppoſe the king had releaſed to the party, there they ſhould never be forfeited by any after-ſale again, notwithſtanding the ſtatute ſaith as often, and every time they may be found, &c. Freem. Rep. 325, 326. Paſch. 1674. in Scacc. Harling v. Cannon.

(U. a. 3) Private Pardon. To what the Words ſhall *extend.*

1. IF the king pardons *to the alienee of his tenant, who holds in chief, all alienations*, by this the tenant cannot alien, but by this the fine for alienation is pardoned, notwithſtanding that he did not pardon the fine but the alienation. Br. Charters de Pardon, pl. 26. cites 14 H. 6. 26. Br. Patents, pl. 102. cites S. C.

2. Sheriff made a falſe return, and the king ex mero motu, ſpeciali gratia & certa ſcientia, pardoned *all miſpriſions, offences, and contempts*; after this pardon was obtained, the judges of B. R. fined him 100l. for this falſe return; the fine was eſtreated into the Exchequer, and the ſheriff was taken in execution, and committed to the Fleet; he ſued a ſpecial writ upon this pardon in the nature of an audita querela, compriſing all this matter, and returnable in the King's Bench. Reſolved that the patent by the ſaid general words pardoned the ſaid offence, and that becauſe the *The king's pardon of all miſpriſions, offences, and contempts, pardons an offence againſt any ſtatute.* By all the judges in the Exchequer Cham-

ber. Jenk. 111. pl. 17. cites 37 H. 6. 4.

the pardon preceded the ſetting of the fine, therefore the fine may be [is] diſcharged. After judgment, and before or after execution, the king's pardon diſcharges the debt or offence, and execution of it, and is pleadable againſt the king. Jenk. 109. pl. 10. cites 36 H. 6. 24. Quatermain's caſe.

But there was alſo in the pardon *omnimoda demanda debita & forisfact.* And this is good. Ibid.

3. Information in the Exchequer *for ſhipping of wool to other place than Calais*, againſt the ſtatute, &c. the *defendant pleaded pardon of the king de ſecta pacis*, which, per Choke, is only ſurety of the peace, and all actions which are contra pacem, and this action is not contra pacem. Br. Charters de Pardon, pl. 24. cites 37 H. 6. 4.

Br. Prerogative, pl. 62. cites S. C.

4. If the king pardons *omnimoda demanda*, yet *inheritance is not pardoned*, quia rex; and yet in the caſe of a common perſon, rent, right of entry, and every thing which is inſplied in it is determined; contra in caſe of the king. Br. Releaſes, pl. 44. cites 6 H. 7. 15.

So a pardon of a *nuſance* does not extend to the *continuance of the nuſance* after the pardon; for this continuance is a new nuſance, as the incloſure is; for this is a depopulation continued. Jenk. 198. pl. 13.

5. The king's pardon of *all offences and miſdeeds, contra formam quorumcumque ſtatutorum*, extends to the offence of *incloſures* againſt the ſtatute of 7 *H.* 8. but it does not extend to the *continuance of the incloſure after the ſaid pardon*, as of a nuſance. Jenk. 198. pl. 13. cites 10 H. 8.

* [35]

S. P. Jenk. 234. pl. 9. —Keilw. 198. b. Mich. S. C. ſays it ſuffices till the date of the pardon; but for all the time that he occupies after his full age, he is chargeable to the king; but where heir is of full age at the time of the pardon, he ſhall go quit, becauſe the king has no title to intermeddle with the land after the pardon; and ſo a diverſity where the heir is of full age, and where within age at the time of the pardon, &c. quod nota. But the reporter makes a quære; for it ſeems that the pardon made to the heir, to whoſe lands the king had once cauſe of wardſhip, ſhall diſcharge the heir as well where he is of full age, as where he is within age at the time of the pardon; and that this pardon countervails a ſpecial livery, and the effect of a ſpecial livery is no other in effect but licentia ingrediendi, &c.

6. If the *heir* of the king's tenant *within age*, enters and takes the profits, and the king pardons him all *intruſions*; this ſhall ſerve him for * *intruſions and meſne profits until office found*, but not for the iſſues afterwards, neither does it diſcharge him of livery; but if he were of *full age* when he ſo intruded, and obtains a pardon of all intruſions before office found, this diſcharges him of intruſion, meſne rates, and livery. Jenk. 198. pl. 13. cites 10 H. 8.

Such pardon will not ſerve where the huſband purchaſes to him and his wife for their lives. Ibid.

7. A. purchaſed land to him and wife, and to his right heirs; the lands were held of the king in capite; A. had no licence; the king by a *coronation pardon, pardoned A. omnes alienationes*, tranſgreſſiones & offenſas pro qualibet alienatione ſibi fact. This pardon pardons this alienation; for the word alienation properly goes to the fee, and a coronation pardon ought to have a favourable conſtruction. By all the Judges of England. Jenk. 222. pl. 67. cites 3 Eliz. D. 196. Sir Robert Catlin's caſe.

8. M. was attainted in a premunire, and the king pardoned him *omnes & ſingulas tranſgreſſiones, offenſas & contemptus.* And the

the queſtion was, whether by this pardon the judgment in premunire was releaſed? And the Court, after giving M. ſome advice to be more careful for the future, and to take heed of running into ſuch high offences, allowed the pardon. 2 Bulſt. 299. Mich. 12 Jac. The King v. Sir Anthony Mildmay.

9. A. became bound to B. in a ſtatute of 10,000l. and after was found in arrear to the crown 22,500l. as collector of the new impoſt. Upon A.'s death his lands were extended for the king's debt, which were afterwards granted by the king to J. S. in truſt for C. A.'s heir; then comes the act of general pardon 13 Car. 2. wherein *all accounts of receivers, collectors*, &c. are excepted; but it is provided, that the heirs, executors, &c. of accountants ſhall not be charged, except for *ſums remaining on accounts already ſtated*. C. conveys to D. and afterwards in the Exchequer pleads the pardon in diſcharge of the crown's debt, which is confeſſed by the attorney general, and judgment given accordingly. Upon an ejectment againſt the executor of B. who had extended the lands upon the ſtatute for the 10,000l. it was adjudged that the word (*accounts*) in the exception of the act of pardon extended to *ſums due on accounts ſtated*, as appears by the ſubſequent proviſo, in favour of the heirs, &c. of the accountants, though properly a ſum due on an account is not an account, as was adjudged on the ſtatute of limitations on the words (merchants accounts). 3 Lev. 135. Travell v. Carteret.

And it was further reſolved, that this debt to the crown was not pardoned, notwithſtanding the act excepts *the accounts of all receivers which have received any ſubſidies, new impoſt, or any rents* of K. Ch. I. *after the 30th day of Jan.* 1642; whereas this money was received, and the account ſtated in 1638; for that the words *after the 30th January* 1642 relate only to thoſe next antecedent, viz. *rents of King Charles I.* and the former part of the clauſe concerning the accounts, ſhall be taken abſolutely *without any limitation to the time*; and that for two reaſons. 1. Becauſe the rebels in the year 1642 begun to ſequeſter the rents of the crown. And 2dly, Becauſe the rents of the king is the *laſt antecedent*, to which that which follows ought to relate. Per three Juſtices againſt Levins J. 3 Lev. 135. Mich. 35 Car. 2. C. B. Travel v. Carteret.

(U. a. 4) Pardon. Good. In reſpect of the Words. [36] In *Criminal Caſes*

1. A MAN was *convicted of robbery at the ſuit of the party*, which *party releaſed him the execution*, and the *king reciting the attainder pardoned him the execution*; and becauſe he *did not pardon the felony by expreſs words*, the charter was diſallowed. And ſo it ſeems that the party by the pardon of the plaintiff ſhall not go quit, without pardon of the king; quod vide Br. Corone, pl. 24. cites 8 H. 4. 22.

2. If *a man kills another*, and the *king pardons all felonies*, this ſhall not ſerve; for it ſhall be intended that the king was deceived in his grant, and did not know the heinouſneſs; per Martin. Br. Charters de Pardon, pl. 19. cites 8 H. 6. 20.

Serjeant Hawkins ſays, it ſeems to be laid down as a general rule in many books, that wherever it may be reaſonably intended that *the king*, when he granted a pardon of felony, was *not fully apprized both of the heinouſneſs of the crime, and alſo how far the party ſtands convicted thereof on record*, the pardon is void, as being gained by impoſition on the king. And this is very agreeable to the reaſon of the law, which ſeems to have intruſted the king with this high prerogative, upon a ſpecial confidence that he will pardon thoſe only whoſe caſe, could it have been foreſeen, the law itſelf may be preſumed willing to have excepted out of its general rules, which the wit of man cannot poſſibly make ſo perfect as to ſuit every particular caſe. And upon this ground this caſe was determined; but

but ſays that he was indicted by theſe words, that he had ſlain a man for having ſued him in the king's court, which Brooke in his abridgment of the caſe omits. 2 Hawk. Pl. C. 383. cap. 37. ſ. 8.

S. P. Br. Patents, pl. 15. cites S. C. per Strange.— If a man be *adjudged for felony*, and after the king *pardons* him *all manner of felonies*, this is not good, becauſe he *did not pardon all executions of felony*. Per Choke J. quod non negatur. Br. Charters de Pardon, pl. 44. cites 6 E. 4. 4.

3. *And* per Strange, *if a man be attainted of felony by outlawry or verdict*, and the king pardons him all felonies, this is not good for the reaſon aforeſaid; and therefore it is uſual to mention *all judgments, executions, pains, and penalties* of the ſame. Br. Charters de Pardon, pl. 19. cites 8 H. 6. 20.

But if it had been *perdonavimus R. W. & alios ſupra de omnibus feloniis factis, &c. per prædictum R. W. vel per J. B. vel R. C. vel per alios*, &c. this had been good; for this is ſeveral.

4. Pardon was, *perdonavimus R. W. J. B. R. C. de omnibus feloniis, per prædictos R. W. J. B. R. C. vel per aliquos eorum fact.* And per Tremaile and Huſſey J. the pardon is not good, becauſe *felony* is ſeveral, and cannot be joint; and therefore, becauſe the pardon is *joint in the premiſes*, it is not good, *though* it be *ſeveral in the ſubſequent*. And after Fairfax went to the juſtices of C. B. for their advice, who ſaid that it cannot be good as it is written; and after it was amended in the Chancery. But Brooke ſays he has heard that the book is miſprinted, and contrary to the record; for the firſt pardon was good, by reaſon of thoſe words (vel eorum aliquem) in the ſubſequent; quod nota. Br. Charters de Pardon, pl. 51. cites 22 E. 4. 7.

ſeveral. Br. Charters de Pardon, pl. 51. cites 22 E. 4. 7. ——— Serjeant Hawkins ſays it ſeems agreed, that the pardon of A., B., and C. of all felonies by them done, without adding, or any of them, is void, becauſe it ſuppoſes them jointly guilty, and extends to no other but joint felonies, whereas all felony is ſeveral in each offender, and cannot be joint. And the Year-book of 22 E. 4. goes ſo far as to hold, that the addition of the words (or any of them) will not help a pardon beginning with ſuch joint words; but it is ſaid to be miſreported, and contrary to the roll, and ſeems to be agreed not to be law at this day. 2 Hawk. Pl. C. 388. cap. 37. ſ. 24.

5. A. commits treaſon or felony; the king's pardon of *all offences* does not pardon *treaſon or felony*; the law requires, in the pardon of capital offences, a *particular mention* of the nature of the crime, ne maleficia remaneant impunita, and the king be deceived. A general pardon of *all felonies* is good for any felony, but not for treaſon. Where a felon is attainted, a pardon of the felony will not ſerve him without a pardon of the attainder alſo. Jenk. 197. pl. 5. cites 2 H. 8.

[37] 6. If the king pardons A. *a felony whereof he ſtands indicted*, or *indicted* and attainted, &c. and in truth *he is not indicted* nor attainted, &c. this is *expreſſio falſi*, and makes the pardon void. 3 Inſt. 238.

7. D. was indicted of felony and murder, and prayed to have his pardon allowed. Per Withens and Holloway, *felonica interfectio* is well enough, though *murdrum* be *omitted*; but the Ch. J. contra. Manſlaughter is felonica interfectio; but at another day (the Ch. J. being abſent) it was allowed. Comb. 39. Mich. 2 Jac. 2. B. R. The King v. Davies.

On the debate of this caſe it ſeems to be admitted, that

8. One outlawed in an appeal of felony, prayed his *clergy*, which was *counterpleaded on account of bigamy*, &c. and afterwards *purchaſed a pardon*, and ſued ſcire facias againſt the appellant, &c. it

it is ſaid, that the *pardon was not allowed, becauſe it made no mention of the bigamy.* 2 Hawk. Pl. C. 383. cap. 37. ſ. 8.

the pardon was not good, becauſe it made no mention of the bigamy; and yet it is ſaid, upon the non-appearance of any one to maintain the appeal, the pardon was allowed; ergo quære. 2 Hawk. Pl. C. 383. cap. 37. ſ. 8, Marg. cites 11 H. 4. 11. pl. 24. & 48. pl. 23.

(U. a. 5) Pardon. Good. In reſpect of the Words. In *Caſes not Criminal.*

1. IN attaint the defendant *pleaded outlawry in the plaintiff*, judgment if he ſhall be anſwered; the *plaintiff ſhewed a pardon*, which was, *ita quod ſtet rectus in curia;* by which Finch. ſaid, that therefore this is conditional; and ſaid, that where the defendant recovered againſt the plaintiff in the firſt action, becauſe he has not made gree to him, there the pardon ſhall not ſerve. Fiſh ſaid, the pardon is not to be repealed by any, unleſs by you, and by our ſuit we are to ſet aſide all the firſt record; and therefore did not allow the ſaying of the defendant, but the charter of the plaintiff was allowed. Br. Charters de Pardon, pl. 34. cites 30 Aſſ. 20.

2. A man was *bound in a recognizance to keep the peace*, and the *defendant in ſcire facias* upon the recognizance *pleaded pardon* of the king *of all debts, accounts, and recognizances*, and the pardon *bore date after the recognizance, and before the forfeiture;* and the opinion of the Court was, that the pardon is good; as releaſe of an obligation before the day of payment is good. Br. Charters de Pardon, pl. 17. cites 11 H. 4. 43.—Contra per Priſot, 37 H. 6. 4.

3. The king pardoned A. B. *omnimoda debita*, &c. *ex mero motu & certa ſcientia;* and after *debt was demanded againſt him* in the Exchequer, *as ſheriff of C.* and *he pleaded this pardon, with ſuggeſtion that he was ſheriff*, &c. And by ſome juſtices the pardon is not good; for it is not de communi gratia, nor general pardon; and per Brian, capi debet juxta intentionem regis, & non ad deceptionem regis; and here he is not named ſheriff in the pardon, and therefore it ſhall be intended his proper debt, and not as ſheriff. But per Huſſey Ch. J. and ſeveral other juſtices, the pardon ſhall ſerve the debtee as ſheriff in the firſt caſe, becauſe it is ex mero motu, &c. for *it is a general pardon;* but *pardon made upon ſuggeſtion or ratione officii ſhall be taken ſtrictly according to the letter;* but after the pardon aforeſaid made to B. was allowed by the barons of the Exchequer. Br. Charters de Pardon, pl. 36. cites 1 H. 7. 10.

The king *pardoned J. N. (Eſq.* only) *all debts and accounts*, and *he was ſheriff of N.* and becauſe it was *ex certa ſcientia & mero motu*, it was allowed without being named ſheriff. Br. Charters de Pardon, pl. 58. cites 2 R. 3. 7. ——— *But* if J. N. be *indebted to the king by two offices*, and *makes executors*, and dies, and the *king pardons the executors by their proper names, omnia debita ſua*, and does not ſay executoribus, &c. this ſhall not ſerve them as executors; per Brian. Ibid. Br. Charters de Pardon, pl. 36. cites 1 H. 7. 10.

4. If the king *grants to the merchants to tranſport wool without paying cuſtom*, this is a good pardon of the cuſtom, per juſticiarios; contra

contra if the king licences the merchants to export wool, and retain the cuſtom, yet the cuſtom ſhall be charged; for this is no pardon in itſelf; nota diverſitatem inde bene. Br. Charters de Pardon, pl. 68. cites 1 H. 7. 34.

But pardon of *all debts* is good by the king; and yet this does not extend to joint-debts that this perſon and another owe; and per Fairfax, this pardon does not extinguiſh relief of the king. Ibid.——*And* per Brian and Vavilor, pardon of the king *of all actions* is not good. Ibid.

5. It was doubted if pardon of the king *of all manner of demands*, be good or not. Br. Charters de Pardon, pl. 75. cites 11 H. 7. 10.

D. 286. pl. 42. Trin. 11 Eliz. cites S. C.

6. The tenant of the king dies ſeiſed, and an office is found accordingly, and the heir had entered and taken the profits before the office found, and afterwards the king pardons *all intruſions*; this is not good without theſe words, *iſſues and profits*, &c. Keilw. 88. b. Hill. 22 H. 7.

7. B. was *indicted for ſtriking in Weſtminſter-Hall* near the ſide of the bar of C. B. ſitting the courts, and obtained his pardon; and the queſtion was, if it ſhould be allowed, becauſe it varied from the indictment; for the *indictment was, verberavit vulneravit & percuſſit*, and the *pardon omitted percuſſit*; and yet good per Cur. for it is in the recital, and if no recital had been, yet it ſhould have been good, and *vulner. is larger than percuſſit*; but if it was not, there are general words, viz. omnia maleſic. in indictamento prædict. contin. Sid. 211. Trin. 16 Car. 2. B. R. The King v. Bockman.

(U. a. 6) Pardon. Good. In Reſpect of the *Time of* the *Making*.

1. A Pardon *made by E. 4. before he was actually king*, was void even after he came to the crown. Hawk. Pl. C. 36. cap. 17. ſ. 13.

2. If the *tenant of the king diſſeiſes me, and dies, his heir within age*, and *I enter*, and the *king pardons me all entries upon him*, and after *office is found for him*, yet the pardon is good; but *pardon after office found is void*; for he ought to traverſe, or make petition or monſtrans de droit, per Choke J. But per Markham, the pardon is not good before the office nor after; which Brook ſays does not ſeem to be law; for it ſeems that it is a good pardon. Br. Charters de Pardon, pl. 43. cites 5 E. 4. 4.

But if he *pardons* him *after the office found*, the *fine for the entry* is *not* pardoned, per Philpot; but per Morton, after office found he ought to have ſpecial pardon; quære. Br. Charters de Pardon, pl. 48. cites 16 E. 4. 1.

3. Tenant of the king dies ſeiſed, and his *heir enters without livery*; per Philpot, if the king *pardons him before office found of the intruſion*, then the intruſion and the iſſues are pardoned. Br. Charters de Pardon, pl. 48. cites 16 E. 4. 1.

4. The *heir before office found may diſtrain the tenants*, and pardon made to him before office of intruſion found is good, but office may be found after, notwithſtanding the pardon; but this ſhall

not

not ſerve the king but for the profits before the office, per Huſſey. Br. Charters de Pardon, pl. 39. cites 3 H. 7. 3.

5. The king may pardon things which are in *pœnam pecuniariam before the act done*; contra of voluntary eſcapes, felony, &c. Br. Charters de Pardon, pl. 41. cites 3 H. 7. 15. Br. Patents, pl. 51. cites S. C.

(U. a. 7) *What* the King may pardon. [39]

1. 2 *Ed.* 3. 2. *CHARTERS of pardon for manſlaughters, robberies, felonies, and other treſpaſſes, ſhall not be granted but where the king may do it ſaving his oath, viz. where one man killeth another in his own defence, or by a misfortune.* This ſtatute is confirmed by 4 *Ed.* 3. 13. *and* 10 *Ed.* 3. 2. *and* 14 *E.* 3. 15.

—The king may pardon *murder*, though he cannot diſpenſe with it; per Hales Arg. March 213. Trin. 18 Car. in Rickebie's caſe.——Holt Ch. J. ſaid there was as good reaſon why the king ſhould pardon an indictment of murder, which is his ſuit, as why the ſubject ſhould diſcharge an appeal, which is the ſuit of the ſubject; and that the king was by his coronation oath to ſhew mercy as well as to do juſtice. And he ſaid that this ſtatute of 2 *E.* 3. *cap* 3. *meant only that the king ſhould be fully informed before he pardoned any felony*; and that the reaſon of that and other reſtrictive ſtatutes was, for that after the ſtatute of Glouceſter, cap. 9. upon a murder done, it was uſual to apply to the Lord Chancellor, and obtain a pardon by undue means and falſe ſuggeſtions, with general words in it; and this was the occaſion of thoſe reſtrictive ſtatutes, that application be made to the king in perſon, to the intent the king himſelf might be apprized of the matter. 2 Salk 499. Hill. 3 W. & M. B. R. The King v. Parſons.——S. P. 4 Mod. 63. Mich 3 W. & M. B. R. in caſe of the King v. Anonymus.

Serjeant Hawkins, after reciting this ſtatute, and adding that it is confirmed by ſeveral ſubſequent ſtatutes, ſays, that there being no precedent in the Regiſter of a pardon of any other homicide, but ſuch as is done either in ſelf-defence, or by miſadventure, or by infants or madmen, ſome have gone ſo far as to hold that the king's pardon of any other homicide is not good, unleſs it be confirmed by parliament, or at leaſt have a non obſtante. But the Serjeant ſays this ſeems contrary not only to the general tenor of the books, which clearly admit the king's power to pardon any homicide in general, but alſo to the expreſs purport of 13 R. 1. which by ſhewing in what form the king ſhall make a pardon of murder, plainly allows that he has a power to make it: beſides, the ſame reaſons hold as ſtrongly againſt the king's power to pardon manſlaughter as murder, which yet he ſays he never knew diſputed. However, it ſeems reaſonable, that thus much at leaſt be allowed to follow from the arguments above mentioned, that too great caution cannot well be taken in the grant of pardons of any homicide, that there be ſome ſuch favourable circumſtances in extenuation of it, as may bring it ſome way within the equity of the caſes in the Regiſter, and theſe old ſtatutes. 2 Hawk. Pl. C. 385. cap. 37. ſ. 14.

2. In *appeal* by the party of the death of his father, the king cannot *pardon the execution;* quod nota. Br. Appeal, pl. 150. cites 14 E. 3. In appeal of death, robbery, rape, &c. the king cannot pardon the defendant; for the appeal is the ſuit of the party to have revenge by death, and whether the defendant be attainted by judgment, &c. or by outlawry, the pardon of the king ſhall not diſcharge the defendant. 3 Inſt. 237.

Serjeant Hawkins ſays, a pardon of the king will not be any *bar to an appeal*, except only where it is *carried on at the ſuit of the king after the nonſuit of the party*, in which caſe it may be barred by a pardon in the ſame manner as an indictment. 2 Hawk. Pl. C. 392. cap. 37. ſ. 35.

3. In *attaint* by A. againſt the party and the petit jury; *againſt the party to have reſtitution;* this the king *cannot* pardon; *againſt the petit jury* by the common law, that they ſhould loſe liberam legem, &c. this the king *may* pardon, becauſe it is a puniſhment exemplary to deter others, and tendeth not to the reſtitution or ſatisfaction of the plaintiff. 3 Inſt. 237. cites 13 E. 4. 5. * S. P. 2 Salk. 680. Paſch. 7 W. 3. B. R. The King v. Croſby.

4. The king cannot pardon the *duty of the party*. Br. Charters de Pardon, pl. 24. cites 37 H. 6. 4. Br. Action Popular, pl. 3. cites S. C.

——Wherever an act of parliament gives a particular intereſt, or right of action to the party grieved by

by the breach of it, as the ſtatutes of mortmain, which give an entry to the next immediate lord for an alienation to a corporation, the ſtatutes againſt maintenance, forcible entries, carrying diſtreſſes out of the hundred, ſuffering one in execution to eſcape, &c. which give an action to the party grieved by the offence prohibited, it ſeems to have been always agreed, that no charter by the king can be of any force to bar the right of the party grounded upon ſuch ſtatute, becauſe it is a ſettled rule, that the king cannot prejudice the intereſt of the party. 2 Hawk. Pl. C. 390. cap. 37. ſ. 29.

Though the king has *granted fines* to a corporation, he may however pardon the *offence*. Reſolved per Cur. Skin. 676. Hill. 8 W. 3. B. R. The King v. Bowerbank.

5. *And* where the king *grants* to me *all fines and amerciaments in ſuch a place*, the king cannot pardon them. Ibid.

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Br. Charters de Pardon, pl. 24. cites S. C.—— S. P. Br. Charters de Pardon, pl. 13. cites 1 H. 7. 3. For after action brought, the party is intitled to his proper debt. ——Br. Action Popular, pl. 4. cites S. C.

6. *Before popular action brought, the king may pardon* all the forfeitures and pains; *but after* information or action brought *the king cannot pardon but only his own part*, and not the part of the party. Br. Action Popular, pl. 3. cites 37 H. 6. 4.

Serjeant Hawkins ſays, he takes it to be a ſettled rule, that the king may *pardon any offence whatever*, whether againſt the common or ſtatute law, *ſo far as the publick is concerned* in it, after it is over, and conſequently may prevent any popular action on a penal ſtatute, by a pardon of the offence before any ſuit commenced by an informer. 2 Hawk. Pl. C. 391. cap. 37. ſ. 33.——He alſo takes it to be a ſettled rule, that the king *cannot* by any diſpenſation, releaſe, pardon, or grant whatſoever, *bar any right*, whether of entry or action, *or any legal intereſt*, benefit or advantage whatſoever, *before veſted in the ſubject*; and that upon this ground it ſeems clear, that the king can no way bar any *action on a ſtatute by the party grieved, nor* even *a popular action* by a common informer, if *commenced before his pardon* or releaſe. 2 Hawk. Pl. C. 392. cap. 37. ſ. 34.

Contra, if it be *after the peace broken*. Ibid.—S. P. Br. Charters de Pardon, pl. 76. cites 11 H. 7. 11, 12.——Br. Recognizance, pl. 22. cites S. C. per Fineux quod non negatur.——S. P. 12 Rep. 30. cites 11 H. 4. 30. 37 H. 6. 4. 1 H. 7. 10.——S. P. 2 Hawk. Pl. C. 392. cap 37. ſ. 34.——The king cannot pardon or releaſe a *recognizance of the peace before it is broken*, becauſe the ſubject has a kind of intereſt in it. Hawk. Pl. C. 129. cap. 60. ſ. 17.——S. P. 3 Inſt. 238.

7. If a man be *bound in a recognizance to keep the peace*, and the king *pardons him* or releaſes *before the peace broken*, this is not good. Br. Charters de Pardon, pl. 24. cites 37 H. 6. 4. per Forteſcue.

Br. Quinzime, pl. 7. cites S. C. Br. Choſe in Action, pl. 7. cites S. C. ——Br. Grants, pl. 111. cites S. C.

8. Where *a tenth is granted to the king*, and he *aſſigns tallies to his creditors*, and *they ſhew them to the collectors*, now the king is diſcharged; and the collectors are charged to the creditors; and therefore after this the king cannot pardon the collectors, nor thoſe of the clergy who granted the tenth; for it is compared there to a grant of a rent over with attornment; quod nota. Br. Charters de Pardon, pl. 37. cites 1 H. 7. 8.

9. *Malum prohibitum is all that which is prohibited by ſtatute, which was lawful before*, as ſhipping of wool beyond ſea, &c. and *malum in ſe* is that which is ill and unlawful, and which the king cannot grant licence to do, and yet may pardon it afterwards; as for killing a man or making a nuſance, &c. the licence is not good, and yet after it is done, the king may pardon it; but with malum prohibitum the king may diſpenſe, as of alienation in mortmain, ſhipping of merchandize, &c. Br. Charters de Pardon, pl. 76. cites 11 H. 7. 11, 12.

10. The king may pardon *a clerk convict remaining in the biſhop's priſon without making purgation*, for this is all temporal; per Fineux Ch. J. quod nemo negavit. Br. Charters de Pardon, pl. 21. cites 15 H. 7. 9.

11. In

11. In *appeal of death* the plaintiff counted *of felony and murder ex inſidiis, inſultu & malitia præmeditatis & præcogitatis*, &c. The defendant pleaded not guilty to the felony and murder, and by niſi prius was *found not guilty of murder, but guilty of death*, viz. *of felonioufly killing*, &c. And it is left a quære whether the queen may pardon the burning in the hand; for *the impriſonment* ſhe cannot pardon, inaſmuch as it *is the execution of the party* in the appeal. D. 261. pl. 26. Paſch. 9 Eliz. Turner v. Cuthberd and Muſgrave. D. 201 b. S. P. Dubitatur.——In ſuch a caſe the defendant pleaded the queen's pardon, and prayed to have it allowed; and a precedent was ſhewn, Paſch. 8 Eliz. Rot. 33. MUSGRAVE's caſe, where the defendant pleaded the queen's pardon in this very caſe, and it was allowed; although in 9 Eliz Dyer, 261. there was a quære thereof; but Popham ſaid it was a ſtrong precedent, for it is hard that the queen ſhould pardon that which is the ſuit of the party; and there is no queſtion if it had been an appeal of homicide, as it well might, the queen could not have pardoned it, whereto Coke the queen's attorney of counſel with the defendant agreed, for it is merely the ſuit of the party. Cro. E. 465. Trin. 38 Eliz. B. R. Penryn v. Corbet.——Cro. E. 632. Mich. 40 & 41 Eliz. in caſe of SHACKBOROUGH v. BIGGINS, it is ſaid that MUSGRAVE's caſe was there cited, and the record viewed, and no judgment herein.——But 5 Rep. 50. Trin. 31 Eliz. BIGGEN's caſe, in appeal it is ſaid that it was reſolved, upon conference with divers other juſtices, that the king may pardon the *burning in the hand*; for that it * appears by the ſtatute of the 4 H. 7. 13. that burning in the hand was only to notify to the judge hereafter, whether the defendant has had his clergy before or not, and ſo no part of the judgment; for if it were, the king could not pardon it, becauſe the *plaintiff has an intereſt in the judgment*; and ſince the king has pardoned the burning in the hand, he thereby pardons the *impriſonment* by conſequence; for the 18th Eliz. provides, that after the allowance of the clergy and burning of the hand, the priſoner ſhall immediately be ſet at large; and if the pardon, by diſcharging the burning of the hand, ſhould prevent his being diſcharged, it would defeat the intent of that ſtatute, and occaſion a *perpetual* impriſonment, and thereupon the defendant was diſcharged.—3 Inſt. 237. cites Trin. 40 Eliz. S. C. by name of SHUGBOROUGH v. BUGGINS, where lord Coke ſays, it was reſolved by the juſtices, upon conference between them, that the queen might pardon the burning of the hand; for that it is no part of the judgment at the ſuit of the party plaintiff in the appeal, but is a collateral and exemplary puniſhment inflicted by the ſtatute 4 H. 7. cap. 13.——But note, that this caſe is reported Cro. E. 682. Trin. 41 Eliz. C. B. by the name of SHUCKBOROUGH v. BIGGEN, where it appears that *no judgment was given* therein, but that the Court was equally divided, and that the caſe at laſt ended by *compromiſe*.——And in Mo. 571. S. C. by name of STROBOROUGH v. BIGGIN, it is ſaid to be agreed that the king *cannot* pardon the *burning of the hand* in an appeal, becauſe it was at the ſuit of the party, and that thereupon the matter was *compounded*, which is likewiſe confirmed by Raymond J. in his Reports, 369. in CELIER's caſe, who ſaid he had *examined* Biggin's caſe, and he held, that the burning in the hand was part of the judgment; for the entry is, *quod le offender cauterizeter in manu ſua leva*.——But Cro. C. 596. Mich. 16 Car. B. R. in Sir MATTHEW MINT's caſe, the king pardoned the burning in the hand, and the pardon was allowed.——And 11 Mod. 254. Trin. 8 Ann. B. R. in caſe of SMITH v. BOWEN, the Court was of opinion that the ſtatute that gives the clergy extended to appeals, and that the burning in the hand being no part of their judgment, the queen might pardon it, according to BIGGIN's caſe. 5 Co. 50. And thereupon the appellee was diſcharged without bail, being pardoned by an act of grace.

Serjeant Hawkins ſays, it is holden by great authorities, that if a perſon be convicted of manſlaughter upon an appeal of death, the king may pardon the burning in the hand; for which this reaſon is given by Sir Edward Coke, that it is † no part of the judgment at the ſuit of the party, but a collateral and exemplary puniſhment inflicted by the ſtatute of 4 H. 7. 13. But this is made a quære by others; and the principal caſe wherein it is ſaid to have been reſolved, is very differently reported, and was never adjudged; and the ground laid down that the king may pardon it, becauſe it is no part of the judgment at the ſuit of the party, (by which it ſeems to be admitted, that if it were part of the judgment the law would be otherwiſe,) ſeems rather to make againſt it than for it; for there are precedents of expreſs judgments quod cauteriſetur in manu ſua leva. Alſo it is admitted, that were a defendant is to have a certain impriſonments, &c. at the ſuit of the party upon a ſtatute, the king cannot diſpenſe with it, except in ſome ſpecial caſes, wherein it may be reaſonably intended that ſuch *impriſonment* was given *by way of ſatisfaction to the public juſtice*, in which caſe it ſeems agreed, that the king may diſpenſe with it, as it is ſaid he may with finding of ſureties by one convicted on the ſtatute againſt treſpaſſes in parks. But it ſeems doubtful whether the ſtatute of 4 *H.* 7. 13. which appoints the burning of the hand, can well admit of ſuch a conſtruction, for the words are, *whereas upon truſt of the privilege of the church, divers have been more bold to commit murder, becauſe they have been admitted to their clergy as oft as they have offended; for avoiding of ſuch preſumptuous boldneſs it is enacted, that every perſon not being in orders, who hath once been admitted to his clergy, be not again admitted thereto; and that every ſuch perſon convicted*, &c. ſhall be marked, &c. From whence it ſeems plain, that the ſtatute expreſsly intends ſuch marking as a diſcouragement of the offence; and it ſeems difficult to give a reaſon why it ſhould be conſtrued to mean it only as a collateral, and not as a direct puniſhment; neither does it ſeem a plain reaſon, that becauſe the ſtatute intended it as an exemplary puniſhment, the king may diſpenſe with it; for ſurely the

the execution of an appellee attainted of murder, and the perpetual impriſonment of a clerk delivered to the ordinary upon a conviction on an appeal, who could not make his purgation, were alſo exemplary puniſhments; and yet it is generally agreed, that the king never could diſpenſe with them: and therefore, upon the whole, this ſeems to be a point that deſerves to be farther conſidered. 2 Hawk. Pl. C. 393. cap. 37. ſ. 39. —† Lord Hobart, fol. 294. ſays, that it is no part of the judgment, or ſo much as in nature of puniſhment, but only a mark to notify that the party may have his clergy but once. Ibid in Marg.

3 Inſt. 171. cites S.C.—S. C. cited Cro. E. 682. Trin. 41 Eliz. in caſe of SHUCKBOROUGH v. BIGGEN, by Popham, who ſaid it was good law; for the *ſuits in the Star-chamber are by information*, which is properly the *ſuit of the queen*, and not of the party; and therefore the queen may pardon it, but not when he is convicted in an action at the party's ſuit; and ſo * he ſaid was the opinion of divers juſtices with whom he had conferred. —But if one be attainted of forgery *in an action upon the ſtatute* of forgery, the queen cannot pardon the puniſhment. Per Popham. Cro. E. 682. Trin. 41 Eliz. C. B. S. C.

12. J. T. being a *copyholder* to the Lord Cromwel of his manor of N. *forged a cuſtomary* of the ſaid manor; and it was proved to be done wittingly, ſubtlely, and falſely, and to the intent, &c. And this was held to be forgery within the ſtatute 5 Eliz. and *judgment was given* accordingly in the Star-chamber; and after this judgment the *queen pardoned the execution of the corporal puniſhment*. And it was held by Wray Ch. J., Saunders Ch. B., Harper and Manwood J. præter Barham and Gerrard Attorney, that the queen may pardon the corporal penance which trenches in common example, &c. But Dyer, Southcote, and Mounſon e contra. D. 322. b. 323. a. Mich. 15 Eliz. in the Star-chamber. Taverner's caſe.

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S.P. Hawk. Pl. C. 394. cap. 37. ſ. 41.—S. C. cited Dav. Rep. 73. a. in the caſe of commenda.—S. P. Hob. 81, 82. Trin. 13 Jac. in caſe of Cuddington v. Wilkins.

13. In all *caſes* depending *between party and party in court chriſtian*, where the ſuit is only *pro ſalute animæ vel reformatione morum*, as for defamation, or laying violent hands upon a clerk, or the like, there the *pardon* of the king *is a bar of the ſuit*; for the *ſuit* is not to recover any damages, or any other thing, but *only to inflict puniſhment* upon the offender pro ſalute animæ, which puniſhment the king may pardon as well before as after the ſuit commenced; for in truth ſuch ſuits are only for the king, though they are proſecuted by the party. Reſolved 5 Rep. 51. a. Trin. 2 Jac. C. B. in Hall's caſe.

——*So* of ſuits in the *Star-chamber* preferred *by any ſubject againſt another*, the king may pardon them; for though a ſubject proſecutes them, yet the ſuits are for the king, and to puniſh the defendants for their offences by impriſonment and fine, &c. to the king. Reſolved 5 Rep. 51. in Hall's caſe.——S. P. 2 Hawk. Pl. C. 394. cap. 37. ſ. 41.——3 Inſt. 238. cites S. C.——S. P. Hob. 82. Trin. 13 Jac. in caſe of Cuddington v. Wilkins.——*So all proceedings in the eccleſiaſtical court ex officio*, are for the king; therefore whatſoever the ſuit is, there the king may pardon them; for they *are only to correct or puniſh the party for the offence*, which the king may pardon, and not for the particular intereſt of the party. Reſolved 5 Rep. 51. b. in Hall's caſe.——S. P. 2 Hawk. Pl. C. 394. cap. 37. ſ. 41.——*But* if one *libels for tithes*, or *contract of matrimony*, *or for legacy*, or the like, *where the plaintiff has intereſt* and property in the thing in demand, and ſentence be given for him for the thing for which he libels, there the king cannot pardon this neither before nor after the ſuit commenced. Reſolved 5 Rep. 51. a. in Hall's caſe.——S. P. 2 Hawk. Pl. C. 394. cap. 37. ſ. 42.

2 L. P. R. 270. tit. Pardon, cites S.C.—S. P. 2 Hawk. Pl. C. 394. cap. 37. ſ. 41, 42.—So of ſuits in the Star-chamber

14. Alice C. libelled againſt R. H. in the court chriſtian for defamation, for calling her *whore*, and had *ſentence*, *and coſts were taxed*. Et decretum fuit quod predictus R. H. foret movendus & citandus ad ſolvend. expenſ. citra tale feſtum. Which ſentence the defendant appealed from, and before the ſaid feaſt R. H. obtained a pardon of the king, and thereupon obtained a prohibition out of C. B. And it was reſolved that though the ſuit be for the king, and which the king may pardon, yet when ſentence is given, and coſts taxed for the plaintiff, *now the plaintiff has a particular*

ticular intereſt in them by the ſentence, which the king cannot pardon, though day be given for the payment of them, as above. 5 Rep. 51. a. b. Trin. 2 Jac. C. B. Hall's caſe.

after ſentence given and coſts taxed for the party, the

pardon ſhall not diſcharge them; *but if the pardon had been obtained before ſentence*, there the pardon had diſcharged all; for then the Court could not have proceeded to any ſentence of the principal, and by conſequence not of coſts, which are only acceſſary. 5 Rep. 51. a. b. Hall's caſe.—It was alſo reſolved, that though the *defendant had appealed*, by which the ſentence to divers purpoſes (by opinion of the doctors of the law ſpiritual) is ſuſpended, as appears in 27 H. 6. tit. Gard. 118. 2 R. 2. tit. Quare Impedit, 143. 1 H. 7. 12. 2 Mar. 105. Yet by the firſt ſentence the party (notwithſtanding the appeal) has an intereſt in the coſts, which cannot be diſcharged by the pardon of the king; and therefore as to this purpoſe, the firſt ſentence is not ſuſpended by the appeal. And after conſultation was granted for the coſts. Ibid.

15. The king cannot pardon *the not repairing a* * *bridge or highway*, becauſe the *ſubject has an intereſt* in them. It is true he may † pardon *fines for the time paſt*, but not for the time to come, for the offence itſelf cannot be pardoned; but for the time after the offender ſhall be fined. And ſo in caſe of *depopulation*. 12 Rep. 29, 30. Trin. 5 Jac. Anon.

Vaugh. 333. 335.——
* S. P. Br. Nuſance, pl. 15. cites 37 H. 6. 4. And that the king cannot pardon a *common nuſance*.——† Br. Charter of Pardon, pl. 24. cites 37 H. 6. 4.——S. P. 3 Inſt. 237.——*So* of *nuſances in the highway*, they cannot be pardoned *till removed*, though they are only *mala prohibita*. But the *fine or puniſhment impoſed* for the doing may be pardoned. *So* of a *water-courſe diverted*; per Vaughan Ch. J. Vaugh. 333.

Serjeant Hawkins ſays, that while a *public nuſance* continues unreformed, it ſeems agreed that the king cannot wholly pardon it, becauſe ſuch pardon would take away the only means of compelling a redreſs of it. But it has been holden by ſome, that a pardon of ſuch offence will ſave the party from any fine for the time precedent to the pardon. 2 Hawk. Pl. C. 391. cap. 37. ſ. 33.

16. Both the *damages and impriſonment in treſpaſs upon the ſtatute Weſt. 1. cap.* 20. concern the plaintiff; and therefore the king's pardon cannot diſpenſe with them; but the *ranſom*, the *finding ſurety*, *and the forejuring of the realm*, are puniſhments exemplary, and concern the king; and therefore he may pardon them. 2 Inſt. 200. [43]

17. M. was *impeached by the houſe of commons, and* by judgment in the houſe of lords, *was diſabled to hold any ſpiritual preferment*. The king afterwards, under the broad ſeal, *pardoned him all treaſons, felonies, diſabilities, &c.* but *without any recital* therein *of the judgment in parliament* againſt him. He was afterwards made biſhop of St. Aſaph. It was argued, whether or no this diſability is pardonable by the king? This point was not adjudged; but ſee the arguments pro & con. Hard. 154 to 157. Paſch. 1659. Thorowgood v. Herbert.

18. P. being *convicted of murder, obtained his pardon, and* being brought to the bar, *pleaded it, and produced his writ of allowance*, and the pardon had in it the word *murdrum*. And it was held by the whole court, that this pardon was good, and ought to be allowed; for that the king might at the common law have pardoned murder, and that appears by thoſe very ſtatutes which limit his power in that very particular; and the drift of thoſe ſtatutes are no more than that the king ſhould not be ſurprized by pardoning it by general words; and therefore *ſince* the making of *thoſe ſtatutes, a pardon of felonies*, &c. *would not* extend to *pardon murder without a non obſtante*; but if the king would recite the particular fact, as he had done here, the pardon would be good without a non obſtante:

2 Salk. 499. Hill. 3 W. & M. B. R. S. C. by name of the King v. Parſons.

ſtante: therefore it ſeems a pardon in general words was good, without reciting the fact and proceedings particularly, as in this caſe the indictment, conviction, and attainder, were all recited. Freem. Rep. 501, 502. Mich. 1691. Parſons's caſe.

19. Holt Ch. J. took this difference, *where the diſability is only the conſequence of the judgment*, the king may pardon it; *but where* the diſability is *part of the judgment* itſelf, the king's pardon will not take it away; therefore * if a man be convict of *perjury on the ſtatute*, the king's pardon will not reſtore him, for it is not a conſequence, but part of the judgment, viz. quod impoſterum non ſit receptus ut teſtis. But a pardon by act of parliament will reſtore him in that caſe; quod nota. Quære of a perjury *at the common law*; and if the law be not the ſame; for there the diſability is only by conſequence, and not part of the judgment. 2 Salk. 689. Paſch. 7 W. 3. B. R. The King v. Croſby.

* If a man be convicted of perjury at common law, the king may pardon him, but if upon the ſtatute he cannot; per Holt Ch. J. Carth. 422. in caſe of the King v. Greep.—2 Salk. 514.

Mich. 9 W. 3. B. R. S. C.

20. Where *beheading* is part of the judgment, as in caſe of high treaſon, the *king may pardon all the reſt*, and conſequently in ſuch caſe the judgment may be well executed by beheading only. 2 Hawk. Pl. C. 463. cap. 51. ſ. 5.

(U. a. 8) Pardon. Obtained how. Suggeſtion, and Proceedings.

1. PARDON was pleaded, that *the king for his ſervice done in Gaſcoigne pardoned him*; and it was allowed; but he was *detained till it was certified whether he did ſuch ſervice there, or not.* And ſo ſee that the *conſideration* upon which the pardon is obtained *is material.* Br. Charters de Terres, pl. 74. cites Itin. Canc. 6 E. 2. 7.

†[44] Becauſe king's had been deceived by falſe †ſuggeſtion,

2. 27 *E.* 3. *ſtat.* 1. *cap.* 2. *Pardons which have not in them the ſuggeſtion whereupon they are granted, and alſo the ſuggeſtors names, ſhall be void; ſo are thoſe likewiſe which are granted upon falſe ſuggeſtions.*

and had thereupon diſpenſed with former ſtatutes, with a clauſe of non obſtante inſerted in the pardons, therefore this ſtatute was made. Arg. 4 Mod. 62. Mich. 3 W. & M. B. R. in caſe of the King v. Anonymous.

Lord Coke ſays, the party who does not inform the king truly, is not worthy of his grace and forgiveneſs; and therefore either ſuppreſſio veri or expreſſio falſi avoids the pardon. 3 Inſt. 238.

H. and others were indicted of murder, and pleaded a pardon, which recited all the proceedings upon the indictment; and then the king was informed, that there was no evidence given that there was any malice prepenſe in them, in other manner than by conſtruction and implication of law, and for that the king pardoned the killing and felony, &c. but no word of murder was in it but by deſcription; and the Court were troubled to hear ſuch a ſuggeſtion in the patent, becauſe they knew the contrary to be true; and therefore they ſaid, that upon ſuch a pardon a ſcire facias might be brought 7 years hence, and they might be hanged notwithſtanding this pardon; and therefore they adviſed H. to procure a better pardon: and Windham J. ſaid, that the ſuggeſtion of the pardon might have been grounded on the merits of the priſoners, &c. but upon this pardon the priſoners had not produced any writ of allowance; and therefore the pardon was not allowed, but their execution reſpited till another day, at which day they produced a patent without any ſuggeſtion at all, and a writ of allowance, but the date was miſtaken, and did not agree with the writ; and therefore execution was reſpited over. Raym. 13 Paſch. 13 Car. 2. B. R. Howard's caſe.——Sid. 41. S. C.

3. 5 *H.* 4. 2. *If an approver commit felony after he is pardoned, he that procured his pardon, ſhall forfeit* 100 *l. whoſe name ſhall alſo for that purpoſe be inſerted in the pardon.*

4. If a man be arraigned of *murder*, and it be *found* that he killed the party *ſe defendendo*, he ought to ſue a *certiorari to remove the record into the Chancery; and* upon the removal thereof *to have his pardon.* F. N. B. [247] (F.)

5. And if a man be *attainted* in aſſiſe of novel diſſeiſin, before the juſtices of aſſiſe, *of a diſſeiſin with force, and be* afterwards *outlawed for the king's fine*, if he will have a pardon of the outlawry, he *ought to have a certiorari* directed *to the juſtices of aſſiſe, to certify the* king in his *Chancery the tenor of the record* of the aſſiſe, *and alſo another writ* to the juſtices, *to certify* the king in his Chancery *whether the defendant in the aſſiſe hath yielded himſelf to priſon, and hath ſatisfied the party his damages.* And if the ſame be ſo certified in the Chancery, then upon that certificate he ſhall have his pardon of the outlawry. F. N. B. [247] (G.)

6. And if a man be *condemned in C. B. in debt, and outlawed upon the ſame*, then before he ſhall have his pardon, he *ought to yield himſelf to the priſon of the Fleet, and ſatisfy the party;* and the *record of his condemnation, and* of the *ſatisfaction, ought to be certified by* certiorari unto the king *in* his *Chancery*, and thereupon he ſhall have his pardon; and that is by the ſtatute 5 E. 3. cap. 12. F. N. B. [247] (G.)

7. *And* if a man be *outlawed ſeverally, at the ſuit of three ſeveral perſons in ſeveral actions* in which he was condemned, he ought to ſue a certiorari to remove the tenor of thoſe records and proceſs into the Chancery, and alſo to have a certiorari to the juſtices of the Common Pleas, if the ſuit be there, to certify the king in Chancery whether he hath yielded himſelf to the priſon of the Fleet, and hath ſatisfied the parties; and when the chief juſtice hath certified the ſame into Chancery, then he ſhall have his pardon for the outlawries, and not before. F. N. B. [247] (G.)

(U. a. 9) Pardon. Allowed in what Caſes.

See (U. a. 10.)

1. WHERE the *baron is outlawed*, and the *feme goes without day*, and the baron purchaſes pardon and ſcire facias thereupon, he ſhall not have it allowed without *bringing in his feme.* Per Thorp. Br. Charters de Pardon, pl. 6. cites 40 E. 3. 34.

But where *baron and feme were outlawed*; and the *baron purchaſed* charter of *pardon*, it was held that he may ſay *that the feme is dead*, or that *he had no ſuch feme*, and ſhall have his charter allowed; for he cannot have it allowed without bringing in his feme, without ſuch ſpecial * matter ſhewn. Br. Charters de Pardon, pl. 64. cites 13 E. 4. 5.——*But* where the *baron and feme* are *outlawed*, and *ſhe appears and ſhews charter of pardon*, and the baron does not come, the charter ſhall not be allowed, becauſe ſhe cannot plead without the baron; but ſhe ſhall go at large; nota. Br. Charters de Pardon, pl. 18. cites 11 H. 4. 89.——Br. Baron and Feme, pl. 36. cites S. C.

* [45]

2. In formedon the *tenant pleaded outlawry* in the demandant, and he *imparled*, and *the next day brought charter of pardon, bearing date after his imparlance*, and the *tenant ſaid, that the charter is upon condition*

condition that he ſue againſt C. D. at whoſe ſuit he was outlawed, which he has not done, judgment, &c. and yet becauſe the demandant is now at the law, the opinion of the Court was againſt the tenant; by which he vouched. Br. Charter de Pardon, pl. 7. cites 44 E. 3. 27.

D. was indicted of murder, and obtained a general pardon of all

3. 13 *R.* 2. 1. *In a pardon the offence committed ſhall be ſpecified, otherwiſe it ſhall not be allowed.*

If the offence pardoned be afterwards found wilful murder, the pardon ſhall not be allowed.

murders, robberies, felonies, &c. Non obſtante the ſtatute of 13 R. 2. or any other ſtatute. And the Court inclined that this pardon ſhould not be allowed; for after the ſaid ſtatute a general non obſtante would not ſerve, without recital of the effect of the indictment upon which he is convicted, to the intent that the king might be apprized of the offence. And though it was the opinion in RICABIE's caſe, that the king could not pardon murder, yet it has never been doubted either before or after, but that the king could pardon it, with a ſpecial recital of the fact and non obſtante; but without ſuch recital the pardon is not good. And they directed that it ſhould be argued for the priſoner, if he would; but he perceiving the opinion of the Court, endeavoured to obtain a new pardon with ſpecial words. Sid. 366. Trin. 20 Car. 2. B. R. The King v. Dudley.——A general non obſtante, without a particular recital of the crime for which the party is convicted, is not good ſince the making of the ſtatute of R. 2. but at the common law, both before and ſince that ſtatute, the king may pardon murder, with ſpecial recital of the fact, non obſtante that or any other ſtatute. Per Cur. 4 Mod. 63. Mich. 3 W. & M. B. R. The King v. Anonymous.

2 Hawk. Pl. C. 384. cap. 37. ſ. 12. cites S. C. But the Serjeant ſays, it does not appear how this pardon was pleaded, nor to what

4. A man was *attainted at the ſuit of the party of robbery*, and the *party pardoned him the execution*, and the *king*, *by charter which recited the attainder*, *pardoned the execution*; and becauſe no mention was expreſſed of the felony, therefore it was diſallowed; quod nota. And ſo it ſeems that he ſhall not eſcape by pardon of the party only; and often *where the party will not proſecute the ſuit*, the party *ſhall be arraigned upon the declaration for the king*. Br. Charters de Pardon, pl. 13. cites 8 H. 4. 22.

purpoſe it was attempted to be made uſe of, nor how far, or in what reſpect it was diſallowed; and therefore though ſome books ſeem to hold generally upon the authority of this caſe, that ſuch a pardon is no way good, yet the Serjeant ſays, he does not well ſee how any more can be proved from it than this, that it ſhall neither amount to a pardon of the felony itſelf, nor of any other conſequence of the attainder, beſides the execution. But he ſays it ſeems difficult to give a reaſon why it ſhould not well pardon the execution, ſince the king does not appear to be any ways deceived; and it has been clearly adjudged that the king may, if he think fit, pardon the execution, and no more.

5. Scire facias ſhall *not* be granted *for the defendant againſt the plaintiff in appeal* upon the pleading of the pardon of the king *after conviction and judgment*, if he *does not ſhew releaſe*, or ſuch like; per Huls; quod non negatur. Br. Scire Facias, pl. 73. cites 11 H. 4. 16.

S. P. For every one ſhall take notice of the act of parliament.

6. *Felon ſhall not* be ſuffered to *relinquiſh a general pardon* by act of parliament, and to plead to the felony; per Cur. *But* yet *he ſhall anſwer of the goods*, but they will not arraign him of the felony. Br. Charters de Pardon, pl. 16. cites 11 H. 4. 41.

Br. Corone, pl. 30. cites S. C.——Where *felons are pardoned by act of parliament*, there the *juſtices ought to take notice thereof*, becauſe it is a general act; ſo that if a priſoner will plead not guilty, yet they ought to ſurceaſe to arraign him, and allow the pardon; quod nota. Br. Charters de Pardon, pl. 1. cites 26 H. 8. 7.——Br. Parliament, pl. 1. cites S. C.——S. P. Though he be ſo far from pleading it, or praying the benefit of it, that he does all he can to waive it. 2 Hawk. Pl. C. 397. cap. 37. ſ. 61.—— Serjeant Hawkins ſays, he takes it to be agreed, that a general pardon by parliament cannot be waived, becauſe no one by his admittance can give a court a power to proceed againſt him, when it appears there is no law to puniſh him. 2 Hawk. Pl. C. 396. cap. 37. ſ. 58.

7. If

7. If *appeal be without day by demiſe of the king*, there, if the *king pardons the defendant*, and the *plaintiff does not bring his re-attachment within the year* to revive the appeal, the pardon ſhall be allowed. Br. Charters de Pardon, pl. 69. cites 2 H. 7. 10. Jenk. 169. pl. 29. cites 2 H. 7. Fitz. Re-attachment, 13. S. C.

and adds, that this pardon ſhall be *allowed without awarding a ſcire facias againſt the appellant*; for it appears on record, that the appeal is extinct, and it would be in vain in this caſe to award a ſcire facias by the juſtices of both benches. Lex nil facit fruſtra.

8. H. was convicted of *manſlaughter, and had his clergy*, and pleaded his pardon, whereby the *burning in the hand* for the manſlaughter, and all other felonies by him committed, et alia malefacta before the 8th July laſt *were pardoned*; and there was a *ſpecial clauſe that he ſhould not find ſurety* for his good behaviour; and the pardon bore date 31ſt October laſt; and though there were divers miſdemeanors committed by him after the ſaid 8th July, for which he deſerved to be bound to the good behaviour, yet he had his pardon allowed, and was diſcharged from finding ſureties, &c. Cro. C. 596. Mich. 16 Car. B. R. Sir Matthew Mint's caſe.

9. H. and others were indicted of *murder*, and found guilty, and *judgment was given, but execution was ſuſpended*. And after they were brought to the bar, and demanded what they could ſay why execution ſhould not be done; and they *pleaded pardon* of the king *ſub magno ſigillo*; and the Court refuſed to allow it, becauſe there *ought to have been* a *writ de allocanda perdonatione* directed to the juſtices: and Mallet J. ſaid, the reaſon why ſuch writ ought to be directed was, *becauſe it was the warrant which remained in court for the juſtices* to allow the pardon. And after at another day the pardon was read to the Court, and H. had brought a writ directed to the juſtices to allow it; and upon reading the pardon, the Court ſaid they would be adviſed; and they ſaid that the *ſuggeſtions* in it were *falſe, and therefore they would ſtop the allowance*. *And* Twiſden J. ſaid, that in the time of Hide Ch. J. an allowance of a pardon was ſtopped, *becauſe there was a non obſtante that the party ſhould not find ſurety of the peace*. Sid. 41. Paſch. 13 Car. 2. B. R. Howard's caſe. Raym. 13. S. C.

(U. a. 10) Pardon. Allowed, how.

See (U. a. 9) (U. a. 13)

1. N. G. was *indicted of the death of R. anno* 13 *E.* 2. and he *ſhewed by record that R. was dead anno* 9 *E.* 2. *and* ſhewed *pardon of his death teſted* 12 *E.* 3. and becauſe it might be that two R.'s were killed, therefore Scrope awarded inqueſt of office to inquire if there was found any R. anno 13. after the pardon; and it was found quod non, by which he went quit, and the pardon allowed; quod nota; notwithſtanding great variance; quod mirum mihi. Br. Charters de Pardon, pl. 29. cites 3 Aſſ. 15. S. P. 2 Hawk. Pl. C. 398. cap. 37. ſ. 66.

2. Charter of pardon was granted to a man who was *outlawed* at the ſuit of the party *upon action de muliere abducta cum bonis viri, becauſe the plaintiff came and confeſſed of his own free-will;* but in B. R. when they came there, they were in doubt to allow it, becauſe the party came into Chancery to confeſs of his own free-will, *without ſcire facias or day in court*, and therefore they doubted if they ſhould award ſcire facias now in B. R. *for it does not appear if he be the ſame perſon or not;* and yet at laſt they allowed the charter, and the acceſſory had not thereof advantage; quod nota: the reaſon ſeems to be inaſmuch as all are principals in this action. Br. Charters de Pardon, pl. 35. cites 42 Aſſ. 16.

[47]

Br. Scire Facias, pl. 207. cites S. C.

3. *He who is outlawed, and has charter of pardon, ſhall not compel the plaintiff to count againſt him*, though he be ready at the bar; becauſe he has not day in court, and therefore was compelled to ſue ſcire facias. Br. Charters de Pardon, pl. 8. cites 46 E. 3. 15.

But Ibid. pl. 47. cites 8 E. 4. 13. and 9 H. 4. accordingly. Contra, that in B. R. *a feme brought appeal againſt four*, at

4. *Several were outlawed in appeal by feme, of the death of her huſband*, and the *one came with* charter of *pardon of the king, and had ſcire facias* againſt the plaintiff, and was *returned warned, and did not come*, by which he *went* quit; and after *another came with ſuch a pardon, and went quit by the firſt default of the feme;* for in this caſe they are *attainted by the outlawry, and ſhall not plead upon the original*, and nothing remains but to be put to execution. Br. Charters de Pardon, pl. 14. cites 9 H. 4. 1.

whoſe ſuit they were *outlawed*, and *one ſued charter of pardon, and had ſcire facias* againſt the feme, which was returned ſerved, and *ſhe did not come*, by which he went quit; and *another ſued charter of pardon*, and he was compelled to have *another ſcire facias*, per Cur. quod nota. —— And agreeable hereunto is Serjeant Hawkins, who ſays that the ſecond ſhall take no advantage of the appellant's default on the firſt ſcire facias, but muſt ſue out his ſcire facias, &c. in the ſame manner as if there had been no ſuch default. 2 Hawk. Pl. C. 393. cap. 37. ſ. 38. cites in Marg. 1 H. 4. 1. pl. 2. Fitzh. Scire Facias, 63. but ſays that Br. Charter de Pardon, pl. 14. in the abridgment of the ſame caſe holds the contrary.

5. But *contra in treſpaſs;* for the ſecond ſhall have ſcire facias upon his charter, becauſe they *may plead upon the original.* Br. Charters de Pardon, pl. 14. cites 9 H. 4. 1.

Contra where the pardon itſelf *is ſhewn, but no* writ of allowance. Ibid.

6. It was ſaid, that if *writ of allowance* of a charter of pardon of felony *be ſhewn* to the juſtices, *and not the pardon itſelf*, this ſhall not ſerve. Br. Charters de Pardon, pl. 42. cites 5 E. 4. 132.

Br. Attorney, pl. 11. cites S. C.

7. *Debt by the king upon an obligation, the defendant pleaded not his deed*, and *found againſt him by niſi prius*, and before the day in Bank the king pardoned him; he cannot plead this by attorney; for *by the judgment the warrant* of attorney of the defendant *is expired;* and therefore he appeared in perſon, and pleaded it in perſon, and he pleaded it to the execution without day in court; for if it was againſt a common perſon, he might have ſcire facias ad cognoſcendum factum, or audita querela, and make him give day in court, and then to plead his releaſe; but ſuch actions, nor any others, do not lie againſt the king. Br. Charters de Pardon, pl. 4. cites 34 H. 6. 3. & 50. and 35 H. 6. 1. 25.

8. Appeal

8. Appeal of *robbery*; the *defendant was outlawed, and got charter of pardon and ſcire facias againſt the plaintiff* in the appeal *returnable*, &c. *without ſhewing releaſe of the plaintiff*; and well; for it is uſual without ſhewing releaſe. Br. Charters de Pardon, pl. 59. cites 2 R. 3. 8.

And if the party be returned warned, and does not appear, the pardon ſhall be allowed *who is outlawed.* Ibid. ——*And* in this ſcire facias the plaintiff *ſhall not make attorney againſt him* Ibid. ——*Contra upon iſſue of bigamy.* Ibid.

9. Note, by the opinion of all the juſtices, where *a clerk convict has charter of pardon*, he *ought to have ſpecial writ*, rehearſing all the matter, *and the pardon directed to the ordinary*, to make *him come before the juſtices to have his pardon allowed*; quod nota; and clerk convict or attaint ſhall be enabled by pardon, per Fineux; quære of clerk attaint. Br. Charters de Pardon, pl. 27. cites 21 H. 7. 31.

10. If one have a charter of pardon for felony committed by him, the Court ought to allow *it upon the prayer of the party that hath it*; but he *muſt produce it* at the bar, *and pray upon his knees* that it may be allowed, 13th November 1650. B. S. for if he produces it not, the Court cannot take notice of it, and if he pray not the allowance of it, the Court cannot tell whether the party do accept of the benefit of it; and he does it on his knees to expreſs his thankfulneſs for the mercy afforded him by the pardon. 2 L. P. R. 271. tit. Pardon.

11. A pardon *of felony with a clauſe of tranſportation* was *allowed*, and the party diſcharged *without finding ſureties*; but per Aſtry, the uſual courſe is to inſert the clauſe for finding ſureties to tranſport himſelf within ſuch a time; but per Cur. he *ought to tranſport himſelf within the time at his peril*; and therefore it was allowed, &c. Comb. 16. Paſch. 2 Jac. 2. B. R. Anon. [48]

12. 5 & 6 *W. & M.* 13. *The act of* * 10 *Ed.* 3. 2. *for finding ſix mainpernors or ſubſtantial perſons to be bound for the good behaviour of a perſon who is pardoned for felony, is hereby repealed: and it is enacted, that if a pardon be pleaded for felony, the Court may, at their diſcretion, remand or commit the perſon to priſon, there to remain till he enters into a recognizance with two ſufficient ſureties for his good behaviour for any time not exceeding 7 years.*

Provided, that if ſuch pardon be pleaded by a feme covert or infant, ſuch feme covert or infant may find two ſureties to enter into a recognizance for them.

* A *man outlawed of two ſeveral felonies, two ſeveral years* was taken and compelled to anſwer to both, and *pleaded pardon of them*; and becauſe he *found ſurety according to the ſtatute of* 10 *E.* 3. de bene gerendo, and after *made an affray upon J. N.* the pardon was void, and another judgment was given upon him, that he ſhould be hanged by the neck; and he was executed. Br. Corone, pl. 133. cites 3 H. 7. 7.——This ſeems to be CLARK's caſe cited Mo. 466. pl. 662. in COLE's caſe, where one indicted of burglary [and convicted] was afterwards guilty of a breach of the peace, and upon ſuggeſting the ſame to the Court, and praying execution to be done upon him, it was ſaid by Ive, clerk of the crown, that WHIDDON was hanged in the queen's time for the like cauſe, after pardon, and that the pardon was conditional, viz. ita quod ſe bene geſſerit verſus cunctum populum dominæ reginæ. Mo. 466. Paſch. 39 Eliz.

13. If one who appears to be *attainted of felony*, whether by outlawry or otherwiſe, *on an appeal* carried on *at the ſuit of the party, get a pardon* from the king, he *muſt ſue a ſcire facias* againſt the appellant, before the pardon ſhall be allowed, unleſs the ap-

pellant appear gratis, and confeſs that he will ſue no farther, &c. 2 Hawk. Pl. C. 392. cap. 37. ſ. 35.

(U. a. 11) Pardon. Allowed at what Time.

1. UPON the *firſt nihil returned* upon ſcire facias upon charter of pardon of *outlawry*, the *plaintiff ſhall not be received to count*; contrary upon the ſecond nihil. Br. Scire Facias, pl. 45. cites 48 E. 3. 1.

General pardon was pleaded to diſcharge an outlawry *after judgment*, and not allowed till the parties were agreed. Toth. 136. cites Tr. 1590. Weekes v. Newborow.

2. A charter of *pardon of felony* being ſhewed to the Court, ſhall be *allowed after judgment* upon an indictment, and execution ſhall not be done. De vita hominis nulla eſt cunctatio longa. Jenk. 137. pl. 82. cites 21 E. 4. 72.

3. The Court *refuſed to allow* a pardon *till the priſoner had paid his fees*, ſcil. gloves to the judges, and alſo to the officers, according to Sir JOHN BELL's caſe, 4 E. 4. 10. b. And the clerk ſaid, that the fees were ready, upon which the pardon was read. Sid. 452. Paſch. 22 Car. 2. B. R. The King v. Webſter.

Before that the defendant in meſne proceſs can have the benefit of this pardon, he muſt *pay coſts* of the outlawry to the plaintiff, though there is no mention of any thing but his appearing and putting in bail. 2 Vent. 210. ——And Pollexfen Ch. J. ſaid, that the practice had been ſo upon the general act of pardon, 25 *Car.* 2. 5. And yet in that ſtatute the clauſe concerning outlawries is to the ſame purpoſe, and no mention made of the coſts of the party. Ibid.

4. 2 *W. & M. ſeſſ.* 1. *cap.* 10. *No proceſs of outlawry at the ſuit of any perſon plaintiff, ſhall be ſtaid, unleſs the defendant* appear, and put in bail where the law requires it, *and take out a ſcire facias; nor ſhall this pardon diſcharge any outlawry after judgment, till ſatisfaction or agreement with the party.*

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5. A pardon *for treaſon* cannot be pleaded until the priſoner be *charged with the indictment* for the offence committed; for before he is charged by the indictment, it doth not appear to the Court that he is the perſon that is pardoned by the pardon. 2 L. P. R. 270. tit. Pardon.

6. Where a *pardon of* the *felonious killing* of J. S. has been *pleaded to an indictment of manſlaughter by the coroner's inqueſt*, the Court in prudence has *refuſed to allow it till* the fact has been *found manſlaughter only by a jury directed by a higher court.* 2 Hawk. Pl. C. 386. cap. 37. ſ. 18.

(U. a. 12) Pardon. Allowed upon what Return to the Scire facias.

But by 40 E. 3. *Sicut alias iſſued*, and the like is 19 E. 3. Ibid. ——

1. IN *account*, the *defendant was outlawed, and got pardon*, and had *ſcire facias againſt the plaintiff*, who was *returned nihil*, and the *pardon was allowed* upon a nihil returned, and he went quit. Br. Retorn de Briefs, pl. 109. cites 21 E. 3.

Br. Charters de Pardon, pl. 5. cites 40 E. 3. 1. ſays, it is agreed that the plaintiff ſhall be *returned attorned*,

warned, or returned *twice nichil*, or otherwiſe the charter ſhall not be allowed, and that upon two nichils, or one garniſhment of all the plaintiffs, it ſhall be allowed.

2. *Treſpaſs by three*, the *defendant was outlawed*, and ſued *charter of pardon*, and *ſcire facias againſt the plaintiffs*, the *ſheriff returned one warned*, and the *other nihil*; and the defendant prayed allowance; & non allocatur; for two are not warned, nor is there more than one nihil returned, but he *ſhall have ſcire facias alias*, and there, *if the ſheriff returns nihil again*, the charter ſhall be allowed, for he who was warned did not come; note, that *two nichils countervail ſcire feci*. Br. Scire Facias, pl. 14. cites 40 E. 5. 1.——And in the next caſe there, it was agreed, that if upon the ſcire facias the ſheriff *returns the plaintiff dead*, the defendant ſhall go quit; quod nota. Ibid. Br. Charters de Pardon, pl. 5. cites S. C.

3. *Two* were *outlawed in debt at the ſuit of two*, and *one* of the outlaws *ſued charter of pardon*, and had ſcire facias againſt the plaintiffs, and the *one was returned warned, and did not come*, and the *other nihil*, by which the defendant would have gone quit, becauſe the default of the one plaintiff in debt ſhall be a nonſuit of both, & non allocatur; but he *was compelled to ſue ſicut alias againſt him who was returned nihil, and idem dies to the other*; and if he ſhould be *returned nihil again*, then the charter ſhould be allowed; quod nota. Br. Scire Facias, pl. 46. cites 48 E. 3. 3. Brooke makes a quære, if *at the day* all *the plaintiffs come, and* this *defendant who had ſued his charter, and the other not*, if they might *count againſt this defendant*, who appeared without the other, for he ſays in the action of debt they cannot; but by the reporter, when it comes to this point, the outlaw ſhall have *idem dies by mainprize, till the other has ſued his charter of pardon*, and *then to count againſt both*. Br. Scire Facias, pl. 46. cites 48 E. 3. 3.——Br. Default, pl. 12. cites S. C.

4. Where ſcire facias upon charter of pardon upon *outlawry at the ſuit of executors* was *returned ſerved at the alias againſt the one, and not* ſerved *againſt the other*, yet the plaintiff was compelled to *count againſt him*; otherwiſe in debt brought by other perſons. Br. Scire Facias, pl. 57. cites 3 H. 4. 10. Br. Executors, pl. 44. cites S. C. Brooke ſays, the reaſon ſeems to be, inaſmuch as executors may be ſummoned and ſevered, and he who comes firſt by diſtreſs ſhall anſwer.

5. *Treſpaſs againſt three*, who are *returned outlawed upon erroneous proceſs*, and the *one had charter of pardon*, and ſcire facias againſt the * *plaintiff*, who *is returned dead*; the charter ſhall be allowed, and when *the other has charter of pardon*, he ſhall have it allowed without ſuing ſcire facias; for it appears to the Court that the plaintiff is dead. Br. Charters de Pardon, pl. 61. cites 7 H. 4. 30. and 9 H. 4. 7. Br. Scire Facias, pl. 65. cites S. C.—— Br. Utlawry, pl. 7. cites S. C. And in appeal, if the defendant is outlawed, and ſues charter of pardon and *ſcire facias againſt the plaintiff who is returned dead*, another ſcire facias ſhall not iſſue againſt the heir of the plaintiff, but the charter ſhall be allowed, and he diſcharged; quod nota. Br. Charters de Pardon, pl. 28. cites 38 H. 6. 13.——Br. Scire Facias, pl. 149. cites S. C.

* [50]

6. Scire facias againſt the plaintiff, an abbot; upon *outlawry and* charter of *pardon* granted to the defendant, who was outlawed at the ſuit of the plaintiff, the *ſheriff returned*, that *the plaintiff* was *depoſed before the coming of the writ*, and the defendant went quit ſine

ſine die; quod nota at the firſt ſcire facias, and yet it is not returned ſerved. Br. Scire Facias, pl. 145. cites 1 H. 6. 2.

S. P. Br. Charters de Pardon, pl. 63. cites 1 H. 6. 2.

7. *Debt by J. abbot* of W. againſt D. till the *defendant is outlawed, and ſued charter of pardon* againſt the abbot, the *ſheriff returned that before the teſte of the ſci. fa. the ſaid J. abbot was, and yet he is depoſed, and another elected per quod ipſam ſcire facere non poteſt per nomen J. abbot prout breve exigit;* and a good return, and the charter allowed; for it amounts to as much as mortuus eſt, for it is a civil death. *Contra* upon ſuch ſcire facias *againſt baron and feme*, and the *ſheriff returns that they are divorced;* for perſons divorced may be warned; contra of dead perſons. Br. Charters de Pardon, pl. 2. cites 2 H. 6. 5.

8. Debt by a dean and chapter, the *defendant was outlawed and ſued ſcire facias upon charter of pardon*, which was returned ſerved, and the plaintiff did not come, and the *defendant ſurmiſed that the dean is dead after the laſt continuance;* and becauſe the plaintiff's attorney could not deny it, the charter was allowed. Br. Charters de Pardon, pl. 56. cites 11 H. 6. 1.

9. In *appeal of death*, the *defendant was outlawed*, and *got pardon* of the king, and had *ſcire facias againſt the appellor without ſhewing releaſe*, or other thing; and yet divers books are, that he ſhall not have ſcire facias, without ſhewing writing or other thing, which will bar the plaintiff of execution. Huſſey agreed, that the ſcire facias lay well, without ſhewing any thing; and the *ſheriff returned* upon the ſcire facias, *that the appellor is dead;* and therefore per judicium, the pardon was allowed without ſuing ſcire facias againſt the heir; for the ſuit is given to him who is heir to the deceaſed, who has no feme; and if this heir dies, his heir, ſcil. the heir of the heir, ſhall not have appeal nor execution; for it is an action which dies with the perſon. Br. Scire Facias, pl. 166. cites 9 H. 7. 5.

See (U. a. 70).

(U. a. 13) Pardon. Writ of Allowance neceſſary, in what Caſes.

1 NO *particular pardon*, be it at the coronation or any other, of any offences whatſoever, that is abſolute *without any condition*, &c. *need any writ of allowance;* but when the pardon is conditional by force of the act of 10 E. 3. cap. 2. there a writ of allowance out of Chancery, teſtifying that the condition is performed, viz. ſurety found according to that act, may be had, or the party may plead the finding of ſurety, &c. and vouch the record. 2 Inſt. 234. cites Hill. 26 E. 3. coram rege. Rot. 21.

2. H. was indicted of *treaſon*, and produced the queen's pardon, without any writ of allowance thereof; and Pope, ſecond clerk [51] of the crown, informed the Court, that the precedents were, that in caſe of treaſon it was uſual to allow the pardon without any writ of allowance, but not in felony. Whereupon the pardon

was

was allowed. Cro. E. 814. Paſch. 43 Eliz. B. R. Sir Henry Linley's caſe.

3. A pardon was pleaded without a *writ of allowance*; and the Court ſaid, that if there had been a *non obſtante* in the pardon, in this caſe they would have allowed it without ſuch writ. Sid. 41. Paſch. 13 Car. 2. B. R. Howard's caſe.

4. C. was *outlawed for murder*, and brought a *writ of error* to reverſe it, which being done, he was forthwith arraigned, and *pleaded his pardon under the great ſeal*, in which there was a *non obſtante for his not finding ſureties* for his good behaviour. Per Holt Ch. J. the pardon ought not to be allowed, without a *writ of allowance* directed to the judges of this Court, out of Chancery, *teſtifying that he has found ſureties* before the coroner and ſheriff, &c. according to the ſtatute. But by the other judges, the pardon ought now to be allowed without any writ of allowance, becauſe the party hath *three months given by the ſtatute after the pardon to find ſureties, under the penalty that his pardon ſhall be void*, if he does not do it. Nota, That afterwards in the ſame term the writ of allowance was brought into Court, and upon prayer, &c. it was recorded under the pardon. Carth. 120. Paſch. 2 W. & M. B. R. Cooke's caſe.

5. Pardon of murder is conditional, viz. the *finding ſureties*, and there muſt be a *writ of allowance*, ſignifying the performance of that condition; and it is not merely at the peril of the party; for we ought not to give a final judgment upon ignorance of its performance. Per Holt Ch. J. Show. 283. Mich. 3 W. & M. The King v. Parſons.

S. P. per Holt Ch. J. *but a pardon for treaſon* may be pleaded *without any writ of allowance*, becauſe that is abſolute. Freem. Rep. 502. Mich. 1691. S. C. by name of Parſon's caſe.

While the ſtatute of 10 E. 3. 2. ſtood in force, pardon of felony could not be allowed without a writ out of Chancery, commonly called a writ of allowance, teſtifying that the party had found ſureties, &c. according to that ſtatute, unleſs it were diſpenſed with by a clauſe of non-obſtante; but the neceſſity thereof is taken away by 5 & 6 W. & M. 13. which has repealed the ſaid ſtatute of 10 E. 3. 2 Hawk. Pl. C. 398. cap. 37. ſ. 70.

6. M. pleaded his *pardon*, and being aſked for his writ of allowance, it was anſwered, that it had been *allowed in the Old Bailey*; and after ſome debate it was *allowed here, without a new writ*. Comb. 230. Mich. 5 Ann. B. R. Sir Richard Manſel's caſe.

(U. a. 14) Pardon. Advantage thereof taken by whom, when, and how.

See (U. a. 16) (Q. a. 2) (Q. a. 3).

1. A Man *ſtruck a juror*, by which it was *awarded that his hand be cut off*, and *the king granted his land to another*; and after the *king pardoned him the amputation of his hand and impriſonment, and whatſoever to him belonged*, and then *the offender* died; and the heir brought ſcire facias againſt the patentee, and re-had his land. Br. Charters de Pardon, pl. 70. cites 41 E. 3. 25.

2. A man was *bound in one obligation by name of R. T.* and *in another by name of J. S.* and was *outlawed upon both, where his name was R. T.* and *ſued charter of pardon thereof by name of J. S.* only; and it was allowed, and he went quit of the other, for it cannot

Br. Miſnomer, pl. 4. cites S. C.

cannot be intended the ſame perſon. Br. Charters de Pardon, pl. 3. cites 3 H. 6. 25.

Br. Charters de Pardon, pl. 47. cites S. C. and 9 H. 4. accordingly.

3. Where *two are appealed, and* are *outlawed*, and *ſue ſeveral charters of pardon*, they ſhall have ſeveral ſcire faciaſes. Br. Scire Facias, pl. 177. cites 8 E. 4. 13.

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In the Star-chamber the rule was, not to allow defendants the benefit of a general pardon *at the hearing of the cauſe*, unleſs they *prayed it by their anſwer in* Court; and the reaſon is, becauſe it does not appear to the Court, that they are not perſons *excepted* in the act. Obiter. Mo. 770. Dagg v. Penkevell, cites a like caſe of Jener v. Waden, and Wentworth v. Wade.

4. If a delinquent in the *Star-chamber pleads not guilty*, he ſhall not have benefit of the general pardon *at the hearing*; for he *ought to plead the pardon, and to aver in fact that he is not any of the perſons excepted*, or otherwiſe the Court is not to allow him the pardon. By the opinion of both the Ch. Juſtices, to which the Lord Keeper agreed. Mo. 619. Mich. 42 & 43 Eliz. in caſe of Blake v. Allen.

5. A. was outlawed after judgment, before the general pardon of the 43 Eliz. and after the pardon died. Upon which his *executors make ſatisfaction*, which is confeſſed of record, and plead the general pardon, with an averment that they are none of the perſons excepted therein. It was reſolved that the *executors* may take benefit of it; for the act is, that *all the king's ſubjects, their heirs, ſucceſſors, executors, and adminiſtrators* ſhall be acquitted, &c. which is to be expounded beneficially for the ſubject. And though the proviſo is, that the act ſhall not extend to any perſon *outlawed on any writ* of ca. ſa. *till ſatisfaction or agreement made with the party*, yet the act veſts ſuch an intereſt in the perſon outlawed, that though he dies, yet his executors may make ſatisfaction, and have benefit of the pardon. Per Cur. 6 Rep. 79. b. Trin. 5 Jac. C. B. Sir Edward Phitton's caſe.

6. *Bill* was exhibited in the Star-chamber *againſt C. and* ſeven or eight ſcore *Dutchmen for buying and tranſporting* of ſundry *great ſums of money*. The defendants pleaded in bar not guilty, and afterwards in their rejoinder pleaded the pardon by parliament 7 Jac. which extended to buying of money, but not to tranſporting. And upon this a queſtion aroſe, whether ſo many of the defendants as were *neither naturalized nor indenizened* were capable of the pardon. And it was argued, that the general pardon in the preamble, and in all parts, uſeth the words of *loving and obedient ſubjects*; whereupon the Ch. J. did in a manner expreſsly hold them out of relief. But Lord Hobart ſays he avoided that queſtion, as being not neceſſary; for he ſays, they all agreed that it did no good in the rejoinder. But he ſays, he told the attorney general, that he held the *Dutch living here within the king's protection, being of a friend country*, to be alſo truly under his ſubjection, and therefore *capable of the title of his loving and obedient ſubjects*, but not of the diſtinct title of natural ſubjects, which is uſual in ſtatutes, ſet in oppoſition againſt denizens and ſtrangers. And beſides, the general pardon hath reſpect of retribution for the ſubſidy, wherein ſtrangers pay more than we, and in ſome ſort may be called grantors; for by living here they tacitly ſubmit to our laws, and ſo their grant

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and conſent is involved in the conſent of parliament. And he thought no judge would doubt but that ſuch a ſtranger ſhould have the benefit of ſuch a pardon againſt common penal laws, and other common offences. *But* if the *ſtranger* were *not in the kingdom at the time of the pardon*, then he were *not within the benefit*; for he is no otherwiſe a ſubject than by his reſidence here. Hob. 270. Courteen's caſe.

7. None ſhall be obliged to *lay the ſtreſs* of his caſe *on any particular words* or clauſe *in a particular pardon*, but may take advantage of the whole. 2 Hawk. Pl. C. 398. cap. 37. ſ. 68.

8. He that will take the benefit of a general pardon, *ought to plead the ſtatute by which* the general pardon was granted. 21 Car. B. R. 8 Ed. 4. 7. 4 H. 7. 8. that the Court may judge whether his offence be pardoned or not; which they cannot do, except the pardon be pleaded, *and* that the party *ſhew he is comprized in the pardon, and not excepted* out of it. 2 L. P. R. 268. tit. Pardon.

(U. a. 15) The Effects and Conſequences of a Pardon. [53]

1. FOR *breaking of* the *priſon* of the king, the appellee ſhall be *ouſted of battel*; but if he can ſhew the king's *pardon for the breaking it*, he *ſhall have the battel*; for the breaking is to the king, by the opinion of the Court. Br. Battail, pl. 3. cites 1 Aſſ. 3.

S. C. cited by the Ch. J. Hob. 82. Trin. 13 Jac. in caſe of CUDDINGTON v. WILKINS, who ſaid that the reaſon of the preſumption of the guiltineſs is the ſame after the pardon as before; but that the reaſon of the caſe is, that the king's *pardon* not only *clears* the offence itſelf, but *all* the dependencies, penalties, and *diſabilities* incident unto it, and that againſt the appellant; for though the appellant has an intereſt in the original fact, which the king would not diſcharge as againſt him, yet in the breaking of the priſon he had none but oblique.

2. If the *heir of the tenant of the king enters after the death of his father*, and the *king pardons* to him *all manner of entries made upon his poſſeſſion*, yet *he has no frank-tenement*, inaſmuch as the ſtatute is quod nullum accreſcat ei liberum tenementum. Br. Charters de Pardon, pl. 43. cites 5 E. 4. 4. per Danby.

If *intruſion by the heir after the death of his anceſtor be found by office*, and after the king *pardons it by act of parliament, or by letters patents*, yet the *heir ſhall ſue livery*; for it is not reſtored to him by the pardon. Br. Charters de Pardon, pl. 54. cites 30 H. 8.——*But* if the pardon was *granted before office found, and at the making* of the pardon *the heir is of full age*, he ſhall retain the land; and office found after the pardon ſhall not grieve him. Br. Charters de Pardon, pl. 54. cites 30 H. 8.——Where *office* is *found before the pardon granted*, the pardon ſhall not ſerve; for then the king is ſeiſed by the office, and there a *releaſe or pardon* cannot give it, but *there ought to be a gift or grant*. Br. Charters de Pardon, pl. 52. cites 29 H. 8.

3. *Appeal of robbery*; the *plaintiff has judgment* againſt the defendant, and the king pardons him, yet he *ſhall ſuffer execution*, *unleſs* the plaintiff upon ſcire facias would confeſs that he would not ſue further. Br. Appeal, pl. 128. cites 11 H. 4. 16.

4. Attorney had made *capias*, *of which there was no original*; by which attachment iſſued againſt him, and he was taken and examined, and confeſſed it, and was committed to the Fleet, and was there for a month, and then was put to his fine, and was *ſworn that he ſhould not meddle any more in the law in any court, and his*

his name ſtruck out of the roll of attornies; quod nota. Per Newton, hereafter you may have *charter of pardon* of the king, and come back; for the biſhop may aſſoil you of this oath. Br. Attorney, pl. 7. cites 20 H. 6. 37.

5. If *alienation without licence* be *pardoned by act of parliament*, the party may enter without ouſter le main, or amoveas manum; but contra by other pardon by letters patents; note the diverſity. Br. Charters de Pardon, pl. 53. cites 29 H. 8.

2 L. P. R. 270. tit. Pardon, cites S. C. —Serjeant Hawkins ſays, it ſeems agreed that the king's pardon cannot reſtore the blood, ſo as to make the perſon attainted capable either of inheriting others, or of being inherited himſelf by any one born before the pardon; yet if ſuch perſon have a ſon born after, and purchaſe lands, and dies, ſuch ſon may be his heir, unleſs he have an elder brother alive born before the pardon; for a pardon does, as it were, make a man a new creature, and give him a new capacity, in reſpect whereof his iſſue born after the pardon may be his heir as to lands purchaſed after the pardon, in the ſame manner as if he had never been attainted. 2 Hawk. Pl. C. 458. cap. 49. ſ. 51.——And Ibid. 396. cap. 37. ſ. 57. the Serjeant ſays, it ſeems agreed that the king's pardon *cannot ſalve the corruption of blood by attainder* of treaſon or felony.

6. If the king *pardons a man attainted of treaſon* or felony, and after he *purchaſes lands* in fee, and takes feme, and has iſſue and dies, this *iſſue ſhall inherit;* for by the pardon he was well reſtored to his blood; becauſe he is thereby enabled to purchaſe, and need not to this purpoſe have reſtitution; and this reaſon ſerves for the iſſue had before the attainder and pardon. Dal. 14. pl. 3. 1 Mar. 1. Anon. per Bromley and Portman.

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S. C. cited Hob. 293. —S. P. Palm. 412. Harris v. White.—— Sid. 168. pl. 27. ſays, this ſeems to be S. C. as Lat. 22. Boston's caſe, though the report there ſuppoſes it to be in another time.——This caſe was denied to be law by Windham J. who ſaid, that though Lord Coke cites it out of Dyer, yet no ſuch caſe is to be found there; and that it has been often denied: and without doubt it is not law, that a parſon ſhall be reſtored by the relation of the pardon, without other act. 1 Sid. 164. Mich. 15 Car. 2. B. R. in caſe of the King v. Wainwrite and Jefferies.——And again denied. Sid. 168. in the caſe of Toombes v. Etherington——And again denied per tot Cur. Sid. 222.

7. One Burton, a *parſon, was deprived for adultery*, and then came a general *pardon* of offences, inter alia, of adultery. Reſolved that * by virtue thereof he was *now become parſon again;* without any ſentence to avoid the ſaid deprivation; for by the pardon the adultery, which was the cauſe and foundation of the ſentence of deprivation, is diſcharged, and by conſequence all that depends upon it. 6 Rep. 13. b. cites D. 135. Burton's caſe.

Hob. 81. Trin. 13 Jac. S. C. by name of Cuddington v. Wilkins. And it was ſaid, that he could no more call him thief in the preſent tenſe, than to ſay that a man has the pox, or is a villein, after he is cured or manumitted; but that he had been a thief or a villein, he might ſay. And it was held no great difference, though this had been a ſpecial pardon, and not known to the defendant; for he muſt take heed, at his peril, that he does no man wrong.——S. C. Hob. 67. And ſays, that in the end it was adjudged for the plaintiff, though it may be he knew him not to be within the pardon; for there is no cauſe to favour idle and injurious words. But perhaps if he had arreſted him for the felony after pardon, it might have been excuſed if he knew it not, becauſe it is an act of juſtice.

8. In caſe for words, the defendant juſtifies, becauſe the plaintiff had *ſtole ſheep;* and the plaintiff replies a general pardon. The Court held upon demurrer, that by the pardon *both the puniſhment and fault were taken away*, for that the wrong was done to the king by the common law; and the king being ſupreme head, if he pardons, the party is cleared of the wrong. Brownl. 10. Trin. 12 Jac. Coddington v. Wilkin.

9. A. was *chancellor* of a dioceſe, but was *deprived and fined*, &c. by the Star-chamber for certain miſdemeanors: B. obtained his

his office. A. was afterwards pardoned. It was held by all the judges at Serjeant's-inn, that the pardon had *avoided the whole ſentence*, except as to the *fine* to the king, and that the ſentence could not take away the office, being a *freehold*; and ſo A. was *allowed to proſecute his aſſiſe* for the office. Cro. C. 55. Mich. 11 Car. B. R. Bennet v. Eaſedale.

10. T. the patron *preſented A. by ſimony*, and then *A. died*; and then he *preſented B.*, and then the king *preſented*, and then came the act of *general pardon* in the 25th of Car. 2. *wherein there is a clauſe of reſtitution* of forfeiture, &c. And the queſtion was, whether or no this had reſtored the party to his right of preſenting. Per North Ch. J. though the king does pardon the ſimony, yet the *diſability remains* ſtill upon the perſon, and renders him incapable of the benefice, as was reſolved in the caſe of PHILLIPS and DRITE lately. But the Court was divided in opinion, and that which made the difficulty of the caſe was, becauſe the king had preſented here before the act of pardon; and although the king may revoke his preſentation by expreſs words, yet whether or no the general words of reſtitution contained in the pardon ſhall amount to a revoking of the preſentation, and of reſtoring the party to his right of preſenting, is the great queſtion. Et adjornatur. Freem. Rep. 198. Trin. 1675. C. B. The King v. Turvill and the Biſhop of Lincoln.

11. The king pardoned inter alia, *all judgments* and convictions *for not coming to church*. And it was agreed, that this pardon did not only pardon the conviction of *recuſancy*, but alſo *reſtored the party to his ability; notwithſtanding he had not conformed*. 3 Lev. 333. Trin. 5 W. & M. C.B. Lord Petre v. the Univerſity of Cambridge.

12. A. was indicted and tried at bar for *high treaſon*; and it was objected to the evidence of B. that he had *ſtood in the pillory upon a judgment* in an information *for perjury*; and it was held by Holt Ch. J. that he was *reſtored* by the general pardon of 2 W. & M. which operated by way of reſtoration, and made him a *new creature*. And it was inſiſted, that the infamy and diſability in this [55] caſe flowed from the *judgment*, *and* not from the *crime*, which might be pardoned even by the *king alone*, though where it flows from the crime, it cannot be pardoned but by *act of parliament*. Salk. 689. Paſch. 7 W. 3. B. R. The King v. Croſby.

13. A. was convicted of *barretry*; and upon this his evidence being objected to, the record was produced, and the judgment was to pay 500 marks, but was *not to ſtand in the pillory*. This being held to be a good objection (becauſe the diſability ariſes from the infamy of the crime, whether the puniſhment be infamous or not) it was then inſiſted to be within the late general pardon. It ſeems to have been held per Holt Ch. J. that the conviction was pardoned, and the party *reſtored to his credit* by the act of parliament, but that the king's *ſpecial* pardon could not have reſtored his credit, the diſability in this caſe being incurred by the *infamy of the crime*, and not of the *puniſhment*. Salk. 690. Mich. 12 W. 3. B. R. The King v. Ford.

14. A.

14. A. having been attainted and pardoned, and permitted to go beyond ſea, his *creditors* moved to *charge him in cuſtodia:* but Holt Ch. J. refuſed it, for this would *defeat* the queen's pardon, by diſabling him from going beyond ſea, which was the condition of the pardon; and there is no reaſon that the pardon ſhould enure for the benefit of the *creditors*, to the prejudice of the party, and put them in a *better condition than before;* for if the attainder had continued he would have been *hanged.* Salk. 500. Hill. 1 Ann. B. R. Foxworthy's caſe.

It diſcharges all the effects and conſequences of the crime.

15. The *crime being pardoned cleanſes the* party from the *guilt.* Per Raymond Ch. J. Gibb. 108. and ſays, it was expreſsly adjudged ſo per Holt Ch. J. in the caſe of Aaron Smith. 2 Salk. 689. 12 Mod 119. The King v. Groenvelt. —— A general pardon *doth diſcharge* not only the puniſhment which was to have been inflicted upon the perſon that did commit the offence pardoned, but alſo *the guilt* of the offence itſelf. It pardons culpa ſo clearly, that in the eye of the law the offender is as innocent as if he never had committed the offence, ſo far doth mercy extend therein. 2 L. P. R. 270. tit. Pardon.

16. If an *indictment* on the ſtatutes of *forcible entry* be removed into B. R. and the defendant, having been turned out of poſſeſſion by the grant of reſtitution to the proſecutor by the juſtices of peace, traverſes the force in the King's Bench, and then the offence is pardoned by a general pardon, the Court cannot proceed on the trial, notwithſtanding the defendant would waive the benefit of the pardon, becauſe it appears judicially, that the king can have no benefit of a fine from the defendant, if a verdict paſs againſt him. Hawk. Pl. C. 154. cap. 64. ſ. 63.

17. Serjeant Hawkins ſays, it ſeems to have been always agreed, than the *forfeiture* of goods *by homicide ſe defendendo* may be ſaved by a pardon (which in this particular caſe ſeems to purge the offence ab initio). 2 Hawk. Pl. C. 381. cap. 37. ſ. 3.

18. It ſeems agreed, that notwithſtanding the king's pardon *to a ſimoniſt* coming into a church, contrary to the purport of 31 Eliz. 6. *or to an officer coming into an office by a corrupt bargain*, contrary to the purport of 5 & 6 E. 6. 16. may ſave ſuch clerk or officer from any criminal proſecution in reſpect of the corrupt bargain, yet it ſhall not enable the clerk to hold the church, nor the officer to retain the office, becauſe they are abſolutely diſabled by ſtatute. 2 Hawk. Pl. C. 396. cap. 37. ſ. 56.

*[56]

And it has been admitted, that the king's *pardon of the burning of the hand*, on a conviction of manſlaughter, has the

19. Pardon of treaſon or felony, even after a conviction or attainder, does ſo far clear the party from the infamy, and all other conſequences of his crime, that he may *not only have an action for a* ſcandal, in *calling him traitor or felon*, after the time of the pardon, *but may* alſo *be a good witneſs*, notwithſtanding the attainder or conviction; becauſe the pardon makes him, as it were, a new man, and * gives him a new capacity and credit. 2 Hawk. Pl. C. 395. cap. 37. ſ. 48.

ſame effect as to this purpoſe as the burning would have had, which is agreed to *reſtore the party to his credit.* 2 Hawk. Pl. C. 395. cap. 37. ſ. 49. —— *But* it has been adjudged, that a pardon is *of no* manner of *force* as to this purpoſe, *till it has paſſed the great ſeal.* 2 Hawk. Pl. C. 395. cap. 37. ſ. 50.

(U. a. 16) Pardon. Pleadings.

1. IF a man be *outlawed in treſpaſs* at the ſuit of the king, and has *pardon*, yet he *ſhall not plead not guilty after;* quod nota. Br. Charters de Pardon, pl. 30. cites 22 Aſſ. 47.

2. A pardon was produced *for felony*, which was *variant from the indictment and from the name;* and yet becauſe it appeared, that it was the will of the king that he ſhould be pardoned, he was remitted to ward, and reſpited. Br. Charters de Pardon, pl. 32. cites 26 Aſſ. 46.

If there be a variance between the record on which a man is convicted or attainted, and his charter of pardon, yet *if there be no repugnancy to intend that the ſame perſon or thing are meant in both, it may be ſupplied by proper averments.* And therefore, if one be indicted by the name of J. S. yeoman, and pardoned by the name of J. S. gentleman, or indicted by the name of B. the taſker, and pardoned by the name of B. the ſon of W. he may make good the variance, by averring that he is the ſame perſon intended in ſuch indictment and pardon; or if in an indictment of the death of J. S. the ſtroke be ſuppoſed to have been given the 1ſt of Auguſt, and in the pardon on the 3d. the party may aver that the death of one and the ſame J. S. are intended in both. And if ſuch variant pardon be pleaded without ſuch averment, it ſeems that the Court may in diſcretion give the party farther day, either to perfect his plea, or to purchaſe a better pardon. 2 Hawk. Pl. C. 393. cap. 37. ſ. 66. ——— 3 Inſt. 240.

3. A man *indicted of treſpaſs came without proceſs, and pleaded pardon* of the king *of all treſpaſſes*, and of this vouched record, and *had two days to have his record.* Br. Charters de Pardon, pl. 33. cites 27 Aſſ. 58.

4. If a man is *indicted of the death of a man, and arraigned*, and *pleads pardon, and is diſcharged*, and after *appeal is brought* againſt him, and the *plaintiff is nonſuited*, and the *defendant arraigned upon the declaration for the king, and pleads the charter again*, there he *ought to ſhew it, notwithſtanding it was allowed of record before.* Br. Charters de Pardon, pl. 15. cites 11 H. 4. 41.

S. P. Or he may plead all the firſt record of diſcharge, and have day to ſhew it. Br. Monſtrans, pl. 36. cites S. C.

5. He who *pleads not guilty cannot plead pardon after, unleſs it be of later date*, and the *charter* was allowed notwithſtanding that it *varied in names*, and *day of the indictment and the appeal;* but it does not appear what variance; the reaſon ſeems inaſmuch as it was of appeal of death, and a man cannot be twice killed; contra of robbery. Br. Charters de Pardon, pl. 15. cites 11 H. 4. 41.

S. P. 2 Hawk. Pl. C. 398. cap. 37. ſ. 67.

6. If a *felon has pardon* to plead, *and pleads not guilty*, he ſhall loſe the advantage of his pardon, and ſhall not plead it after. Br. Corone, pl. 199. cites 35 H. 6. 1. & concordat 19 H. 8. and in H. 4. 41. per Cheynie; but contra M. 3 M. 1.

Jenk. 129. pl. 62. ſays, that if the king pardons a felon, and it is ſhewn to the Court, and yet the felon pleads not guilty, and waives the pardon, he ſhall not be hanged; for it is the king's will that he ſhall not, and the king has an intereſt in the life of his ſubject. The books to the contrary are to be underſtood where the charter of pardon is not ſhewn to the Court. By all the Judges of England.

Serjeant Hawkins ſays, it is certain that a man may waive the benefit of a pardon under the great ſeal, as where one who has ſuch a pardon, does not plead it, but takes the general iſſue, after which he ſhall not reſort to the pardon. 2 Hawk. Pl. C. 396. cap. 37. ſ. 59.

Br. Laches, pl. 6. cites S. C.—— 2 Hawk. Pl. C. 393. cap 37. f. 62. cites S. C.

7. B. *ſheriff* of the county of O. returned *an exigent quarto exactus* in B. R. *and tendered to aver that the defendant is outlawed*, upon which * *iſſued certiorari*, and the *coroners returned him outlawed by the ſame exigent*, by which the *ſheriff was amerced to* 50*l.* and *the eſtreats of it ſent into the Exchequer*; upon which proceſs iſſued againſt him, by which he came, and *ſhewed pardon of all miſpriſions, offences and contempts* done *meſne between the certificate of the coroners and the amercement adjudged*, and prayed to be diſmiſſed; but the barons awarded him to the Fleet, by which he had habeas corpora out of B. R. to the warden of the Fleet, who brought him to the bar, and ſhewed the cauſe aforeſaid, and there he pleaded the ſame pardon and writ of allowance, and found ſurety if, &c. and the attorney of the king demurred upon his plea; and per Cur. *where the eſtreats are ſent into the Exchequer*, as above, *yet the record remains in Bank, and there it ſhall be traverſed, and there the pardon ſhall be pleaded, and not in the Exchequer where the eſtreat is.* And per Forteſcue Ch. J. the points are, if the words of the pardon are ſufficient? and if the ſheriff be attainted by certification of the coroners? and if the ſheriff has furceaſed his time to plead his pardon or not? Br. Charters de Pardon, pl. 25. cites 36 H. 6. 24. —And ſays, that 37 H. 6. 21. it appears that the ſheriff brought ſpecial writ out of Chancery in nature of an audita querela, by force of his charter, directed to the juſtices of B. R. that they do right to him, by which he had the habeas corpus. And the opinion of all the juſtices was, that the pardon ſhall ſerve the ſheriff; for thoſe words miſpriſion and offence ſhall ſerve him, for it is miſpriſion and it is offence; and though the pardon be before the amercement, yet the pardon is good; for the falſe return was the offence, which was before the pardon, and then when it is pardoned no amercement ought to be aſſeſſed, becauſe it is pardoned; and if the juſtices had had conuſance thereof, they would not have aſſeſſed the amercement; and the party has not furceaſed his time to plead it; for he *had not day to plead it*, nor cauſe till the amercement was aſſeſſed and eſtreated, and proceſs made for it. And this caſe was argued in the Exchequer Chamber by all the juſtices; & per tot. Cur. A pardon granted at the ſuit of the party *ſhall be taken more ſtrong for the king, and more ſtrong againſt the party; but* a *general pardon*, or pardons granted *ex mero motu*, ſhall be taken more ſtrong againſt the king, and moſt for the benefit of the party; for it is intended there that the king is appriſed of the matter; contra where it comes by ſuit of the party, or by ſurmiſe: and it was ſaid, that where the ſheriff returns quarto exactus, and the coroners above certify that the defendant is outlawed, it ſhall be *intended that the certificate of the coroners is true, becauſe they are judges of it*, and the return of the ſheriff is falſe. Quatermain's caſe.

S. P. Br. Parliament, pl. 40. cites S. C.——

8. Where a man pleads pardon *granted by parliament*, he *ought to aver that he is not any of them who are excepted, and that he was not adherent to M. who was excepted.* Br. Charters de Pardon, pl. 46. cites 8 E. 4. 7. by the juſtices.

9. *And*

9. *And ſo of all other exceptions.* Br. Charters de Pardon, pl. 46. cites 8 E. 4. 7.

Jenk. 129. pl. 62. cites S. C ——

S. P. per Cur. Freem. Rep. 84. Paſch. 1673. in caſe of Philips v. Crawly. ——S. P. 2 Hawk. Pl. C. 396. cap. 37. ſ. 60. ——S. P. per Doderidge J. 2 Roll R. 307. Hancock's caſe. —— S. P. For *where pardon*, ſtatute, cuſtom, or the like, as preſcription, &c. *makes exception* or forepriſe, or condition, or a thing which amounts to it, *theſe ſhall be pleaded expreſsly*. Br. Charters de Pardon, pl. 66. cites 4 H. 7. 8. ——S. P. Br. Pleadings, pl 124. cites 8 E. 4. 7. & 4 H. 7. 8.

Where *diſabling exceptions are in the body of an act of general pardon*, there the *party ought to aver that he is not within the exceptions*, but *not* ſo *where* the exceptions are *only in the proviſo* of the act; per Twiſden; which the Court agreed. Keb. 20. Paſch. 13 Car. 2. Whitwick v. Oſbalton. ——S. C. argued 1 Lev. 26. but no reſolution ——Holt Ch. J. agreed, that there were many authorities, that he that pleads an act of pardon ſhould *ſhew* that he was *not within the exception* of the act, and cited 3 Inſt. 234. Yet he could not think it neceſſary to do it, if *the very purview of the act be not qualified and reſtrained*; for if there be firſt general words of pardon, and after comes a proviſo or exception, the natural way is to plead the pardon generally, and then the king's attorney, upon view of the pardon ſo entered upon record in the plea, is to ſhew that the party is within the exception. 12 Mod. 613. Hill. 13 W. 3 in caſe of Ingram v. Foot.

* Serjeant Hawkins ſays, if the body of a ſtatute be general as to all perſons whatſoever, and afterwards ſome are excepted in the proviſoes, perhaps it may be ſufficient to plead ſuch pardon without any averment, that he who pleads it is none of the perſons ſo excepted, it being a general rule, that where a man is within the general words of the body of a record or deed, which is qualified by ſubſequent proviſoes, it is ſufficient for him to bring his caſe within ſuch general words, and that the exceptions in ſuch proviſoes ought to be ſhewn of the other ſide. 2 Hawk. Pl. C. 397. cap. 37. ſ. 60.

* [58]

10. *And* that *if J. S. be excepted*, and *there are three of the name*, and the other pleads the pardon, *he ought to ſhew it.* Br. Charters de Pardon, pl. 46. cites 8 E. 4. 7.

If a perſon who would take advantage of a pardon be

of the ſame name with one of the perſons excepted by name, it is ſaid that it will not be ſufficient for him to aver that he was none of the perſons excepted, without adding that he is a different perſon from ſuch other of the ſame name. But Serjeant Hawkins ſays, how it can be tried, unleſs it appear by ſome addition to the name in the ſtatute, may deſerve to be conſidered. 2 Hawk. Pl. C 397. cap. 37. ſ. 60.

11. *And* where it is *pleaded in pais, where the attorney of the king is not preſent to confeſs the averment*, they ſhall make proclamation; and per Markham, the Court may rejoin for the king. Br. Charters de Pardon, pl. 46. cites 8 E. 4. 7.

12. If a man be *brought into court by capias utlagatum upon appeal*, and he *pleads the pardon of the king againſt the king*, he ſhall have *ſcire facias* againſt the appellant, *without ſhewing matter of diſcharge againſt him.* 21 E. 4. 73. b. Per Huſſey Ch. J. who ſhewed thereof precedents.

Br. Charters de Pardon, pl. 50. cites S. C. but ſeems to be miſprinted. --But *contra*

it is *in debt or treſpaſs, where he is in execution*; for there he ought to *ſhew* acquittance, or other *matter which proves the plaintiff's conſent.* Ibid.

13. If *recognizance of debt paſſes for the king upon iſſue tried*, and after the *king pardons it*, this *ſhall not be pleaded between verdict and judgment, but after judgment.* Br. Charters de Pardon, pl. 75. cites 11 H. 7. 10.

S. P. per all the juſtices in Cam. Scacc. Br. Jours, pl. 94. cites S. C. and 35 H. 6. 1. accordingly.

14. If *quod ei deforceat* be brought, and a wrongful entry is found, *and a general pardon* in parliament *pardons all offences, if the tenant*, when judgment is given againſt him, *does not ſuggeſt* to the court, *that* neither *he nor his offence are excepted*, if *judgment* be entered *quod capiatur, it is not error;* for there are many exceptions

S. P. Lane, 71. Bently v. Leigh. — Vaughan aſked Ellis whether, ſuppoſing

in a pardon; and in a civil matter the *Court is not bound* ex officio *to regard it, but they may if they will;* and therefore if judgment be given ſed non in miſericordia quia pardonatur, it is good; for the judges may, if they will, take conuſance of a pardon, though it be not pleaded. Jenk. 258. pl. 54.

there was a general pardon, and the party did not plead, nor the judges did

not take notice thereof, whether the party might have *remedy by writ of error?* And Ellis ſaid No; becauſe they would *alledge nothing for error but what did appear in the record*; to which Vaughan aſſented. Freem. Rep. 84. Paſch. 1673. in caſe of Phillips v. Crowly.

Serjeant Hawkins ſays, it ſeems agreed, that if any perſons are excepted out of a general pardon, the Court is not bound, and ſome have held that it has no power in diſcretion to give any perſon the benefit of it, unleſs it be pleaded. 2 Hawk. Pl. C. 396. cap. 37. ſ. 60.——But when a *pardon* is general, *without exception of* any *perſon or cauſe*, in ſuch caſe the judges ſhall take notice of it; per Doderidge. 2 Roll. R. 307. Hancock's caſe.——The party *need not to aver that his offence is not excepted* in a general pardon, becauſe the juſtices have notice ſufficient of offences excepted by the words of the pardon, but not of perſons; but this reſts upon the averment; by the opinion of both the chief juſtices, to which the Lord Keeper agreed. Mo. 619. Mich. 42 & 43 Eliz. in caſe of Blake v. Allen.——Where a *general act* of parliament *excepts certain* kinds of *crimes*, there is no need to aver that the crime whereof the perſon is indicted, is not one of ſuch excepted crimes; but the *Court ought judicially to take notice whether it be excepted or not.* 2 Hawk. Pl. C 397. cap. 37. ſ. 62.——*Alſo* where ſuch a *ſtatute excepts only one particular perſon*, it has been ſaid that there is no need of an averment, that a perſon indicted is not ſuch perſon; but that the Court is to take notice whether he be or not. 2 Hawk. Pl. C. 397. cap. 37. ſ. 63.

15. In *debt* the *defendant pleaded outlawry in* the *plaintiff* at the ſuit of one H. in C. B. The *plaintiff pleaded* the *pardon of* 31 *Eliz.* [59] *and* alſo *that he brought ſcire facias, and H. was returned dead*, by which he was adjudged to go fine die; upon which plea the defendant demurred in law, becauſe it was not averred that he is not any of the perſons excepted out of the pardon, as 7 E. 4. 7. 4 H. 7. 8. Com. 103. But it ſeemed to the Court, that the pardon is allowed enough to make any man anſwer to the action of the plaintiff, but not againſt the queen; for ſhe is not bound by the allowance. Mo. 303. Hill. 34 Eliz. Aſhley v. Harriſon.

16. A. was *outlawed* after judgment before the general pardon, and died after the pardon. His *executors* make ſatisfaction, and *without any proceſs plead* the pardon. Adjudged, that as in this caſe no ſcire facias, nor capias utlagatum, nor other proceſs lies againſt the *executors*, they may *(after ſatisfaction made) come in gratis without proceſs* for the neceſſity of the caſe, and plead the general pardon, with an *averment that they are not any of the perſons excepted.* Adjudged per Cur. 6 Rep. 79. Trin. 5 Jac. Sir Edward Phitton's caſe.

17. A. was indicted of ſtealing ſome plate from King James, whereas it was in truth queen Anne's, and ſtolen from her, for which he was pardoned; and being again indicted, there was a general *pardon, excepting goods purloined from the king;* the Court doubting whether A. was within the exception of this pardon, adviſed him to plead. Cro. C. 449. Hill. 11 Car. B. R. Bell's caſe.

18. In *caſe for words*, the defendant juſtifies that the plaintiff had *ſerved* as a ſoldier *againſt the king;* plaintiff demurs, by reaſon of the general pardon. But it was adjudged for the defendant; for that the plaintiff ought to have *ſhewn that he was not one of the perſons therein excepted.* Raym. 23. Mich. 13 Car. 2. B. R. Harris's caſe.

19. In

19. In a *ſcire facias* brought upon an inquiſition *againſt A. who owed* 30*l. to J. S.* who had been *attainted for murder*, and executed, *A. pleads* that ſhe was *not indebted modo & forma.* Hale Ch. B. held, that upon this iſſue the act of general pardon *could not be given in evidence*, but ought to have been *pleaded*; this not being a general iſſue within the intent of the act, it would have been a good bar. Hard. 421. Trin. 17 Car. 2. The King v. Barnard.

20. The *earl of S.* was by the convention, which was afterwards turned into a parliament, anno 1 W. & M. *impeached* by the Commons *for high treaſon*, for being reconciled to the church of Rome contrary to the ſtatute; *and* thereupon he was *committed to the Tower* by the Houſe of Peers, and there continued till the parliament was diſſolved, and a new one called, and now (after a long ſeſſions) adjourned for two months. *And now* the earl *was brought* to the bar *by a habeas corpus, and* his counſel *moved that he* might *be diſcharged upon the* new *act of oblivion*, which paſſed in the laſt ſeſſions of parliament, *wherein neither his crime nor* his *perſon were excepted*, but clearly within the act of pardon. But per Cur. *notice cannot be taken of this act, unleſs* it be *pleaded with the averments*; becauſe there are ſeveral exceptions in it, both as to crimes and perſons, therefore it is neceſſary that the party, who would have the benefit thereof, ſhould aver himſelf by plea capable of ſuch benefit, and not excepted therein, as it is ruled in Plowden, and other books; *and here the lord* at the bar *cannot plead* this pardon, *becauſe there is nothing before the* * *Court upon which to ground ſuch plea.* Carth. 131, 132. Paſch. 2 W. & M. B. R. The Earl of Saliſbury's caſe.

* The reporter adds a *quære*, whether he might not plead it *in diſcharge of the matter returned by the habeas corpus*, and enter it as the ſame. Roll. Ibid. in Marg.

21. 12 *W.* 3. 2. *No pardon ſhall be pleadable to any impeachment by the Commons in parliament.*

22. It ſeems plain, that *pardons of* manſlaughter, or any *other felony except murder or rape, remain as* they were *at common law*; from whence it follows, that the *pardon of* the *felonious killing* of J. S. *may be well pleaded to an indictment of manſlaughter* for killing him. 2 Hawk. Pl. C. 386. cap. 37. ſ. 18.

23. He who pleads a *particular pardon*, ought to *produce it ſub pede ſigilli*, though it be a plea in bar; becauſe it is preſumed to be in his cuſtody, and the property of it belongs to him; *yet* if a man pleads ſuch pardon, without producing it, *the Court may* in diſcretion *indulge him a farther day* to put in a better plea; and that at ſuch day he may perfect his plea by producing the charter. 2 Hawk. Pl. C. 397. cap. 37. ſ. 65. [60]

(X. a) Charter of the King. *Non Obſtante* [*The Original* thereof.]

[1.] IN time of *H.* 3. *about the year* 1252. *the clauſe of non obſtante was uſed firſt* in England by the king in his grants and other writings. Matthew Paris calls it an *odious and deteſtable* clauſe. And Roger de Thurſby, then juſticiary, fetching a deep ſigh at the ſight thereof in

It was ſaid that non obſtante was invented and *firſt uſed in*

in the king's grant, cried out of both the time and it, ſaying, it was a *ſtream derived from the ſulphureous fountain of the clergy.* Speed. 530.]

the court of Rome, for which Marſil. Pat. pronounced a

væ againſt the ſaid court, for introducing this clauſe of non obſtante, which has been an ill precedent, and miſchievous to all commonwealths of Chriſtendom; for the temporal princes perceiving that the pope diſpenſed with his canons, have uſed their prerogative to diſpenſe with their penal laws and ſtatutes, where before they had cauſed their laws to be religiouſly obſerved, as the laws of the Medes and Perſians, which could not be diſpenſed with. And therefore a canoniſt ſaid, diſpenſatio *eſt vulnus quod vulnerat jus commune.* And another ſaid, that all abuſes ſhould be reformed ſi duo tantum verba, (viz. non obſtante) non impedirent. And Mat. Paris, in anno Dom. 1246. having recited certain decrees made in the council at Lions, which were beneficial for the church of England, ſed omnia hæc & alia, ſaid he, per hoc repagulum (non obſtante) infirmantur. Dav. Rep. 69. b. Paſch. 9 Jac. in C. B. in Ireland, in the caſe of commenda.

The laws concerning non obſtantes are none of the ancient laws of this land, but brought in by the pope. The book of 2 H. 7. fo. 6. b. & 7. firſt gave riſe to this exorbitant power; yet it is not the opinion of all, or indeed of any of the judges, as it is affirmed to be. Arg. 2 Mod. 261. Trin. 29 Car. 2. in the Exchequer, in the caſe of Arris v. Stukely.

(Y. a) Non Obſtante. *Licences* upon Penal Statutes.

[1. WHEN an act of parliament *generally prohibits a thing upon a penalty which is popular, or only given to the king*, becauſe it may be *inconvenient to* divers *particular perſons*, in reſpect of perſon, place, and time, &c. the law has given power to the king to diſpenſe with *particular perſons*. Co. 11. MONOPOLIES, 88.]

[2. *But* when the parliament has made an act to reſtrain **pro bono publico* the importation of ſeveral foreign manufactures, to the intent that the ſubjects of the king may apply themſelves to the making of the ſaid manufactures, there the king cannot for a private gain grant the ſole importation of them to one or divers (without any limitation) non obſtante the act. Co. 11. MONOPOLIES, 88.]

* S. P. Per the Ch. J. 8 Mod. 18. Mich. 7 Geo. in Sir Hans Sloane's caſe.—To ſay that the king cannot diſpenſe with a law that is made pro bono publico, is to ſay that he can diſpenſe with no law at all, for all laws are ſuppoſed to be pro bono publico, when they are firſt made; per Herbert Ch. J. Freem. Rep. 493. Paſch. 1682. in Sir Edward Hale's caſe.

[3. *As* the king cannot licenſe a man *to import foreign cards*, notwithſtanding the act of 3 *E.* 4. for the reaſon aforeſaid. Co. 11. MONOPOLIES, 88.]

†[61]

[4. Where a ſtatute *concerns the benefit of the king only*, he may diſpenſe with it by a non obſtante. H. 7 Ja. B. per Coke.]

[†5. *But* where a ſtatute concerns *the benefit of the ſubject*, there the king cannot diſpenſe with it by a non obſtante. H. 7 Ja. B. HICMAN's caſe. Per Curiam.]

†There is not any difference when the law diſpenſed with is *pro bono publico*, for *every law is ſuppoſed to be ſo*; but the true difference is, when the law gives any particular perſon an intereſt, and when it concerns no one perſon more than another; for there, in the firſt caſe, the king cannot diſpenſe, but in the laſt he may, becauſe he alone is injured; for though ſuch a law be pro bono ſubditorum, yet it is not ſingulorum, but populi complicati; and no one can have an action, for as well every one may have an action. Per Vaughan Ch. J. Freem. Rep. 138. Hill. 1673. Thomas v. Sorrell.

The king cannot diſpenſe with any thing that is forbid by the ſtatute de piſtoribus, nor with the ſtatute againſt mixing of wine, for there is a particular wrong to the buyer. Ibid. 139.

In caſe of a common informer, after action commenced, the king cannot diſpenſe, becauſe the beginning of the action doth attach an intereſt in the party, though the king might pardon it before action brought. Ibid.

In ſome caſes the king cannot diſpenſe where no particular intereſt or action was given, as in caſe of ſimony,

ſimony, or buying of offices, &c. but that is becauſe the perſons there are under an abſolute diſability, as if they were dead; per Vaughan Ch. J. Ibid. 139.

It was reſolved that the king could not diſpenſe with the diſability upon the ſtatute of 31 Eliz. 6. of *ſimony*, by a non obſtante; for *when an act of parliament* is made, that *diſableth* any perſon, or maketh any thing void or tortious *for the good of the church or commonwealth*, in this law all the king's ſubjects have an intereſt; and therefore the king cannot diſpenſe therewith, any more than with the common law. 3 Inſt. 154. cites Mich. 13 Jac. ——But where a *ſtatute prohibits* any thing *upon a penalty*, and gives the penalty *to the king*, or to the king and the informer, there the king may diſpenſe with the penalty; and this diverſity is warranted by our books. 3 Inſt. 154.

[6. *As* where the ſtatute of 15 *R.* 2. *cap. provides in the negative, that the admiral ſhall not hold pleas of any thing but* of thoſe which were *done ſuper altum mare*, the king cannot by his charter diſpenſe * with it by a non obſtante, and give power to the admiral to hold plea a primis pontibus uſque ad mare, becauſe this ſtatute was made for the benefit of the ſubject. * H. 7 Ja. B. HICMAN's caſe. Per Curiam.] * Fol. 180. bis.

[7. *It was ordained by the ſtatute ſtaple of* 27 *E.* 3. *that merchants aliens might bring over the ſea merchandizes of the ſtaple, but not merchants denizens;* and after, by the aſſent of the king and his council, for certain reaſons, paſſage was granted of the ſaid merchandizes of denizens; and thereupon proclamation made and ſent to the cuſtomers, to ſuffer them to paſs till a certain time, paying the cuſtoms as aliens. *And becauſe that the ſaid merchants denizens doubteth them to be impeached in time to come for their merchandize which they have ſo paſſed, by virtue of ſuch grant and proclamation, foraſmuch as they were made out of the parliament, the king willing to provide for their ſurety in this behalf, hath ratified and confirmed in this parliament the ſame, &c.* 34 *E.* 3. *cap.* 21.] Expired.

[8. Rot. Parl. 1 H. 5. N. 15. The Commons pray, that the ſtatutes for *voidance of aliens out of the realm* be held and executed; to which the king agrees, ſaving his prerogative, that he may diſpenſe with ſuch as he pleaſe; and thereupon the Commons anſwered, that their intention was no other, nor ever ſhall be, by the aid of God.] Prynne's Cott. Rec. Abr. 535. No 15.

[9. Rot. Parl. 1 H. 5. N. 22. The *ſtatutes of proviſors confirmed, and that the king ſhall not give any protection or grant againſt the execution of them, ſaving the king's prerogative;* to which the king agreed.] Prynne's Cott. Rec. Abr. 536. No 22.

10. Where a ſtatute is, *that none ſhall ſhip wool, unleſs to Calais*, the king may diſpenſe with it by *licence*, and this *before ſeiſure, and action taken by the party*, &c. and this with clauſe of non obſtante. Br. Prerogative, pl. 122. cites 2 R. 3. 11. D. 54. Marg. pl. 17. The king by his prerogative may licenſe any to *trade with commodities unlawful*, as well as lawful; and cites Rot. Parl. 29 H. 6. No 15. Et clauſ. ann. 19 H. 3. and that R. 2. in the 20th year, gave leave to the merchants of Newcaſtle to carry wools and fells to any other port beſides Calais, which was renewed to them anno 5, 21, and 30 H. 6. he granted to Benedict BANONI, merchant of Flanders, non obſtante any ſtatute in reſtraint 60 ſacks of wool; ſo H. 4. diſpoſed of great quantities of *tin*, and H. 7. raiſed great ſums of money in granting leave to merchants to trade inward and outward commodities, as to Alonzo de Bruges great proportion of *woad* anno ſexto, and a multitude of other kind of grain and other prohibited things, as † in annis 20, 21, 22. prout patet ex compoſitione in [inter] H. 7. and Dudley. ——Ibid. cites Hill. 3 Jac. B. R. Rot 128. information againſt HAWES, upon the ſtatute 5 Eliz. for ſhipping and tranſporting of ſheep-ſkins, and he pleaded the grant of Qu. Eliz. anno 37. to one Gilbert Lee, to tranſport the number of 200,000 a year for 10 years to come, &c.

† [62]

S. C. cited by Williams J. 3 Bulſt. 5.

11. The king lincenſed one *to tranſport bell-metal, non obſtante any ſtatute made, or to be made;* afterwards an act was made, prohibiting the exportation of bell-metal, upon a penalty. It ſeemed to Baldwin and Shelly, that by this act, to which every man is party, the licence was revoked, and that the king cannot diſpenſe with a new law to be made, before it is made, as he may in things to come, in which he hath an inheritance; as he may grant to one to be diſcharged of taxes, and ſubſidies to be granted, and it is good. Quære. Dy. 52. pl. 1, 2. Hill. 33 H. 8.

12. The act 4 *H.* 7. *cap.* 9. *prohibits the importation of Gaſcoigne wine, but only in Engliſh ſhips*, and the maſter and mariners being Engliſh, under pain of forfeiture, &c. afterwards the king by letters patents *licenſed one to import* 600 *tun* of that wine *in any ſhip, non obſtante the ſtatute, without ſaying any thing of the mariners*, &c. And by the ſtatute of 32 H. 8. cap. 14. it is enacted that the ſaid ſtatute ſhall ſtand in full force, ſo that from henceforth no perſon ſhall attempt to do any thing contrary thereto, upon the pain limited in the ſaid ſtatute. And upon information brought in the Exchequer againſt the aſſignee of the patentee, for importing contrary to the 4 H. 7. 9. he pleaded the king's grant, without a profert hic in curia of the letters patents. And the better opinion was, that for that reaſon the plea was ill; but as to the matter in law, whether the grant was good or not, they ſeemed not ſo; quære. And by the report of Baron Forteſcue, the judgment was given for the king the ſame term, for the inſufficiency of the plea, but not for the matter in law. Ideo inde quære. D. 54. pl. 17. Mich. 34 H. 8. Richard's caſe.

13. *No act can bind the king* from any prerogative which is ſole and inſeparable to his perſon, *but that he may diſpenſe with it* by a non obſtante; and this royal power cannot be reſtrained by any act of parliament, neither in theſi nor in hypotheſi, but that the king by his royal prerogative may diſpenſe with it. 12 Rep. 14. b. Hill. 24 Eliz. Anon.

14. Where a *ſtatute expires, and is revived*, it ſeems as if non obſtante to the expired ſtatute will not reach the new revived one. See D. 202. b. 70. Marg.

S. C. cited 3 Bulſt. 91. Mich. 13 Jac. in caſe of the king v. Zaker & al.—S. C. cited Cro. J. 386. Mich. 13 Jac. B. R. in caſe of the King v. the Biſhop of Wincheſter & al. ——— S. C. cited Hob. 75. in caſe of the KING v. THE BISHOP OF NORWICH; for the perſon being diſabled by ſtatute, could not be enabled by the king. ——— Serjeant Hawkins ſays, that a perſon diſabled by the aboveſaid ſtatute cannot be reſtored to his ability at any time during his life, by any grant or diſpenſation whatſoever. 2 Hawk. Pl. C. 169. cap. 67. ſ. 5.

15. It was reſolved by the Lord Ch. J. and Lord Chancellor Egerton, upon mature deliberation, and hearing counſel, that the king could not diſpenſe with the *diſability upon* the ſtatute 5 *E.* 6. cap. 16. of *buying offices*. 3 Inſt. 154. cites 12 Jac. Sir Arthur Ingram's caſe, alias Sir Robert Vernon's caſe.

16. J. H. and N. H. his ſon, having a *joint-patent of clerks of the court of wards*, with an expreſs proviſion, *that if one of* them *ſhould die, the other ſhould enjoy the whole non obſtante the ſtatute.* J. H. being dead, Sir S. L. moved the king that he might be joined by patent to N. H. the ſurvivor, upon opinion that by words of the ſtatute

ſtatute 32 H 8. (viz. that there ſhould be two clerks to be named by his highneſs to be clerks of the ſaid court). This was referred by his majeſty to Viſcount Wallingford, Lord Hobart, and Sir James Lea attorney of the court; and they certified the king (having heard counſel, and ſeen the former grants ever ſince the erection of the ſaid court) that the king was not bound to the number, but * might with a non obſtante diſpenſe with it; but the auditor's place being *judicial*, and appointed to be in two, cannot be in leſs, becauſe the ſubject has an intereſt in the judicature, which cannot be committed either to more or leſs than the law of their creation has eſtabliſhed. Hob. 214. Hare v. Leiſure.

[63]

* Becauſe this *office* is *miniſterial*. Jenk. 292. pl. 34. S. C.

17. The ſtatute 3 *Jac.* 1. *cap.* 4. *which gives forfeitures for recuſancy ſays, ſ.* 11. *that the king may refuſe the penalty of* 20*l. a month, and take two-third parts of his lands and leaſes which ſhall be or come to ſuch offenders, till he or they ſhall conform, in lieu of the* 20*l. monthly; and ſ.* 12. *is, that the* king ſhall not leaſe *the ſaid two parts* to the recuſant, or to any other for a recuſant's uſe.——The Lord Brudnel was a recuſant convict. The earl of W. took a leaſe of the king of two parts of his eſtate, in truſt for the recuſant, and with a non obſtante of the act above-mentioned; but becauſe *the truſt did not appear by any matter of record*, the Court would not take notice of it by any matter dehors; but their opinion was, that the king in this caſe *could not diſpenſe, becauſe* he was *diſabled by the act* to grant, &c. Hard. 110. Paſch. 1658. in the Exchequer. The Attorney General v. Earl of Weſtmoreland.

18. In debt upon the ſtatute 12 *Car.* 2. *cap.* 25. which *enacts, that no perſon ſell wine by retail, unleſs enabled according to this ſtatute, under the penalty of* 5*l. for every ſeveral offence.* Upon † nil debet pleaded, the jury find the *ſtatute* 7 *E.* 6. *cap.* 5. *that none ſell wines without licence, according to the ſaid act.* Then they find *the patent of* 9 *Jac. incorporating the vintners of London, and that ſuch as ſhould be free of their company might ſell wine by retail, or in groſs, within three miles of London, &c. in their houſes or elſewhere, non obſtante the ſaid ſtatute* 7 *E.* 6. *or any other ſtatute made or to be made.* They likewiſe find the ſtatute of 12 Car. 2. 25. and a *proviſo therein not to prejudice the vintners' company, but that they may uſe and enjoy ſuch liberties as they have heretofore lawfully uſed.* It was argued, that the patent was void in its creation. 1ſt, In reſpect of the perſons to whom it was made, ſc. a ‡ corporation, which never was ſubject to an uſe, and therefore not capable of ſuch a truſt as to make whom they pleaſe free of their company, or exempt them from the law, and in effect to delegate to them a power to exempt whom they pleaſe from the law, and thereby delegate an *exemption to every one who ſhould be free of their company.* 2dly, Becauſe it was *for ever*, and ſo not good in point of time. 3dly, That it was void, in reſpect of the places *extending to great part of the realm*, whereas *diſpenſatio eſt provida relaxatio juris pro neceſſitate penſata.* Thurland, Windham, Ellis, and Turner Ch. Baron held, that the patent was never good; and grounded themſelves much upon

See S. C. argued by the judges. Freem. Rep. 85. pl. 105. and Ibid. 115. pl. 137. Ibid. 128. pl. 150. ſays, that Turner held that the patent was good in its creation. And Ibid. 137. pl. 159. argued by the two Chief Juſtices. —— S. C. argued by Vaughan Ch. J. Vaugh. 330 to 359. wherein matters which may or may not be diſpenſed

withal by the king's prerogative are very minutely treated of. upon the reaſons before alleged: but the 8 others held it good in its creation. Lev. 217. Trin. 19 Car. 2. Thomas v. Sorrel.

——Hardr. 433 to 451. ſeems to be S. C. by name of Thomas v. Waters.——S. P. Ibid. 464. Thomas v. Boys.——† Turner Ch. B. took exception to this plea; for the defendant *ought to have pleaded the ſpecial matter*; becauſe when an information or action is brought upon any ſtatute, if the defendant be diſcharged by any proviſo therein, he may give it in evidence; but if it be any foreign matter, even though it be a licence purſuant to a proviſo of that ſtatute, he muſt plead it. And Hale ſaid, that a licence purſuant to a proviſo, is all one as a proviſo, and ſo might be given in evidence. Freem. Rep. 129. Mich. 1673 THOMAS v. TALMARSH, but ſeems to be S. C. And ſays that this exception was not taken notice of by counſel or judges till Turner argued, and who was the 8th judge that argued.

‡ Many precedents of licences to corporations, non obſtante ſtatutes, are mentioned, Vaugh. 252 to 254.

19. *But* it was agreed, that *this non obſtante* in the patent of king James *could not diſpenſe with the ſtatute of Car.* 2. *made after*, notwithſtanding the words *(or any other ſtatute made or to be made)*. Ibid. 218.

20. *And* it was agreed by all (except Thurland) that the *proviſo in the ſtatute of* 12 *Car.* 2. *exempts the vintners* of London out of
[64] this ſtatute, becauſe it was a privilege lawfully uſed by them before the ſtatute; and thereupon the record was remitted out of the Exchequer into B. R. and there, upon motion of Levins, judgment was entered accordingly. Ibid. 221.

21. 1 *W. & M. ſtat.* 2. *cap.* 2. *ſ.* 1. enacts that *no diſpenſation by non obſtante of any ſtatute ſhall be allowed, except a diſpenſation be allowed in ſuch ſtatute, and except in ſuch caſes as ſhall be ſpecially provided for during this ſeſſion of parliament.*

22. The ſtatute of 5 *Eliz. enables mariners to take apprentices, and enacts, that ſuch apprentices ſhall be bound by their covenants, as apprentices in London are by their cuſtom there, the indentures being inrolled in the next vil corporate.* It was reſolved, that the king cannot alter the place of the inrolment, but they ſhall be inrolled according to the ſtatute, otherwiſe the covenants ſhall be at common law, and the apprentices not bound by them. 3 Lev. 389. Paſch. 6 W. & M. C. B. Poulſon v. .....

(Y. a. 2) Non Obſtante. *Good.* In what Caſes the King may diſpenſe.

Br. Prerogative, pl. 37. cites S. C.—— S. P. Though there are ſtatutes which ordain that ſuch patents ſhall be void, yet with a clauſe of

1. THE king *granted the ſhrievalty* of the county of N. *to the earl of N. for term of life, with all profits* thereunto appertaining, *rendering* 100*l. per annum*, abſque aliquo [alio] reddendo: and it was agreed, that it may be granted for term of life, or in fee; and there was a clauſe of *non obſtante to diſpenſe with the ſtatutes of* 28 *E.* 3. *cap.* 7. *and* 43 *E.* 3. *cap.* 9. which will, that none ſhall be ſheriff above a year. Br. Patents, pl. 109. cites 2 H. 7. 6.

2. And per Ratcliff, the king by his prerogative may by the clauſe of non obſtante *diſpenſe* with *the certainty and value of the land* granted by patent, and of *the ſhipping of wool*, or *of charters of murder* being

being void for not finding ſureties. Br. Patents, pl. 109. cites 2 H. 7. 6.

non obſtante they are good,

and to be allowed. And though the *ſtatutes ſay, that ſuch patents ſhall be void, although they have a clauſe of non obſtante*, yet a patent of ſuch things, with words of non obſtante any clauſe derogating from the non obſtante, will make the patent good: the reaſon of the law is, that the king by his royalty is truſted with the government, pardons, and public buſineſs; particular caſes may happen which deſerve remiſſion, upon conſideration of circumſtances. By all the judges in the Exchequer Chamber. Jenk. 173. pl. 43. cites S. C.

Serjeant Hawkins ſays, where a ſtatute is expreſs, that the king's charter againſt the purport of it, whether with or without a clauſe of non obſtante, ſhall be void, it is ſaid by Sir Edward Coke, that no clauſe of non obſtante can diſpenſe with it, unleſs to tend to reſtrain ſome prerogative, ſolely and inſeparably incident to the perſon of the king, as the right of pardoning, or of commanding the ſervice of the ſubject for the public weal, which being, as he ſeems to argue, founded on the law of nature, are ſo far inſeparable from the king, that by a clauſe of non obſtante he may diſpenſe with any ſtatute whatſoever, which tends to deprive him of them. And on this ground the reſolution of the judges in the Year-book of H. 7. is ſaid to be maintainable, whereby it was adjudged without any difficulty, that where the ſtatute of 23 H. 6. cap. 8. expreſsly enacts, that patents to ſheriffs to continue longer than a year, ſhall be void, and the party diſabled to bear the office of ſheriff, notwithſtanding any clauſe of non obſtante, yet the king by the clauſe of non obſtante, might make a good patent of ſuch office for life, which is in effect to ſay, that let there be never ſo good reaſons for the making a new law for the reſtraint of the prerogative in any particular relating to the ſervice of the ſubject, yet it is not in the power of the legiſlature to make ſuch a law; and yet no one will deny, that wherever the law of nature leaves a matter indifferent, there the law of man ought to prevail: neither is there any pretence to ſay, that the king has a right by the law of nature to appoint ſheriffs, ſince it is plain that before the ſtatute of 9 E. 2. the freeholders choſe them, unleſs they had a fee in their office. And what reaſon can there be, that the ſtatute-law, which gives the crown the power of making ſheriffs, may not alſo qualify that power, as ſhall be thought convenient? But it is obſervable, that the reſolution abovementioned does not go upon any particular reaſon, which may diſtinguiſh the caſe of a ſheriff from any other caſe, but only on the king's power by non obſtante to diſpenſe with the ſtatutes concerning the tranſporting wool, the pardoning of murder, and the expreſſing the quantities of the land granted by the king's patents, and ſuch like, which becauſe they may be diſpenſed with by clauſes of non obſtante, it is taken for granted, that the ſtatute of 23 H. 6. might as well be diſpenſed with by them, as if it were a plain conſequence, that becauſe ſtatutes which ſay nothing concerning the clauſe of non obſtante may be diſpenſed with by it, therefore a ſtatute which * expreſsly provides againſt it, may alſo as well be diſpenſed with by it. 2 Hawk. Pl. C. 390, 391. cap. 37. ſ. 29.

* [65]

3. The king cannot diſpenſe with any *to do a nuſance in the high-way*; and if he does, ſuch diſpenſation is void. Dav. Rep. 75. a. Paſch. 9 Jac. C. B. in the caſe of Commenda, cites 11 H. 7. 12.

4. Though the king may diſpenſe with a *ſtatute*, which *prohibits an indifferent thing to be done*, yet he *cannot change the common law* by his patent. Dav. Rep. 75. b. cites 37 H. 8. Br. Patents, 100. 6 H. 7. 4.

Where a ſtatute is made only in eaſe of the king, and not to abridge his prerogative, it was adjudged that the king may diſpenſe with it. 2 Mod 263. Trin. 29 Car. 2. in the Exchequer, Arris v. Stukely. —— But the king cannot diſpenſe with the *common law* with a non obſtante. Dav. Rep. 75. b. Paſch. 9 Jac. C. B. in the caſe of Commenda; cites 4 Coke, 35. Bozom's caſe.

5. The *office of the alnager* was by ſeveral ſtatutes prohibited to be *granted without a bill ſealed by the Lord Treaſurer*, and ſent by him to the court of Chancery, as had been accuſtomed, or otherwiſe it ſhould be void. Queen Mary granted the ſaid office de gratia ſpeciali, certa ſcientia, & mero motu, to one Ward for 21 years, without any ſuch warrant. Adjudged by all the juſtices de Banco, that the grant was void, though a clauſe of non obſtante to any ſtatute is contained therein; and that by reaſon of its not being ſhewn to the Court that ſuch clauſe was in the grant. Dyer, 303. pl. 48. Mich. 13 & 14 Eliz. Ward's caſe.

S. C. cited Hob. 146. Mich. 10 Jac. Per Hobart Ch. J. in caſe of Colt and Glover v. the Biſhop of Coventry and Litchfield.

6. When

S. C. Godb. 35. Mich. 27 Eliz. B. R. by name of Futter and Borome's caſe.

6. When the words of a *grant* are *not ſufficient ex vi termini to paſs the thing granted*, but the grant is utterly void, there any non obſtante cannot make the grant good; *but* in caſe of *grant of land* which is *in leaſe* for life, or for years, there, by the grant of the land, *the words are* ex vi termini *ſufficient to make the reverſion paſs*; but the law requires that the king be not deceived in the thing granted, and therefore this is ſupplied by a non obſtante. 4 Rep. 35. b. 36. a. Mich. 26 & 27 Eliz. B. R. in Bozoun's caſe.

S. C. cited by Hobart Ch. J. Hob. 229. in caſe of Needler v. the Biſhop of Winton. —S. C. Godb. 35. Mich. 27 Eliz. by name of Futter and Borome's caſe.

7. When the king *by the common law cannot* in any manner *make a grant*, there a non obſtante of the common law will not, againſt the reaſon of the common law, make the grant good. But when he may lawfully by the common law make the grant, but the common law requires, that he be ſo inſtructed that he be not *deceived*, there a non obſtante ſupplying it ſtands with the reaſon of the common law, and ſhall make the grant good. Reſolved 4 Rep. 35. b. Mich. 26 & 27 Eliz. B. R. Bozoun's caſe.

S. C. Godb. 35. Mich. 27 Eliz. B. R. by name of Futter and Borome's caſe.

8. If the *king grants a protection in quare impedit, or aſſiſe*, with non obſtante of any law to the contrary, this grant is void; for by the common law protection does not lie in any of thoſe caſes for the loſs which may accrue to the plaintiff by ſuch great delay; and therefore the non obſtante cannot avail, when by the common law the king cannot grant it. Reſolved 4 Rep. 35. b. Mich. 26 & 27 Eliz. B. R. in Bozoun's caſe.

S. P. 3 Mod. 37, 38. Mich. 35 Car 2. B. R. THE KING v. CONEY AND O-BRIAN, where ſuch a pardon

9. A. pleaded his pardon for the murder of B. wherein the king pardoned *feloniam & felonicam interfectionem* non obſtante the 13 *Rich.* 2. before which ſtatute murder was pardonable by the name of felony, which was adjudged good; but if it had been without a non obſtante, it would have been void, becauſe by that ſtatute the pardon of murder is prohibited. Mo. 752. pl. 1033. Hill. 1 Jac. Lucas's caſe.

was held good by the whole Court; and Jeffries Ch. J. ſaid, that he had propoſed this caſe to all the judges of England, and they were all of the ſame opinion; and that he remembered DUDLEY'S caſe, where a pardon in general words was allowed.

* Serjeant Hawkins ſays, it ſo fully appears from the expreſs words of 13 R. 2. that the king's *pardon of murder, rape, or treaſon, cannot be good without a clauſe of non obſtante*, that he ſays he does not know that it has ever been diſputed. But it has been often formerly adjudged, that a murder might be well pardoned under the general deſcription of a felonious killing, if the charter had the clauſe of non obſtante of this ſtatute; which conſtruction ſeems in a great meaſure to evacate ſo excellent a law, by barely changing the form of the charter; but it ſeems difficult to give a good reaſon why this ſtatute ſhou'd ſo eaſily be evaded, which was made for the prevention of ſuch great miſchiefs, and no way tend to aboliſh the king's prerogative, but only to put ſuch a reſtraint upon the abuſe of it, that every one muſt own it to be reaſonable. But if ſuch opinions were founded upon the king's power of diſpenſing with ſtatutes, they ſeem to have been of little force ſince the ſtatute of 1 *W. & M. ſeſſ.* 2. *cap.* 2. by which it is declared and enacted, *that from and after that ſeſſion no diſpenſation by non obſtante of, or to any ſtatute, or any part thereof, ſhall be allowed*, &c. 2 Hawk. Pl. C. 386. cap. 37. ſ. 17.

*[66]

Vaughan Ch. J. ſaid, that the diſtinction between *malum prohibi-*

10. The king may diſpenſe with *malum prohibitum* before the offence is committed, and pardon it after it is committed; but he *cannot* diſpenſe *with malum in ſe before it is committed*, but he may pardon it afterwards. By all the judges of England. Jenk. 307. pl. 83.

pl. 83. cites Hill. 2 Jac. 7 Co. 36. b. &c. The caſe of diſpenſations.

tum and *malum in ſe*, was of little uſe, if not rightly underſtood; for every action in itſelf is good, and the evil of it is, that it is prohibited by ſome law; for ſin is the tranſgreſſion of a law. But he ſaid, 1ſt, That what we call *malum in ſe*, is either that which the very term implies to be unlawful, as murder is unlawful killing, adultery is unlawful copulation; and theſe can by no law be made lawful: and much leſs can the king diſpenſe with them; for ſuch laws would certainly be void, becauſe there is a contradiction in the very term; for it is impoſſible that murder, which is the unlawful killing of man, ſhould be lawful, though a law might be made that it ſhould be lawful for ſuch and ſuch cauſes to take away the life of a man, which to do, as the law ſtands now, would be murder. And a law might be made, that ſhe that is the wife of A. ſhould be the wife of B. and then it would be no adultery for B. to lie with her. 2d, Another ſort of *mala in ſe* are ſuch as the law of the land doth admit to be prohibited *jure divino*; for theſe can, by no human law, be diſpenſed withal; for whatſoever may be made lawful by any human law, is not *malum in ſe*. The true difference where the king may diſpenſe, and where he may not, is not when it is *malum in ſe*, and when it is *malum prohibitum*; for there are ſome *mala prohibita* by ſtatute, that the king may diſpenſe with, and others that he cannot. Freem. Rep. 137, 138. Hill. 1673. in C. B. Thomas v. Sorrell.

Neither doth it make any difference, when the *law* diſpenſed with is *capital*, or when it is leſs *penal*; for there are ſome capital laws that he may diſpenſe with, as 3 Inſt. 74. Freem. Rep. 138. Thomas v. Sorrell.

11. A *law which prohibits a tort* and injury *to a third perſon*, cannot be diſpenſed with. Dav. Rep. 77. a. Paſch. 9 Jac. C. B. in Ireland, in the caſe of Commenda.

12. Upon a purview in the ſtatute of Weſtm. 2. cap. 10. there was great queſtion whether the king might diſpenſe with that law and *give a farther day* than is thereby preſcribed; and in the end it was reſolved that he might for the advancement and *furtherance of juſtice*. 2 Inſt. 377.

13. The ſtatutes of 2 *E.* 3. 10 *E.* 3. 14 *E.* 3. 13 *R.* 2. ordain that the king's pardon of *notorious felonies*, *rapes*, *murders*, ſhould not be granted or allowed, although it hath the words of non obſtante any ſtatute; yet patents of pardons of ſuch offences were allowed with a non obſtante any ſtatute, and notwithſtanding any cauſe to defeat the non obſtante. Mr. Jenkins ſays, in his time no ſuch pardon was paſſed and allowed (that he ever heard of) without the *judges certificate, before ſuch pardon was granted*. If any ſuch pardon be pleaded before any *judge*, he ought not to be *tam fracti abjectique animi*, to allow it immediately; if he does ſo, he *is not worthy to be a judge;* he ought to reprieve the priſoner, and ſignify the circumſtance of the offence to his majeſty. And upon this right ſhall be done with regard to the public good. Jenk. 308. pl. 84.

But ſee 1 W. & M. ſeſſ. 2. cap. 2.

14. A non obſtante in the patent helps the *non-recital of leaſes of record*. Jenk. 303. pl. 77. Baron Blague's caſe.

15. The king cannot diſpenſe with the laws of *maintenance*, *forcible entries*, carrying *diſtreſſes out of the hundred*, &c. the reaſon is not becauſe they are *mala in ſe*, but becauſe the party that is grieved hath by the law an action given him; for it is not *malum in ſe* to maintain a lawful ſuit, nor to enter forcibly where a man hath right, &c. Per Vaughan Ch. J. Freem. Rep. 138, 139. Hill. 1673. C. B. Thomas v. Sortell. [67]

16. There are ſome caſes wherein the king cannot diſpenſe. 1ſt, *Mala in ſe*, ſuch things which by the law of God or nature are evil, antecedently to any human law; nay, the king cannot diſpenſe

penſe with a law made for the puniſhment of any ſuch offence, as a rape is felony by the law, the king's diſpenſation will not make it none, and that anſwers the caſes of ſimony. 2dly, Where the *ſubject hath a particular intereſt or damage;* and therefore the king cannot diſpenſe with a nuſance, and the ſtatute of uſury. 3dly, Where there is a *precedant diſability;* and therefore where a man * buys any office within the ſtatute of E. 6. the king's diſpenſation will not avail him, becauſe by the contract, a diſability is created in him. Per Herbert Ch. J. But if he got the diſpenſation before, and contract afterwards, it ſeemed to him that it was good. And he ſaid he knew no caſe that did not come under one of theſe heads, but that the king could diſpenſe with it. Freem. Rep. 493. Paſch. 1682. in Sir Edward Hale's caſe.

* S. P. By Vaughan Ch. J. Freem. Rep. 139. in caſe of Thomas v. Sorrel.

17. H. 8. granted the manor of S. with the appurtenances; and then followed theſe words, viz. *all which are of ſuch a yearly value, as is expreſſed in ſuch a particular*, with a *non obſtante of any miſrecital of the true value, or that they were of greater value.* The value was not truly expreſſed in the particular; but Hale Ch. B. held the grant good; he ſaid, that the reaſon why a miſtake in the conſideration, or in the king's title, or the non-recital of an eſtate or leaſe in being, ſhall vitiate the king's patent is, becauſe by his prerogative he ought to be truly informed of his caſe; but it is otherwiſe in the caſe of a common perſon, whoſe grant is to be taken moſt ſtrongly againſt himſelf, and that here the non obſtante aids thoſe defects; and it is the proper office of a non obſtante to do ſo, as appears in 4 Rep. Bozoun's caſe; and that without doubt, if there had been ſuch a non obſtante in the patent in Arthur Legate's caſe after the clauſe, quæ quidem omnia ſunt concelata, non obſtante that they are not concealed, all would have paſſed which was comprized in the patent; to which all the Court agreed. Hard. 231. Trin. 14 Car. 2. in the Exchequer. The Attorney General v. Hungate.

18. 14 *R.* 2. enacted, that *no cuſtomer or comptroller ſhould have any* office in the cuſtoms for life, *but only during the king's pleaſure.* In 12 Car. 2. the king *granted* the office of comptroller of the cuſtoms in the port of Exeter to R. S. and T. S. durante beneplacito. R. S. died. Two years after the death of R. S. the king granted the office to A. [for life as it ſeems, though it does not appear in the caſe] *with a generul non obſtante of all ſtatutes*, but without any mention of this ſtatute in particular; and it was inſiſted that this ſtatute being made for the public good, the king cannot by any non obſtante diſpenſe with it. But afterwards the Court gave judgment for the plaintiff, and held that the king might diſpenſe with this ſtatute; for the *ſubject had no intereſt, nor was he any ways concerned in the prohibition;* that it was made only for the eaſe of the king, and not to abridge his prerogative; and that the general clauſe of non obſtante aliquo alio ſtatuto was ſufficient. 2 Mod. 260. 263. Trin. 29 Car. 2. in the Exchequer. Arris v. Stukely.

19. *And* by the like reaſon he might diſpenſe with the ſtatute of

4 *H.*

4 *H.* 4. 24. *that a man ſhall hold the office of alnager without a bill from the treaſurer.* Ibid.

20. *And* with the ſtatute of 31 *H.* 6. 5. *that no cuſtomer or comptroller ſhall have any eſtate certain in his office.* Per Cur. for the reaſons above. Ibid. in the caſe of Arris v. Stukely.

21. In many caſes the diſpenſation of the king by a non obſtante is good; as where a ſtatute preſcribes the form of the king's grant, where it doth *not directly* prohibit a thing, but only under pain of a forfeiture; but if it be *direct & pro bono publico*, there a non [68] obſtante is not good; he cannot diſpenſe with the ſtatute of 31 Eliz. againſt ſimony; for the party being diſabled by an act of parliament, cannot be enabled by a non obſtante. He cannot diſpenſe with the ſtatute of leaſes of eccleſiaſtical perſons, nor with the juriſdiction of the admiralty encroaching on the common law; for the *foundation* of a non obſtante *is* in the king's prerogative. and is *current in his grants*; but in thoſe ſtatutes the ſubject has an intereſt. Arg. 2 Mod. 261. Trin. 29 Car. 2. in Exchequer, in caſe of Arris v. Stukely.

(Z. a) Officers of the King. What Things they may do Ex Officio.

[1. NO officer which the king has, nor altogether, may ex officio *diſpoſe of the king's treaſure, though* it be *for the honour or profit of the king himſelf.* Co. 11. Count DEVON, 91. b.] See (F. b.) pl. 1. & 9. and (G. b.) pl. 1.—— Mo. 476.

They cannot *without the king's own warrant.* 11 Rep. 92. Earl of Devonſhire's caſe.

(A. b) *Seals.* The *Antiquity* of the Seals.

[1. MICH. 14 Jac. B. R. upon evidence at the bar in a caſe between Sir CAREW REYNELL AND WHITEMORE, where iſſue was, whether the abbot of Weſtminſter, before the diſſolution, held plea of all actions perſonal under 40s. (which court, after the diſſolution, was granted to the dean and chapter of Weſtminſter) there was ſhewn in evidence an *inſpeximus by R.* 2. *of the patent of king Edward the Confeſſor*, by which he granted to the abbot of Weſtminſter *ſocam & ſakam (hoc eſt, conuſance of pleas)*, and at the ſame time *a patent of king William the Conqueror was ſhewn, ann.* 10. *of his reign, well wrote, and ſealed with a fair ſeal of wax, which had an inſcription*; and upon the one part of the ſeal is the image of a man * having an ear of corn in one hand, and a croſs in the other hand; and upon the other part of the ſeal is the image of a man riding upon a horſe; and by this patent he confirms the privileges, granted by the ſaid patent of Edward de ſoca & ſaka; and thoſe privileges were confirmed by divers popes, as was written upon the back of this patent, ſcilicet, by Innocent the 2d, by Eugenius the 3d, by Adrian, Alexander, and Clement. Nota, * Fol. 181.

Nota, by thoſe patents the antiquity of the law of patents with ſeals, *Mr. Floyer of Devon* has a grant of land by Rivers earl of Devon under his ſeal of wax fair and laced, in time of king Stephen, and a confirmation of it by another of the earls, in time of king John.]

[2. Vide Speed. 415. 418. b. ſays, that William *the Conqueror* uſed to ſeal his charters, which was circumſcribed of one part, that he was *Normannorum Patronus*, and of the other part, that he *fuit Rex Angliæ.*]

[3. William *the Conqueror* granted to the city of London their *ancient liberties*, by a charter ſealed *with green wax.* Speed. 424. b.]

[4. And another charter of his is there cited, *the wax whereof was bitten with his tooth in token of ſooth.*]

[5. *The Saxons* were wont to ſeal with gilded croſſes, and ſuch like marks. Speed. 424.]

[69] [6. *R.* 1. ſealed his charters with a ſeal of arms, and he *was the firſt who ſealed with a ſeal of arms.* Speed. 479.]

[7. R. 1. upon his return from Jeruſalem changed his ſeal; for where before it was 2 *lions rampant combating, now he changed it into three lions paſſant.* Speed. 479.]

[8. There is in the Study of Sir Robert Cotton *a patent* (which he had ſeen) *of king William the Conqueror, under ſuch ſeal as is above ſaid, to be put to the grant to the dean and chapter of Weſtminſter*, which was made *to the abbot of Battel*, and which was the charter of their foundation. And there is another *charter of king William Rufus under his ſeal* to the ſame abbot. Vide Janus Anglor. 67, 68. of the Antiquity of Seals of Wax ex Relatione Seldeni.]

9. On the 11th day of June, 43 E. 3. the king's great ſeal was ſafely laid up, and *another ſeal*, engraven *with the ſtile of France*, was taken and uſed, and ſundry patents, charters and writs therewith ſealed; and the ſame day were all other the king's ſeals in like ſort changed. Prynne's Cott. Rec. Abr. 108.

(B. b) The *Diverſity* of Seals, and what.

[1. THERE is mention made in ancient books and records of writs under the *targe*, and without the targe. 17 E. 3. 59. b. A man had writ of *ſcire facias without the targe.*]

[2. It ſeems that *by writs under the targe is intended writs ſealed with a part of the great ſeal of England, ſcilicet, that part which has the ſculpture of the target*, and is ſo called from the picture of the target, which is made upon the wax of the writ by the ſaid part of the ſeal.]

[3. There is mention made of writs *ſub pede ſigilli*, as of outlawries.]

[4. It ſeems by this *is intended, when the writ has the print of the foot of the great ſeal.*]

[5. There is mention made ſometimes of writs *under the half ſeal*

ſeal, as 8 *El. cap.* 5. where it is *enacted, that all ſentences given in a marine cauſe upon appeal to the queen in Chancery by ſuch commiſſioners or delegates, which ſhall be nominated by the queen and her ſucceſſors, by commiſſion under the half ſeal, as it hath been heretofore uſed in ſuch caſes, ſhall be final, &c.*]

6. There is *a ſeal for the county palatine of Lancaſter, and another for the dutchy*, (i. e.) ſuch lands as lie out of the county palatine, and yet are part of the dutchy; for ſuch there are, and the dukes of Lancaſter held them, but not as counts palatine, for they had not jura regalia over them. It is for this reaſon that the king may make a corporation by the ſeal of the county palatine, within the county palatine, but he cannot grant or make a corporation by the dutchy ſeal within the dutchy lands. 3 Salk. 111. Hill. 2 W. 3. B. R. in caſe of Cotton v. Johnſon.

S. P. 2 Lutw. 1236. Paſch. 9 W. 3. in caſe of Aſtell v. Clerk.

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Fol. 182.

(C. b) King. Grant. Seal. *What* Things *ought to be* granted *under the* * *Great Seal.*

See (P. a. 6) pl. 10. —— (E. b. 2) (S. d. 3).

* The great ſeal *is clavis regni.* 2 Inſt. 557.

[1. *By the common law* no grant of the king is available or pleadable but under the great ſeal of England. Co. 2. *Lane's* caſe, 16. b. per Curiam reſolved.]

2. 28 *E.* 1. *cap.* 6. *Henceforth no writ concerning the common law ſhall be awarded under the petit ſeal.*

At the making this ſtatute the king had three ſeals. 1. Magnum ſigillum, the great ſeal. 2. Parvum ſigillum, the little, or petit ſeal. 3. Signettum, the ſignet. The great ſeal is *in the cuſtody of the lord chancellor*, or lord keeper of the great ſeal; and there is a ſpecial officer in the court of Chancery, called ſigillator, who hath the ſealing of writs, and other things that paſs the great ſeal. Parvum ſigillum, the little or petit ſeal, after this time called the privy ſeal; this ſeal is in the cuſtody of the clerk of the privy ſeal, ſometime called keeper of the privy ſeal, after called lord privy ſeal, of whom Fleta ſays thus: Cuſtodi ſigilli privati aſſociantur clerici honeſti, & circumſpecti domino regi jurati, qui in legibus & conſuetudinibus Anglicanis notitiam habeant pleniorem, quorum officium ſit ſupplicationes & querelas conquerentium audire & examinare & eis ſuper qualitatibus injuriarum oſtenſarum debitum remedium exhibere per brevia regis. By this ancient writer three things are to be obſerved; 1. That the *clerks aſſociates* to the keeper of the privy ſeal are thoſe that we now call the *maſters of requeſts*, magiſtri a libellis ſupplicum, whoſe office is here lively pourtrayed out, viz. quorum officium ſit ſupplicationes & querelas conquerentium audire & examinare. 2. Of what quality ought theſe maſters of the requeſts to be; they muſt have three qualities. 1. They muſt be † honeſti & circumſpecti. 2. Domino regi jurati. 3. Qui in legibus & conſuetudinibus Anglicanis notitiam habeant pleniorem. 3. To what end did they hear and examine the matters contained in theſe petitions? Ut eis (id eſt) conquerentibus ſuper qualitatibus injuriarum oſtenſarum debitum remedium exhibere per breve regis. So as their office was, that being learned in the law, they ſhould direct ſuch as petitioned to the king to take their remedy by the king's writ, that is, by original writ in the Chancery. And hereby it appears, that this act is but an affirmance of the common law, for no writ before this act could have been ſealed by the privy ſeal. 2 Inſt. 554, 555. cap. 6. —— † Fleta 2 lib. cap. 13. ſ. 1.

This act ſays not, that all writs which concern the common law ſhall paſs under the great ſeal, but *no writs ſhall paſs under the privy ſeal which touch the common law*; for it is to be known, that the Court of the King's Bench, and the Common Pleas had, at the making this ſtatute, ſeveral ſeals, whereby they ſealed judicial writs. As the *ſeal* belonging to the court *of King's Bench* is in the cuſtody of the Ch. J. and ſo likewiſe the ſeal belonging to the court of *Common Pleas* is in the cuſtody of the Ch. J. of that court, and the ſeal belonging to the *court of Exchequer* is in the cuſtody of the chancellor of that court. Ad cancellarium Scaccarii pertinet cuſtodia ſigilli regis. ‡ Officium cancellarii eſt ſigillum regis cuſtodire, ſimul cum contrarotulis ſuis pro proficuo regni, and theſe ſeals *are incidents inſeparable to the ſaid courts* for the ſealing of all judicial writs, &c. which, for adminiſtration of juſtice diſtributive to all men, are reſpectively under the ſaid ſeals, *and without which the courts cannot adminiſter juſtice*; and therefore the profits coming of theſe ſeals have been letten and demiſed of ancient and latter times, but the ſeals themſelves were never demiſed, or letten, nor could be, nor any other keeper appointed to be keeper of them, than has been time out of mind. 2 Inſt. 555. cap. 6. ——

‡ Fleta, 2 lib. cap. 29.

So of *warrant of eſſoign de ſervitio regis.* Ibid.

3. Note, per Cur. Arguendo in writ of eſcheat, that *protection* upon privy ſeal is not good; for it ought to be under the great ſeal. Br. Protection, pl. 13. cites 35 H. 6. 2.

4. 4 *H.* 7. *cap.* 14. *All grants and writings of lands, and other things pertaining to the earldom of March, ſhall be under the great ſeal, and not under the ſpecial ſeal.*

Ibid. Marg. ſays, it appears ſufficiently, that a grant under the great ſeal is good; for in the act is a proviſo, that tenure in capite ſhall be reſerved in all grants of any ‡ inheritance made by the great ſeal, and cites Pulton's Statutes, 618. b.— ‡ [of any ſuch lands] Raſt. Stat. 738. paragraph 2.

5. The ſtatute of 27 *H.* 8. of eſtabliſhment of the court of *augmentations* enacted, that all *patents* to be made *for life or years, of any office concerning the lands of the court, ſhall be ſealed with the great ſeal of that court, &c.* The honour of Petworth in Suſſex was by act of parliament within the ſurvey of that court. The king granted the office of ſteward, and divers other offices of the ſaid honour, to the earl of Southampton for life by bill aſſigned, which paſſed under the *great ſeal in Chancery.* And whether this grant under that ſeal was good or not was much doubted, by reaſon of the above clauſe. Divers ſerjeants thought it the ſureſt way to have it under the ſeal of augmentation, becauſe of the word (ſhall) which is a word obligatory, and, as it were, compulſory; but ſome thought the grant under the ſeal of the * Chancery good in law; for Bromley ſaid, that if it be enacted by parliament, that the youngeſt ſon ſhall have appeal of the death of his father, this does † not exclude the eldeſt ſon of his ſuit, becauſe there are *not any words of reſtraint.* D. 50. pl. 1. Mich. 33 H. 8. Lord Southampton's caſe.

† S. P. Arg. and reſolved, that in the principal caſe in D. 50. a demiſe made under the great ſeal of lands within the ſurvey of the court of augmentation by the authority of the ſame book is not void. 11 Rep. 64. b. Mich. 12 Jac. in Dr. Foſter's caſe.

* [71]

6. Great ſeal ſhall be always *credited,* and where the certificate under it is not ſtrictly true, there is no remedy but an act of parliament, or by authority of the Chancellor of England, to cauſe the parties to bring the ſaid exemplification with them into *Chancery,* there to be *cancelled,* or remain with, &c. as was ſaid in the DUKE OF NORFOLK'S CASE. But in exemplification under the ſeal of C. B. or B. R. or Exchequer, it is otherwiſe; for they have not ſuch force in themſelves, nor import ſuch truth; per omnes Juſt. Dal. 19. pl. 4. 3 & 4 P. & M. Anon.

7. H. 8. ſeiſed of a manor as parcel of his dutchy of Lancaſter, *grants* to the fraternity of Walden *two mills,* &c. as *parcel of the ſaid manor in fee, reſerving a* yearly *rent of* 10l. *and then grants the manor and rent* to Ld. Audley *in fee.* Ed. 6. upon the diſſolution of the ſaid corporation, grants the ſaid mills to the corporation of the vill of Walden, reſerving a rent of 10l. nobis hæredibus & ſucceſſoribus vel tali capitali domino ad quem, &c. de jure pertinebit, &c. It was held, that the manor and rent were not paſſed together by the grant to Ld. Audley, but ſevered. For the manor, with its rights, members, and appurtenances, was granted under the dutchy ſeal, by which the rent could not have paſſed, and the rent was granted under the great ſeal, which otherwiſe could not have paſſed at all; and for this reaſon it was adjudged, that the corporation

poration of the vill of Walden ſhould pay a rent of 10l. to the crown, over and above the rent reſerved to Ld. Audley, which was not due to him as capitalis dominus, by reaſon of the ſeverance in the original grant. Adjudged Mo. 167. Mich. 26 & 27 Eliz. the caſe of Saffron Walden.

8. The granting of *repriſals extraordinary* is always under the great ſeal. 1 Molloy, 28. cap. 2. ſ. 8.

(D. b) What Things *may be* granted under the Great Seal.

[1. A *Preſentation* to a church, *the advowſon of which belongs to the dutchy of Lancaſter*, may be granted under the great ſeal; for it is a flower fallen from the tree, and not within the ſtatute of 3 *H.* 5. M. 10 Ja. B. between the KING plaintiff, and the BISHOP OF LINCOLN AND KING defendants, per Curiam. Trin. 11 Ja. B. adjudged ſame caſe.]

S. C. nor is it parcel of the poſſeſſions of the dutchy, but a recommendation of the clerk to the ordinary, and does not concern the inheritance; and it was held ſuch preſentation might be even by parol. Moor, 874. Mich. 11 Jac. ——But ſuch a grant of a *ward* of the dutchy is not good, as has been adjudged. Mo. 874. cites Trin. 8 Jac. Rot. 1811. ——S. C. cited 2 Lutw. 1237. in caſe of Aſtill v. Clark. ——If the king has an advowſon in right of the dutchy, he may preſent thereto in right of the crown. Cro. J. 248. per Coke J. Trin. 8 Jac. C. B. in caſe of the King v. ....——[Which ſeems to prove the ſame point, that a preſentation to a church, parcel of the dutchy, may be under the great ſeal.]

[72]

[2. *But* a grant of the *next avoidance* of ſuch advowſon cannot be under the great ſeal, but ought to be under the dutchy ſeal. M. 10 Ja. B. per Curiam.]

S. C. cited 2 Lutw. 1237. in caſe of Aſtill v. Clark. Brownl 182. the King v. Emerſon, cites M. 10 Jac. S. P. adjudged.

3. A *preſentation* was made under the great ſeal *to a church*, which the king had *in right of a ward*, and held good; for that he may make ſuch preſentation either under the ſeal of the court of wards or the great ſeal. Cro. C. 70. Mich. 3 Car. C. B. Stephens v. Potter.

(E. b) What Things done under the *Exchequer Seal* ſhall be good.

[1. THE king may *make a man his bailiff of his manor* by patent under the Exchequer ſeal, and it ſhall be good. M. 5 Ja. B. between TOMLINSON AND BENSON, per Curiam.]

S. C. cited Gibb. 293. in caſe of Mills v. Keyes.

[2. If A. makes a leaſe *reſerving rent*, and after is outlawed, and this found by inquiſition, the king may *grant over the benefit of the outlawry* to a common perſon under the Exchequer ſeal, and thereupon he *may have account for the rent incurred after againſt the leſſee*. Mich. 10 Car. B. R. between CULPEPPER AND COVENTRY, per Curiam, upon a ſpecial verdict, and the Court then ſaid, that this was the common courſe of the Exchequer. Intratur Trin. 7 Car. Rot. 835.]

On a ſpecial verdict it was found, that the king made a *leaſe for life* under the Exchequer ſeal, *remainder for life*, &c. *reſerving the uſual rent*; and it was objected, that the leaſe was not good, becauſe a freehold could not paſs from the king, but by patent under the great ſeal; but adjudged by all the juſtices, that the leaſe was good, and for the king's benefit, that his lands ſhould not lie unletten. Cro. C. 513. Hill. 13 Car. B. R. Rot. 1252. Kemp v. Bernard.

[3. A *leaſe for years* of land made *by the king* under the Exchequer ſeal by the cuſtom of the court of the Exchequer is good, and ſhall bind the king; for it has been ſo time out of mind, &c. Co. 2. Lane's caſe. Adjudged. 16. b.]

[4. 8 H. 6. 34. b. Br. Leaſes, 71. Nota, that the *order of the Exchequer is to make their leaſes by the word committimus* ſuch lands *habendum, &c. reddendo* ſuch ferme [rent] this is a good leaſe by the ancient uſage there.]

Cro. C. 513. S. C.—— Reynolds Ch. B. doubted this caſe, and that from the general tenor of the books the *uſually* there muſt refer to the *manner of granting*, and taking it ſo, he knows of no authority to ſupport ſuch grant; but if an office for life had been *found to be an ancient office*, and to have been *uſually granted under the Exchequer ſeal*, it might be good; and the whole Court inclined, that an office for life granted, muſt be under the great ſeal; but this being on the firſt argument, Ld. Ch. B. ſaid, he did not deliver it as his final opinion. Gibb. 294. in the Exchequer, Trin. 5 Geo. 2. Mills v. Keyes.

[5. A *leaſe for three lives* made by the king *of land parcel of the poſſeſſions of the crown* under the Exchequer ſeal, *though the rent reſerved be not averred to be the ancient rent*, yet it is good becauſe it is the *ancient uſage of the ſaid court* of Exchequer, whereof all other courts ought to take conuſance, without averment. Mich. 14 Car. B. R. between Kemp and Barnard, adjudged per totam Curiam upon a demurrer. Intratur Hill. 13 Car. Rot. 1252.]

[6. Co. 10. Prid. & Nap. 12. upon the ſtatute of 35 *El. cap.* 3. *the* words *(confirmation of letters under any ſeal)* are interpreted under the Exchequer or augmentation ſeal.]

*[73]

So where the queen made a *leaſe for life on condition to be void on non-payment of rent*, and upon a *commiſſion* awarded *under the Exchequer ſeal*, it was *found, that the rent was not paid*, and thereupon the queen makes a new leaſe. Upon a ſpecial verdict in treſpaſs, the plaintiff had judgment for this reaſon (among others), that the commiſſion under the Exchequer ſeal was not ſufficient to find a condition broken upon a leaſe for life, though upon a leaſe for years it might be found, and in any county being an office only to inform the queen. Cro. E. 855. Trin. 42 Eliz. Rot. 641. B. R. Parſlow v. Corn.——Cites Paſch. 27 Eliz. Knight v. Beech.

7. In an information of intruſion upon demurrer the caſe was, that the *huſband deviſed to his wife*, who was *an alien born*, and by a commiſſion under the Exchequer ſeal, ſhe was found to be ſo; by reaſon whereof the king was intitled to the land; but adjudged, that the *inquiſition was void; becauſe this is *office of intitling*, which ſhould be under the great ſeal, but an office of *inſtruction* or information may be under the Exchequer ſeal. 5 Rep. 52. Mich. 29 & 30 Eliz. in Scacc. Page's caſe.

So a ſpecial verdict in ejectment found, that the defendant, being *indicted* on a ſtatute 18 Eliz. *for a premunire, made a gift in tail* of his lands, *and was afterwards found guilty*; and then by a *commiſſion under the Exchequer ſeal*, it was *found, that he was ſeiſed in fee* at the time of the offence committed, and that the queen had granted the lands to one under whom the plaintiff claimed, and that the defendant claimed under the tenant in tail; adjudged, that to veſt the lands in the king there muſt be an office found by inquiſition under the great ſeal, without which the freehold could not be diveſted from the party, and that the inquiſition under the Exchequer ſeal *is only an information* to the king and his officers *to ſeize the lands in charge*. Cro. C. 172. Hill. 1 Car. Rot. 828. Groſſe v. Gayer.—— Jo. 217. Mich. 5 Car. B. R. S. C. by name of Groſſe v. Gayne.

So a leaſe for years of another's land,

8. If any *manor or land, of whatſoever value, comes to the king by attainder or otherwiſe*, the *cuſtody* thereof may be granted over under the

the Exchequer ſeal by the authority of the Lord Treaſurer and Chancellor there, without ſpecial warrant; for it is but a diſpoſing of the profits, becauſe the king himſelf cannot manure it; and it is always revocable, ſi quis plus dare voluerit. Cro. J. 109. pl. 6. Hill. 3 Jac. B. R. per Popham, to which the other Juſtices agreed. Predyman v. Wodry.

which comes to the king by attainder, is but a chattle in him, and vendible for his beſt profit, and therefore is grantable under the Exchequer ſeal; for it is as a ſale; and therefore the grant is good. Cro. J. 109. Predyman v. Wodry.

(E. b. 2) Dutchy Seal.

1. IN quare impedit it was agreed, that there was a ſtatute H. 5. that no lands nor tenements of the dutchy of Lancaſter might paſs from the king but under the ſeal of the dutchy of Lancaſter; and therefore per Danby, if the *king grants an advowſon of the dutchy under the ſeal of the dutchy, and* after *confirms it by the great ſeal*, this is a void confirmation. Quære. Br. Patents, pl. 88. cites 32 H. 6. 22.

2. Where *leaſes* are made *of lands* which are newly *annexed to the dutchy of Lancaſter, and lying within that county palatine;* if they are ſealed with the ſeal of the dutchy-court at Weſtminſter they are void, becauſe by the *ſtatute* 37 *H.* 8. *cap.* 40. *ſuch lands* and poſſeſſions *muſt paſs under the ſeal of the county palatine*, and not under any other ſeal, as it ſeems by the intendment of the act, though it be not fully ſo expreſſed. Dy. 232. pl. 7. Mich. 6 & 7 Eliz.

3. It was ſaid by the Court, that a *grant of an office* of keeping the courts of the dutchy land *by privy ſeal* is not good, but it ought to be by dutchy ſeal. Noy, 53. Ld. Willoughby v. Kempe.

4. A queſtion was, whether the *grant of a fair* under the great ſeal was good, where the queen was *ſeiſed in right of her dutchy of Lancaſter?* or in other words, whether the grant of this fair ſhall be taken as part of the poſſeſſions of the dutchy, and ſo not paſs but under the ſeal of the county palatine? And adjudged, that a grant under the great ſeal was good, becauſe it was a franchiſe created de novo by virtue of the prerogative royal, and cannot properly be called a poſſeſſion of the dutchy. And though by the 3 H. 5. [74] it is enacted, that no grants of the poſſeſſions of the ſaid dutchy ſhall be made but under the dutchy ſeal, this is to be intended of things naturally ariſing from the lands, as rents, ways, mills, &c. which ſavour of the land; and ſuch franchiſes were thereby preſerved which were then in being; but this grant of a fair is a royal franchiſe, and created de novo, and ſo not within that act, and cannot paſs by the dutchy ſeal. 2 Lutw. 1233 to 1237. Mich. 10 W. 3. C. B. Aſtill v. Clarke.

5. Whereupon Treby Ch. J. obſerved, that there was a difference between poſſeſſions and prerogatives; and that *poſſeſſions* ought to paſs under the dutchy ſeal, as above, but *royal franchiſes* (as a fair, &c. *out of the county palatine, and within the dutchy*) ought to paſs by the great ſeal. 2. Lutw. 1237. Aſtill v. Clerk.

6. All *corporations made within the dutchy* of Lancaſter, *and out of the county palatine*, by the dutchy ſeal are without warrant; for to make *a* corporation is *jus regale*, and cannot paſs by the dutchy ſeal; *but within the county palatine*, the king, by the dutchy ſeal, may make a corporation, becauſe the duke of Lancaſter had jura regalia; per Treby Ch. J. in delivering the opinion of the Court. 2 Lutw. 1237. in caſe of Aſtill v. Clark.

Fol. 183.

(F. b) King, Warrant. Seals, Privy. By what Warrant the King may do Things. *[*Privy Seal.*]

*There are 4 *clerks* of the privy ſeal, who give their attendance on the Ld. Privy Seal: the principal *office* and charge of the Lord Privy Seal, and of his clerks, *is about ſuch things as paſs by bill ſigned, and are to go to the great ſeal*; of this you may read in the ſtatute 27 H. 8. cap. 11. & lib. 8. fol. 18. in caſu principis. 2 Inſt. 555. cap. 6.

[1. †THE warrant which is ſufficient in law *to iſſue the king's treaſure ought to be under the great ſeal or privy ſeal.* Co. 11. Earl of Devon, 92.]

† *Chattels real, and inheritances* muſt paſs by grants under the great ſeal; *but perſonal things*, as diſpoſal of money, horſes, armour, &c. may paſs by cuſtom by the privy ſeal. Arg. by Coke Attorney General. Mo. 476. pl. 681. in caſe of the QUEEN v. DODDINGTON. And he vouched a precedent. 3 E. 4. Rot. 14. Inter brevia coram baronibus, where the *ſheriffs of London would have excuſed themſelves of* 14 *l. diſpoſed of by command of the king under his ſignet*, and could not, but were forced to obtain a privy ſeal.

The privy ſeal is not ſufficient authority to diſpoſe of the queen's *money* by the lord treaſurer, unleſs where it is due; and he that receives money out of the Exchequer by ſuch authority is accountable for it, and if he dies, his executor ſhall anſwer for it as a debt from the teſtator. Cro. E. 545. Dodington's caſe.

Money was never iſſued on the great or privy ſeal; and anciently there were no writs of liberate for the payment of money on any debt due from the crown, or any grants made of any ſums, but afterwards they were wont to grant patents or privy ſeals to the treaſurer, giving him authority to iſſue warrants for the money. Gilb. Hiſt. of Exchq. 143. —— The writs were anciently directed to the treaſurer and chancellor, and therefore the warrants are at preſent ſigned by the treaſurer and chancellor, and mention the authority of the broad ſeal by which he iſſues them. Ibid.

S. C. cited 2 Rep. 17. b. Mich. 28 & 29 Eliz. in LANE's caſe, and ſays, that with this agrees 37 H. 6. 27. b.

[2. The king may *grant* by his letters patents *under his privy ſeal, to* any to *make a general attorney in all pleas.* F. N. 26. b. Regiſt.]

Roll. Rep. 7. S. C.

[3. The king may *grant an obligation under his privy ſeal*, becauſe it is but a chattel. P. 12 Ja. B. R. between CULLOM AND SHERMAN, per Coke.]

[75]

[4. 11 E. 1. Rot. Pat. Memb. 13. rex *commiſit* Waltero de Julburne *officium cancellarii regis in Hibernia by writ de privato ſigillo*.]

S. C. cited 2 Rep. 17. b. Mich. 28 & 29 Eliz. in Lane's caſe.

[5. *Artic. ſuper chartas, cap. 6. under the petit ſeal, ſhall not iſſue from henceforth any* writ which touches common law.]

Pl. 8.

[6. The king *may diſcharge a recognizance forfeited by his privy ſeal.* Mich. 11 Car. B. R. WITHERING's caſe, where it was commanded by the king, under his privy ſeal, to diſcharge the recognizance

cognizance and to ſtay proceſs; and per Curiam this was ſufficient *to ſtay proceſs*. But they were divided in this ſcilicet whether it be ſufficient to diſcharge the recognizance. But it was ſaid, that it was uſual in the Exchequer to *enter an exoneretur upon ſuch privy ſeal.*]

[7. The king may *command* under his privy ſeal, *that one ſhall not go over the ſea out of his realm.* F. N. 85. a.]

S. C. cited 2 Rep. 17. b. Mich. 28 & 29 Eliz. in Lane's caſe.

[8. A *protection or warrant of an eſſoin* is not good under the privy ſeal. 35 H. 6. Co. 2. LANE, 17. b. A *diſcharge of a debt due to the king* under his privy ſeal is ſufficient diſcharge in law. 1 E. 4. Ex parte rememb. Domini Regis Rot. 14.]

Pl. 6. See (G. b.) pl. 3. ——No *eſſoin de ſervitio regis* can be warranted by the king under his privy ſeal, nor protection granted under the privy ſeal, but both of them *under the great ſeal*: becauſe they tend to the great delay of juſtice, if they be not duly obtained; and therefore the law doth require the great ſeal in theſe caſes. But a warrant of the king under the *privy ſeal to iſſue out money out of his coffers is ſufficient*; becauſe it concerneth but a chattel in poſſeſſion. And in matters of ſmall moment, and which can work no delay to the ſubject, the privy ſeal is ſufficient; as to grant a *ſuperſedeas of a proceſs in the king's own caſe, or* to grant a *niſi prius where the king is party*, or to *allow a plea againſt the king*, to *cancel a recognizance* made to the king, to *diſcharge a debt*, or the like. 2 Inſt. 555. cap. 6.

[9. The warrant of the king *by parol* is not ſufficient *to iſſue his treaſure.* Co. 11. Earl of DEVON, 92.]

Upon the account in the Exchequer of B. Fulham, the king's butler, he demanded allowance of certain parcels of wines given by the king to certain perſons, by word of mouth, without writing, and it was diſallowed by the rule of the Court. 4 Inſt. 115 ——So upon the account in the Exchequer of Richard Bury, keeper of the wardrobe, he demanded allowance for certain veſſels of gold and ſilver, and certain jewels given by the king ore tenus to Iſabel, queen of England; and others to Philip, queen of England, conſort of the king. et non allocatur by the like rule of the Court: for the gifts by word in both theſe caſes are void, which are good rules to eſtabliſh the law in a caſe wherein there hath been variety of opinions in our books. 4 Inſt. 115.

[10. If the *king preſents B. and upon refuſal of him brings quare impedit, and pending this, C. * procures of the king a preſentation* of himſelf, *without mention of the firſt* preſentation, and after *the king notifies to the juſtices where this depends, by his letters ſigned, that he had forgot the firſt preſentation, and ſays, that his pleaſure is that the firſt preſentation ſhall ſtand firm.* Though this *notification* was not under the great ſeal, yet it is good. But there they aided themſelves alſo becauſe the deceit was confeſſed by the demurrer. D. 17 El. 339. 47.]

See (O. b) pl. 3. S. C. ——S. C. cited 6 Rep. 29. b. Trin. 44 El. in Green's caſe. —— [* In the original is left a large blank between (C.) and the word (procures) which ſeems to be only an overſight in the printing.]

11. Ralph Everden, Knt. brought a writ out of Chancery, and alſo a writ of privy ſeal to the judges *reciting, that he was a baron, and commanding them to diſcharge him* to be *of juries*, &c. And by good advice he was entirely diſcharged. 6 Rep. 53. in the counteſs of Rutland's caſe, cites 48 E. 3. 30. b.

Br. Exemptions, pl. 3. cites S. C.

12. 13 R. 2. 1. *No pardon of treaſon or felony ſhall paſs without warrant of the privy ſeal.* [76]

13. The king by privy ſeal *licenſed the maſter of the ordnance to take all unſerviceable iron ordnance*, &c. upon a ſuggeſtion, that thoſe things had been *uſually taken as fees*, &c. belonging to his office: reſolved,

reſolved, that becauſe the office itſelf was but newly erected, and ſo the privy ſeal was obtained upon a *falſe ſuggeſtion*, the king was deceived, and by conſequence the privy ſeal was void. 11 Rep. 89. Hill. 4 Jac. Earl of Devonſhire's caſe.

Ibid. 395. Paſch. 17 Car. 2. S.C. by name of *Whitehill* v. the *Attorney-General*, & al. and the compoſition made by the Court was confirmed.

14. The *forfeitures of the ſums on ſeveral recognizances, for not appearing* at the ſeſſions, *was granted to T. S. by a privy ſeal*; and the queſtion was, whether the court of Exchequer could compound thoſe forfeitures by virtue of a privy ſeal granted to them before that to T. S. or whether the latter privy ſeal was not a revocation of the former? but it was held clearly by the Court, that they might, upon good matter in equity, diſcharge thoſe debts, by virtue of the ſtatute of 33 H. 8. cap. 39. Hard. 334. Mich. 15 Car. 2. in the Exchequer, Mrs. Aſhe's caſe.

See (F. b)

(G. b) King. Seals. *Signet.*

See (F. b) pl. 1.——

[1. THE *warrant* of the king, *under his privy ſignet*, is not ſufficient *to iſſue his treaſure*. Co. 11. Earl of DEVON, 92.]

11 Rep. 92. a. Hill. 4 Jac. S. C. and ſays, that this appears by a judgment in the Exchequer in * PETILIAN's caſe. Hill. 1 E. 4. Rot. 14. in dorſo, where ſuch a warrant under the privy ſignet, to iſſue the treaſure of the king, was diſallowed. ——* S. C. cited 4 Inſt. 116. as Hill. 6 E. 4.

See ne exeat regnum (B) 1.——

[2. The *privy ſignet* is ſufficient *to inhibit a man to go over the ſea*, F. N. 85. a.]

S. C. cited 2 Rep. 17. b. Mich. 28 & 29 Eliz. in Lane's caſe.——S. C. cited 11 Rep. 92. a. ——The law in ſome caſes *taketh notice of the ſignet*; for a *ne exeat regnum* may be by the king's writ under the great ſeal, or by commandment under the privy ſeal, or under the ſignet; for in this caſe the ſubject ought to take notice as well of the privy ſeal and ſignet, as of the great ſeal; *for this is but a ſignification of the king's commandment*, and nothing paſſeth from him. *But* a warrant under the privy ſignet *to iſſue any treaſure* is not ſufficient, but there it *ought to be* either *under the great or privy ſeal.*

See (F. b) pl. 8.

[3. A *diſcharge of a debt due to the king* under the *privy ſignet* is not ſufficient. 1 E. 4. Ex parte Rememb. Dominæ Reginæ. Rot. 14. Co. 2. LANE, 17. b.]

4 Inſt. 55.

4. 11 *R.* 2. *cap.* 10. *The king's ſignet, or privy ſeal, ſhall not be ſent in prejudice of the realm, or diſturbance of the law.*

If *letters patents* paſs *by bill ſigned without privy ſeal*, the patent is *ſubſcribed per iſſum regem*, (and then the bill ſigned remains with the chancellor for his warrant,) and when it paſſes *by bill ſigned, and by privy ſeal alſo*, then the privy ſeal remains with the Lord Chancellor, and the bill ſigned remains with the clerks of the ſignet, and the Lord Privy Seal has an extract thereof for him to make the privy ſeal

5. 27 *H.* 8. 11. *How and in what manner the king's grants, writings, and leaſes, ſhall paſs the privy ſignet, the privy ſeal, and the great ſeal, and in what time they ſhall paſs thoſe ſeals; and the forfeitures ſet upon the clerks of the privy ſignet and privy ſeal for not doing their duty; and what fees they ſhall take for thoſe writings, and what fees ſhall be paid to any perſon for the ſame, and how and where ſuch writings ſhall come to the great ſeal, with an immediate warrant, and not paſs the ſignet or privy ſeal, and what fees ſhall be then paid therefore, and how and under what ſeals the king's leaſes, grants, and writings of lands, or offices of the county palatine or dutchy of Lancaſter ſhall paſs; and what grants, leaſes, or writings for the king may be made without his warrants, and divers articles at large concerning theſe matters. For theſe ſee the ſtatute itſelf at large.*

ſeal by, and then the letters patents are *ſubſcribed per breve de privato ſigillo*; and if the words, viz. (authoritate parliamenti) be added, then it paſſes according to the act of 27 H. 8. cap. 11. And when the *king ſigns the patent himſelf in the upper part, and the ſignature and the grand ſeal go together*, then it is ſubſcribed *per ipſum regem* with his own proper hand. And when it is made *by authority and conſent of parliament*, then it is ſubſcribed *per ipſum regem et totum concilium in parliamento*, or to ſuch effect. 8 Rep. 18. b. 19. a. Hill. 3 Jac. in a note of the Reporter, in the prince's caſe.

6. At the making of the ſtatute of 28 E. 1. cap. 6. the king had another ſeal, and that is called ſignettum, his *ſignet*. This ſeal is ever *in the cuſtody of the principal ſecretary*. And there be *four clerks* of the ſignet, called *clerici ſignetti*, attending on him. The reaſon wherefore it is in the ſecretary's cuſtody is, for that the *king's private letters are ſigned therewith*. Alſo the *duty of the clerk* of the ſignet *is to write out ſuch grants* or letters patents *as paſs by bill ſigned* (that is, a bill *ſuperſcribed with the* ſignature, or ſign manual, or royal *hand of the king*) *to the privy ſeal, which* bill being tranſcribed and ſealed with the ſignet, *is a warrant to the privy ſeal, and the privy ſeal is a warrant to the great ſeal*. Such was the wiſdom of prudent antiquity, that whatſoever ſhould paſs the great ſeal ſhould come through ſo many hands, to the end, *that nothing ſhould paſs* that great ſeal, that is ſo highly eſteemed and accounted of in law, *that was againſt law, or inconvenient; or* that any thing ſhould paſs from the king any ways, which he intended not, *by* undue or *ſurreptitious means*. 2 Inſt. 555, 556. cap. 6.

7. An *accountant*, who might have taken the *benefit of a general pardon, had*, within the time limited by the act, and *before notice of the act, accounted* for 700l. and *given bond to pay it*. He, by Engliſh bill, prayed relief, his account being pardoned by the act of indemnity. Afterwards he obtained a *warrant* from the king *under the privy ſignet for a decree by confeſſion*; but the Court would not allow of it unleſs it were under the privy ſeal, &c. Hard. 204. Mich. 13 Car. 2. in the Exchequer. Savory v. the Attorney-General.

8. In an *information* againſt B. *for extortion*, an iſſue was joined; and the day that the jury were returned, the king ſent a writing under his ſign manual to Sir Thomas Fanſhaw, clerk of the crown, to enter a *ceſſer* of proſecution. And Palmer, attorney-general, affirmed, that the king might ſtay proceedings; yet notwithſtanding, the Court proceeded to ſwear the jury, and ſaid, they were not to delay for the great or little ſeal; whereupon the attorney entered a *noli proſequi*. Vent. 33. Trin. 21 Car. 2. B. R. The King v. Benſon.

9. King Ch. 1. granted to P. an office *durante beneplacito*. King Ch. 2. ſends his privy ſignet to the Lord Treaſurer to confirm P. in this office. It was agreed on all hands, that the king's privy *ſignet does but only intimate the king's mind, but can transfer no intereſt*. Freem. Rep. 71. Hill. 1672. in Canc. King v. Foſter.

10. The Attorney-general ſaid, that he never ſaw any *ſign manual* but what was counterſigned by the ſecretary of ſtate, or the lords of the treaſury; but that he had ſeen ſeveral not ſealed with the ſignet or privy ſeal, and that he had obſerved this difference, viz. that *where* the ſign manual was *only a direction* or commiſſion *to do a farther act*, as to make out letters patents, there *it is only counterſigned*,

terſigned, but not ſealed. *But where* it is to be *the principal act itſelf*, there it is to be *both ſealed and counterſigned*. 9 Mod. 54. Trin. 9 Geo. in Canc. in the caſe of Vernon v. Benſon.

[78] (G. b. 2.) *Grants* of the King. *Good* or void. In what Caſes in general.

1. THE queſtion being upon a grant of the king; it was inſiſted that the king's grant ſhall be void in theſe following caſes: 1ſt, Where he is *miſinformed* in his grant; as 1 Rep. 52. 2dly, *Miſrecital* ſhall avoid it; as Mo. 318. Hob. 224. 243. 3dly, If the king be *deceived in matter of fact or matter of law*, it is void; as 10 Rep. 112. 1 Rep. 46. 4thly, *Want of form* will avoid the king's grant; as Hob. 243. 323. 1 Rep. 50. D. 124. 5thly, When the *thing is in him, or comes to him in another manner than he ſuppoſes*; as 4 Rep. 34. 1 Roll. 192. Mo. 888. Hob. 170. 1 Rep. 49. 2 Rep. 33. 11 Rep. 90. 2 Roll. 186. Hob. 323. On the other hand it was argued, that the king's grant ſhould be *good*, 1ſt, If there be an *original certainty*, although there be a miſtake after; as 2 Cro. 34. 48. Yelv. 42. 3 Le. 152. 1 And. 148. 29 E. 3. 7. D. 83. Godb. 423. 10 Rep. 110. 10 H. 4. 2. 2dly, There is a difference when the *miſtake relates to the title* of the king, and when it is *but a denomination of the thing*; as 9 H. 6. 28. 8 H. 7. 3. 10 Rep. 110. 21 E. 4. 49. 3 H. 7. 6. 38 H. 6. 31. 9 E. 4. 11, 12. 3dly, The king's grant ſhall be *conſtrued liberally for his honour*; as ſtatute 18 E. 1. 6 Rep. 6. 1 Rep. 43. Freem. Rep. 172. Trin. 1674. C. B. in the caſe of the King v. Clarke.

2. A grant *to an alien* by the king, or to a *man outlawed*, or to a *vill* which is *not incorporated*, are void. And the ſame *law* to a body which is *not incorporated*. Br. Patents, pl. 44. cites 22 H. 7. 13. per Keble.

(G. b. 3) Good. In reſpect of the *Matter or Manner*.

1. 11 *R.* 2. 8. ENACTS, that *all annuities, and other things given or granted by the king, his father, or grandfather, with this clauſe, quouſque pro ſtatu ſuo aliter duxerimus ordinandum, ſhall be void if other things have been afterwards accepted by the grantees thereof.*

The miſchief which was at the common law was in the antedating of letters pa-

2. 18 *H.* 6. *cap.* 1. enacts, that *every warrant hereafter ſent by the king, or his heirs to the chancellor of England for the time being, the day of the delivery of the ſame to the chancellor ſhall be entered of record in the Chancery.* (3.) *And the chancellor do cauſe letters patents to be made upon the ſame warrants, bearing date the day of the ſaid delivery in the Chancery, and not before in any wiſe.* (4.) *And if any letters*

patents

patents be from henceforth made contrary, they ſhall be holden as void, fruſtrate, and none.

tents, before the warrant came

to the chancellor to make the letters patents, as the preamble of the act ſhews. And becauſe no charter of the king ſhould bear date before the time of the delivery of the warrant, therefore this act was made, which remedies the ſaid miſchief in making the patent void, which varies from the day of the warrant entered, that is to ſay, in which it bore date before the day of the entry of the warrant received. But the juſtices ſaid, they were reſolved upon two points touching this act: 1ſt, That the patent is good, if no warrant be made or ſent; for the great ſeal, without other circumſtances, is ſufficient to the party to whom the patent is made, and the warrant is the diſcharge of the chancellor; for thereby he knows the will of the king. 2dly, That if patent bears date after the day of the delivery of the warrant, the patent in ſuch caſe ſhall be good, in as much as it is out of the intent of the makers of the act; for no miſchief in ſuch caſe was to the king, or to any other which needs any reformation, but the miſchief was in the dating of the patent before the delivery of the warrant, as before is ſhewn. Pl. C. 491. b. 492. a. Mich. 18 & 19 Eliz. Ludford v. Gretton.

By this ſtatute the letters patents bearing date another day than the day of the entry of the warrant (where there is a warrant) is good, and not otherwiſe. And if there is a warrant, and the day of the delivery thereof is entered, and the patent has no * day of the date, it is good, and out of the words and intent of the act, and reſts at the common law. And the letters patents by the common law were good, notwithſtanding they had no day of the date, and now are, notwithſtanding that they have in them no place of the date; per Brown, quod Dier conceſſit. Pl. C. 232. 4 Eliz. in the caſe of Willion v. Lord Barkley.——* S. P. 20 H. 7. 8.

3. If the king grants *conuſance of pleas* to one N. *and does not ſay before whom it ſhall be held*, the grant is void; for the grantee cannot make a judge; *but if he had court before*, there the grant is good. Br. Patents, pl. 44. cites 2 H. 7. 13. per Keble. [79]

4. If the king *grants ward during the nonage*, and after *ſpecial livery is ſued*, this is void, and the grant good. *Contra where the grant is, as long as it ſhall happen to be in our hands*, there a ſpecial livery made within age, ſhall avoid the grant. Br. Patents, pl. 47. cites 3 H. 7. 3. & 8 H. 4. accordingly,

5. If the king gives land *to A. and his heirs males*, this patent is void; for if A. has only a daughter, and dies, and this daughter has a ſon, the fee ſhould be in abeyance; for the daughter is the heir; and if the daughter dies, her ſon ſhould have the fee: but the law will not allow ſuch *ceaſing and reviving* of a freehold. The parliament may create ſuch an eſtate, but it can be done no otherwiſe. By all the judges of England. Jenk. 199. pl. 16. cites 18 H. 8.

But the king's patent of land *to A. and his heirs habendum* to him and *his aſſigns* is a good patent, and paſſes the fee ſimple. Jenk. 283. pl. 14.——Where the king's patent *creates a new eſtate, of which the law does not take conuſance, as* where the king gives land *to A. and his heirs males, or* gives land *to his eldeſt ſon, & ipſius & hæredum ſuorum regum Angliæ filiis primogenitis in regno Angliorum hæreditario ſucceſſuris.* Theſe patents are void. Jenk. 304. cites 18 H. 8.

6. Letters patents are good in the following caſes; that is to ſay, where *no warrant is made;* and where warrant is made and delivered, and *no day of the delivery entered; and where* day is entered, and *the letters patents bear date after the day entered.* Reſolved. Pl. C. 492. Mich. 18 & 19 Eliz. in the caſe of Ludford v. Gretton.

7. The king may grant a *right of entry* and a *real action;* but ſuch grant muſt be conceived in ſpecial words, ſetting forth how the right of entry is. Le. 21. Trin. 26 Eliz. in the Duke of Northumberland's, alias Doughty's, caſe. 3 Le. 198. in an anonymous caſe.

8. The king, ſeiſed of a manor in right of his crown, did by his ſteward *grant copyhold lands*, parcel of the ſaid manor in fee, *and afterwards*

afterwards made a leaſe of the ſame lands under the Exchequer ſeal *for twenty-one years*, &c. Adjudged, that though no grants of the king are available but under the great ſeal, yet this leaſe, under the Exchequer ſeal, was good by the *common uſage* of that Court, though not particularly alleged; for the courſe of every court is as a law, of which the common law takes notice, without alleging it in pleadings. 2 Rep. 16. Mich. 28 & 29 Eliz. C. B. Lane's caſe.

9. 35 *Eliz.* 3. *Enacts*, that *all letters patents made by H.* 8. *ſince the 4th of February, in the twenty-ſeventh year of his reign, for the foundation of any dean or chapter, or college, ſhall be adjudged good.*

The right of all others, (except of priors, abbots, &c.) is ſaved.

All grants made by the queen to others ſince the ſaid time, as alſo all others that ſhould be made (by force of a commiſſion then on foot) before the end of this ſeſſion, or within one year after, ſhall be good.

This act ſhall not extend to letters patents of offices, nor of concealments, except ſuch concealments only as are ſold by commiſſioners.

Neither ſhall this act extend to make good letters patents heretofore adjudged void by any court of record at Weſtminſter, or by act of parliament; neither yet thoſe of monopolies for toleration of any offence prohibited by any penal law, nor of lands where there is an eſtate-tail in the queen, unleſs ſuch eſtate be duly recited.

Here alſo the right of others is ſaved.

Lane, 39. S. C.

10. King Edward 2. having *granted the manor and caſtle* of Skipton upon Craven *to Robert Clifford in tail, H.* 6. *granted* to Thomas Lord Clifford (who was heir of the body of the ſaid Robert) *reverſionem caſtri & manerii* præd. &c. *Nec non caſtrum & manerium prædictum.* It was held, that admitting the grant in tail ſhould be void, yet the caſtle and manor ſhould paſs to Thomas Lord Clifford in fee in poſſeſſion, becauſe the intent of the king was to paſs it, whether in poſſeſſion or reverſion. 8 Rep. 166. Mich. 7 Jac. Earl of Cumberland's caſe.

[80]

The words (*will and declare*) are ſufficient to amount to a grant; and

11. It was reſolved by Hubbard, Tanfield, Altham, Winch, Nichols, and Haughton, that *volumus* was a good word of grant, as Pigot was of opinion, in 21 E. 4. 12 Rep. 120. Paſch. 12 Jac. in Dungannon's caſe.

ſuch words are always uſed in patents and franchiſes, being things contingent, & de futuro; adjudged. 8 Rep. 73. b. in the Lord Stafford's caſe.

12. The king's patent may be *without date*; for he may reſort to the inrolment and privy ſeal, and ſo help it; but in ſuch caſe, if he ſurmiſe a falſe date, the ſame makes the patent void. Arg. Godb. 416. Trin. 21 Jac. in caſe of Lord Zouch v. Moor, cites 21 E. 4. 45. and 20 H. 7. 7, 8.

13. A grant of a *rent-charge out of the king's manor, with a clauſe of diſtreſs*, is a void grant; for the king cannot be ſued, nor can a diſtreſs be taken upon land in his poſſeſſion. Jenk. 112. pl. 18.

Jenk. 112. pl. 18. S.P.

14. If the king grants an *annuity, without ſaying by whoſe hands* it ſhall be received, it is void. Jenk. 208. pl. 41.

16. A grant of a *wardſhip quamdiu* in manibus noſtris, &c. is good. So of the *lands of fugitives*. So of the *profits of lands of a perſon outlawed in treſpaſs*, or any perſonal action. So of *lands which a felon attainted has in right of his wife*; for theſe *are only chattels* in the king. Jenk. 246. pl. 35.

But where the *king has an eſtate in fee or grants it for life, in any land*, and grants it *quam diu in manibus noſtris* fore contingerit, it is a void grant; for ſuch a grant was never heard of, and it is not determinable by any collateral means. Jenk. 246. pl. 35.

17. A patent of *lands* in general, with a reſtriction to a *tenure* or *occupation*, or *poſſeſſion*, which is *falſe*, is a void patent; otherwiſe of a patent of the manor of Dale, or *any certain thing*, a falſe addition does not vitiate the patent in this caſe; for the addition is *ſurpluſage*. Jenk. 304. pl 77.

(G. b. 4) Grant. Good *in Part*, and void in Part.

1. IF the *king has two manors, one for life, the other in fee*, and the king *grants theſe two* manors *to A. for life*, and dies, the grant remains good, as to the manor in fee. Jenk. 209. pl. 41.

2. A patent may be *repealed* in part, but this ſhall be only *in clauſes independent*. Per Hale Ch. B. Raym. 177. Paſch. 21 Car. 2. B. R. in Sackvill College's caſe, cites Fitzh. Petition, 19.

3. The king *leaſed a manor and mines*, and withal *grants that the vendee ſhall have the ſole vending of allom, reſerving out of the premiſes* 10,000*l. a year to himſelf, and* 1640*l. a year to the Lord Mulgrave.* The queſtion was, whether this grant, being void for part, (viz. for the ſole vending of allom,) ſhall be void for the reſt? It was held, that had it been in the caſe of a common perſon, it might be good for part, and void for part, although the reſervation was intire. But it was urged here, that the king is deceived, it being plain that he intended to grant the ſole vending of allom, which he could not do. In anſwer whereto a difference was taken, where the king is *miſtaken in matter of fact*, there his grant ſhall be void, but not where he *miſtakes the law*; and cited 6 Rep. 55. LORD CHANDOIS'S CASE. But the Court ſeemed to incline, that the grant was void, it appearing upon the face thereof that the king was *deceived in the very ſubſtance* thereof, and the rent being reſerved out of the whole. Sed Curia adviſare vult. 2 Freem. Rep. 17. pl. 15. Hill. 1676. Lord Mulgrave v. Sir J. Mounſon. [81]

Fol. 184.

(H. b.) Office. Grant. In what Caſes a *Grant* ſhall be *good before Office*. 18 *H.* 6. *cap.* 6.

See (I. c) pl. 9. The caſe was to this effect: King Philip and Queen Mary leaſed for years, rendering rent at the feaſts of the Annunciation, and St. Michael, with a proviſo, that upon non-payment within 40 days of either of the feaſts, the leaſe ſhould ceaſe, and be void. In 9 Eliz. the rent was not paid at Michaelmas, nor within 40 days after; but afterwards the queen's receiver received it, and made an acquittance as if it had been paid at the day, and received the rent afterwards every year until 30 Eliz. and made acquittances of it. 30 Eliz. the queen granted this land in fee to Sir T. H. and afterwards an office found the non-payment 9 Eliz. upon which Sir T. H. entered. And the queſtion was, if the leaſe was void or not without office? And all the barons agreed, that this leaſe was void immediately upon the non-payment, and that the land is diſcharged of this contract of the term; and the patentee is no longer termor, nor (as Manwood ſaid) a tenant at will, nor at ſufferance, but only a bailiff or pernor de ſon tort, and then all the acceptances after cannot make a void leaſe good. And they likewiſe held, that the firſt eſtate ended as by limitation; and in ſuch caſe no office is neceſſary to intitle the queen, and that therefore the patentee of the queen might enter, as into land of which there was no leaſe. Cro. E. 220. Hill. 33 Eliz. in Scacc. S. C. ——Note, a writ of error was brought in the Exchequer Chamber, and error aſſigned in the matter in law; and after argument, Mich. 36 & 37 Eliz. the judgment was affirmed. Ibid.——S. C. Poph. 53. by name of Finch v. Riſeley.——2 Le. 134 to 145. S. C. by name of Sir Moyle Finch's caſe.

There is a difference betwixt a leaſe for years, reſerving rent payable at the receipt of the Exchequer, with ſuch proviſoes, and when it is payable to the receiver or his deputy; for in the firſt caſe the payment or non-payment appears by record. And therefore to prove the non-payment, there needs no office; but in the laſt caſe the payment is to be made to the receiver or his deputy, and that appears not of record; and therefore the leaſe not void by the non-payment without office. Agreed. Cro. Car. 100, Mich. 3 Car. Stephens v. Potter.

[1. IF the *king leaſes land for years* reſerving rent to be paid at the receipt of the Exchequer, or to the hand of the receiver, if the leſſee *does not pay the rent at the day, the * leaſe ſhall be void*, by which his eſtate is determined. Though it does not appear of record that the eſtate is determined, becauſe it may be that he has paid the rent to the receiver in the country, yet the king may grant the land over before any office found thereof. M. 32, 33 El. B. R. between Sir MOYLE FINCH and THROGMORTON adjudged. Contra, M. 2 Ja. B.]

S. C. cited by Clerk J. 2 Le. 145. in caſe of Sir MoyleFinch v. Throgmorton; but he adds, that ſome ſay that the caſe was not adjudged but compounded.

[2. *So* if the king leaſe land for years, *upon condition that the leſſee ſhall not do waſt*, and after the leſſee does waſt, though this matter of forfeiture was a matter en pais, yet the king may grant the land over before any office found of between HUNGATE and Sir THOMAS HENEAGE cited M. 32, 33 Eliz. B. R.]

[3. If a man be *convicted a papiſt*, yet before the commiſſion is returned, the king is not ſufficiently intitled to the land or goods to grant them. Paſch. 2 Ja. B.]

See S. P. citedD. 197. b. pl. 46. as of Mich. 14 H. 8. Toly's caſe.

[4. If the *king grants an office of a receiverſhip to J. S.* and makes an ordinance in the letters patents, *that* the receiver *ſhould enter into his account, and finiſh it before Hillary term annually, and to pay the laſt money of his debt ſtated by the auditor before the* 20*th day of March then next enſuing, upon pain of forfeiture and loſs of his office*; and after the receiver is caſt in arrear in his account before the auditor, and *does not pay* the money before the 20th day, according to the ordinance; and this arrear appears by record in the Exchequer. By this nonpayment the office is forfeited, and the king may

may grant it over before any *ſcire facias* brought (or office, as it ſeems, or other record of the forfeiture); and yet if no grant be made to another, he ought not to be removed without a ſcire facias brought by the king, becauſe it is an office of record; and by record he ought to be diſplaced. D. 4 El. 211. 29.] [82]

18 H. 6. cap. 6.

[5. If a man *be attainted of treaſon, and his land ſettled in the actual poſſeſſion of the king, either by a ſpecial ſtatute, or by* 33 *H.* 8. *cap.* the king, notwithſtanding the ſtatute of 18 H. 6. cap. 6. may grant them over before any office thereof found. D. 3, 4 Ma. 145. 67.] Br. Office devant, &c. pl. 17. cites 28 H. 8.— Br. N.C. pl. 90. 27 H. 8.

6. *If villein of the king purchaſes goods*, the property is in the king without ſeiſure; *contra of lands*. The goods may be waſted, and therefore it ſeems, that grant of the king of goods, as here, is good without office. Br. Patents, pl. 83. cites 35 E. 3.

7. Where the king is *intitled to land by ward*, he may grant it over before office, and before ſeiſin, and he may ſeiſe before office; per Gaſcoign, Thirwit, and Huls, juſtices. The reaſon ſeems to be, becauſe the king *has only a chattel in it*; but ſee now the ſtatute * 18 H. 6. 6. that the patent before office is void of land. Br. Patents, pl. 49. cites 10 H. 4. 3. * See pl. 8. below.

8. 18 *H.* 6. *cap.* 6. enacts, that *no letters patent ſhall be made of any lands before an inquiſition of the king's title be found returned in the Chancery or Exchequer; † if the king's title be not found of record, nor within the month after the return, if it be not to them which profer their traverſe, and if any letters patent be made to the contrary they ſhall be void.* † A man purchaſed land of the king and queen, which was parcel of the poſſeſſions of the Duke of Suffolk attainted of high treaſons, of which land purchaſed no office was found. And the queſtion was, whether the patent was void by reaſon of this ſtatute? And it ſeemed to ſeveral, that the patent above was good by the words (if the king's title, &c.) in as much as the act of attainder is found in the Chancery and Exchequer of record. The reporter adds, et colligo that the intendment of this ſtatute is to reform grants and leaſes to farm made by the chancellor, treaſurer, or other officers of the king of tenements of ſubjects found by office to be the title of the king, and ſeiſed into the hands of the king meſne between the finding of offices and the return of them, and not to any grants or gifts in fee ſimple or tail, &c. D. 145. b. pl. 66. Paſch. 3 & 4 P. & M. Anon.

Rhodes, Pirryam, and Anderſon J. held, that this ſtatute did not extend to the grant of any land but thoſe which come to the king by new title, as wardſhip, mortmain, attainder, and the like, in which caſes the miſchief was at the common law in this, that thoſe who had right could not traverſe the office, and have the land in farm, but were prevented by grants made before the office returned by which the king had diſabled himſelf to grant the land in farm to him who tendered traverſe, and no man could tender traverſe before the office returned. Mo. 209. Paſch. 27 Eliz. Knight's caſe.

9. Grant of the king *of the body of a ward, or* of *goods*, is good without any office thereof found; *contra of land* by the ſtatute of 18 H. 6. Br. Patents, pl. 70. cites 20 E. 4. 11. S. P. Br. Patents, pl. 83.

10. The king *granted to a biſhop bona felonum de ſe* within a certain precinct. The *biſhop was attainted* of treaſon. A *leſſee for years of the biſhop within this precinct before the indictment* or attainder *became felo de ſe*; the *king* had *before this granted to B.* his almoner *omnia bona felonum de ſe* after the ſaid treaſon committed, and before any indictment; *after this* grant to B. *the biſhop is indicted and attainted*. The king ſhall have this leaſe; for the king's grant to B. before the attainder of the biſhop was void; for the king granted that The queſtion in the Exchequer Chamber was, whether the almoner ſhould have this leaſe or not? And it was held by

Brook C. J. of C. B. Brook Ch. that which he had not. This is a *remote poſſibility* in the king which cannot be granted. Jenk. 210. pl. 44. cites 1 Mar. D. 108.

Baron of the Exchequer, Portman, Brown, Whiddon juſtices, Baron Saxby, and Griffin attorney general, that the almoner ſhall not have the leaſe, but it ſhall be in order and diſtribution of the Exchequer inter poſſeſſiones archiepiſcopatus, becauſe as the power to grant it was not in the queen at the time of the grant, in as much as they were in the archbiſhop, &c. But Bromley Ch. J. Saunders, Stamford, Juſtices, Baron Brown, James Dyer, and Cordel the Solicitor e contra; for the king may grant a thing which is not in him at the time of the grant, but which may come afterwards, as the cuſtody and marriage of the heir of his tenant, or the temporalties of a biſhop cum * acciderint. But of eſcheat cum acciderit negatur penitus per Baker, tamen quære inde. The reporter adds, nota, it had been clear if the archbiſhop had been attainted of the treaſon at the time of the grant, the grant of the queen had been good. D. 108. a. pl. 29. the Biſhop of Chicheſter v. Webb.

* [83]

See (K. b)— (Z. b)— (A. c) to (E. c)— (R. c)— † (L. b)

(I. b.) What Things ſhall paſs by *General Words* with *Reference to other Perſon* or † Thing.

[1. IF the *king purchaſes a manor to which franchiſes real are regardant, and after gives the manor ſimul cum libertat. ad illud ſpectant.* and does *not ſay, ſimul cum libertat. ad illud ſpectant. at the time that the manor was in the hands of the feoffor of the king*, the franchiſes do not paſs by this general grant, becauſe the franchiſes of common right were annexed to the crown. ‡ 43 Aſſ. 10. per Thorpe. 43 E. 3. 20. b.]

‡ Br. Extinguiſhment, pl. 32. S. C.

[2. *But* otherwiſe it had been if *ſpecial mention* had been made as ‖ is aforeſaid in the charter. § 43 Aſſ. 10. 43 E. 3. 20. b.]

‖ Fol. 185.

§ Br. Extinguiſhment, pl. 32. cites S. C. For they were extinct before, as it ſeems, and by theſe words they paſs as appendants; per Thorpe. ——— Br. Incident, pl. 12. cites S. C.

There is a difference between what was *originally a flower of the crown*, and other things which are not, as *catalla felonum*, &c.

[3. If A. be ſeiſed of a manor, to which the franchiſes of *waiſe and ſtray, or ſuch like, are appendant*, and the *king purchaſes the manor with the appurtenances*, now the franchiſes are re-united to the crown, and not appendant to the manor; yet if *he grant the manor in ſo large and ample manner as A. had it*, the franchiſes will paſs as appurtenant to the manor. Co. Litt. 121. b.]

If ſuch come again to the king they are merged in the crown; but it is otherwiſe in caſe of a *leet, park, warren, toll*, &c. which were firſt created by the king. 2 Mod. 144. Hill. 28 & 29 Car. 2. C. B. in caſe of James v. Johnſon.

[4. If J. S. has certain *liberties appertaining to a manor*, and after the liberties *are reſumed*, and afterwards the *king grants the manor to J. D. with general words*, that he ſhall have *tot, talia, tanta & eaſdem libertates, &c. as J. S. had*, &c. This ſhall not paſs the liberties which J. S. had before the reſumption. P. 11 Car. B. R. ſaid by Juſtice Jones to be ſo adjudged.]

So of all the lands and tenements which were J. S.'s.

[5. If the king grants *all lands, tenements, and advowſons of churches which were the prior of N.'s*, this is a good grant. Br. Patents, pl. 87. cites 32 H. 6. 20, 21. per Cur.]

Ibid. ——— *So if* he be poſſeſſed of a ward, and grants all lands and tenements, advowſons and knights fees *which were J. N.'s, father of the ward.* Ibid. ——— *So* of all lands and tenements, &c. *which were J. P.'s, attainted of felony.* Ibid.

6. The

6. The king, *for* a great ſum of *money*, *bargains and ſells* to A. *the manor* of Stepney, *and* the *marſh of Stepney in fee*, and the king moreover grants, that the ſaid patentee ſhall have the ſaid manor and marſh *as amply as it came into the king's hands by the grant and ſurrender of the biſhop of London*, and in truth *the king had* not the marſh *by ſuch grant and ſurrender, but only the manor, and had the marſh from others.* Reſolved by all the judges of England, that the manor and marſh paſs well by this patent. The ſaid *reference* in the ſaid patent *to the* biſhop of London's *ſurrender is in the king's covenant, and not in the body of the grant;* and therefore it does not vitiate the patent, the firſt certainty in the king's patent is ſufficient, where the king is not deceived in his grant. Jenk. 261. pl. 60. cites Trin. 31 Eliz. Hare's caſe.

7. If the king *grants* over certain *lands which had come to his hands before, and* grants *further* to the grantee *tales libertates* privilegia juriſdictiones, &c. *as he, who was laſt ſeiſed of the lands had*, whereas the *king did not know the certainty of the liberties* and privileges, yet the grant is good enough, and the patentee may inquire what liberties and privileges the other had before; and in as much as this uncertainty may be *reduced to a certainty by inquiry* or other circumſtance the grant is good. 10 Rep. 65. a. Hill. 10 Jac. in Whiſtler's caſe.—Cites Pl. C. 12. b. in Fogaſſa's caſe. [84]

(K. b) Grants of the King. [*Words of Reference.*]

See (I. b)— (L. b)— (Z. b)— (A. c) to (E. c) and (R. c)

[1. IF the *abbot of D. had deodands* by grant of the king in a certain vill, and after *the abby comes to the king* with the poſſeſſions by the ſtatute of diſſolutions, and *the king grants the land and vill & bona & catalla felonum* by expreſs words, *and after makes a grant* with general words *of tot, talia, eadem & hujuſmodi franchiſia, libertates, &c. which the abbot* had in the ſaid land and vill: the patentee ſhall have, by thoſe general words, deodands which ſhall happen there, in as much as it has reference to the liberties which the abbot had. P. 11 Car. B. R. between the KING AND THE INHABITANTS OF ST. EDMOND'S BURY IN SUFFOLK. Adjudged in a quo warranto and plea made thereto.]

If an abbot was ſeiſed of a manor which had waifs and eſtrays appendant to it, & catalla felonum & utlagatorum, and the manor comes to the king's hands, and he grants over with a tot, talia, &c. there they paſs, and the ſecond grantee ſhall have waifs and eſtrays as appendant to the manor, but not catalla felonum & utlagatorum, unleſs he has ſpecial grant of them by deed. Jo. 349. in Itin. de Waltham.

[2. If the *rectory impropriate of W. to which an advowſon of a vicarage is appendant, comes to the king* by eſcheat *by attainder of J. S.* and the *king ex certa ſcientia & mero motu* grants to B. in fee all the poſſeſſions of the glebe and tithes of the rectory by ſpecial and particular names, and generally *omnia hereditamenta ſua quæcunque parcel. ſpect. vel pertin. dictæ rectoriæ de W.* (but no expreſs mention is made of the rectory, or of the advowſon, &c.) *adeo plene & in tam amplis modo & forma qualitate & conditione prout dictus J. S. ea habuit & prout ad manus ipſius regis devenerunt ſeu devenire debuerunt.* In this caſe, by this grant and the ſaid general words, the advowſon

Bend. 252. pl. 270. S. C. with the pleadings, adjudged.— S. C. cited 10 Rep. 65. b. Hill. 10 Jac. in Whiſtler's caſe. — 2 Mod. 1. Hill. 26 H. &c.

27 Car. 2. the King v. the Biſhop of Rocheſter

advowſon of the vicarage ſhall paſs, and by the ſaid words adeo plene, &c. prout, &c. & ex gratia ſpeciali, certa ſcientia, &c. the parſonage ſhall paſs alſo. D. 18 El. 350, 351. 21, 22. adjudged; for the queen by ignorance is not deceived.]

3. If the king has a *manor by eſcheat or* by *purchaſe*, and grants the manor *as entirely as J. N. held it, or as it came to his hands by eſcheat*, an advowſon appendant paſſes without the other words; for it ſhall be intended, that the king is apprized of his right; per Thorp quod Curia conceſſit. Br. Patents, pl. 6. cites 43 E. 3. 22.

[85]

See (I. b) (K. b) (Z. b) (A. c) to (E. c) & (R. c)

(L. b) What Things ſhall paſs by general Words with Reference to *other Thing*.

The caſe was this, viz. Queen Elizabeth being *ſeiſed of a manor*, to which an *advowſon* was *appendant* in her demeſne, as of fee in right of her crown, *granted the* ſaid *manor*, with the appurtenances, *for* 21 *years, excepting the advowſon*; and afterwards reciting the ſaid demiſe and exception, ſhe *made another grant to the ſame grantee for another term* of years, *with the like exception*. King James, in conſideration of ſervice, ex certa ſcientia, &c. *granted the manor* cum ſuis juribus, &c. to G. H. *exceptis quæ in eiſdem literis patentibus excipiuntur*, and mentions the leaſe in reverſion, and the like exception therein; but then follows this clauſe, *& ulterius de uberiori gratia* noſtra & ex certa ſcientia, &c. damus *omnia et ſingula tenementa prædicto manerio quoquo modo ſpectant, &c.* Et ulterius damus, &c. to the ſaid G. H. and his heirs the ſaid manor ac cætera omnia & ſingula præmiſſa cum eorum pertinentiis *adeo plene, &c. as the ſame came to him, and now are in his hands*. And it was reſolved as here. And, 2dly, It was reſolved, that if thoſe words (adeo plene et integre) had been omitted, then it would not have paſſed by the firſt clauſe, but by the addition of the laſt clauſe, all the parts of the patent taking effect at one and the ſame time, the advowſon ſhall paſs appendant. And, 3dly, Though the firſt clauſe of the grant refers to the demiſe in which the advowſon is excepted, yet by the middle clauſe, all tenements, &c. pertaining to the ſaid manor are granted; and the laſt clauſe grants the manor with the appurtenances, &c. adeo plene. 4thly, It was reſolved, without any difficulty, that the exception ſhall be extended only to the leaſes recited, and not to be any exception out of the letters patents of the fee ſimple. And judgment was given, that the advowſon paſſed. 10 Rep. 63. Hill. 10 Jac. *Whiſtler*'s caſe.—S. C. cited 2 Mod. 1. Hill. 26 & 27 Car. 2. C. B. in caſe of the King v. the Biſhop of Rocheſter.—S. C. cited 2 Mod. 107. Trin. 28 Car. 2. in Scacc. in caſe of the Attorney General v. Sir Edward Turner.—S. C. cited Hob. 170. Hill. 12 Jac. Stukely v. Butler.

[1. WHEN the charter of the king *in general terms refers to a certainty*, this contains as expreſs mention as [if] the certainty had been expreſſed in the charter, though the certainty to which the reference is, be *not of record, but lies in averment by matter en pais or in fact*. Co. 10. WHISTLER, 64. Reſolved.]

[2. The *prior of Chriſtchurch*, in the county of Southampton, was *ſeized of the manor* of Chriſtchurch, *and of a free fiſhing in groſs in the river of Avon in Chriſtchurch; and all this came* by the diſſolution of monaſteries in 31 H. 8. *to the king*; and the *king grants the manor* of Chriſtchurch, *and the ſcite of the ſaid priory, and all lands, tenements, and hereditaments in Chriſtchurch* aforeſaid, *at any time appertaining to the ſaid priory; and all liberties, privileges, free warrens, free fiſhings, &c. * belonging to the ſaid manor*. The ſaid fiſhery which the prior had in groſs ſhall paſs by this grant; for it will paſs by the general words of (all lands, tenements, and hereditaments at any time belonging to the ſaid priory), this being an hereditament belonging to the priory; and the laſt words, in which the free fiſhery is expreſsly granted with a *reſtriction (appurtenant to the ſaid manor)* will not reſtrain the firſt general words, but the piſchary in groſs ſhall paſs by it; for the laſt words were only

* Fol. 186.

in

in majorem cautelam. Mich. 11 Car. B. R. between Lord ARUNDEL, of WARDER, and Alderman VENN, per Curiam. Reſolved and ruled accordingly upon evidence at the bar.]

[3. *King Ed. 6. was ſeized in fee of the manor of C. of which a wood, containing* 300 *acres, was parcel*; he *granted the ſaid wood in fee*, and after the ſaid *wood reverted to him as eſcheat* for treaſon, afterwards *queen Mary granted the ſaid wood in fee*, the *grantee regranted it to queen Elizabeth*; and afterwards *queen Elizabeth granted the manor & omnes boſcos modo vel antehac cognit. vel reputat. ut pars membrum vel parcell' ejuſdem manerii* to the earl of Leiceſter in fee. In this caſe, by thoſe words the woods ſhall paſs; for the word *antehac* in caſe of the king may well have retroſpect to the time of E. 6. but not ultra if the word *unquam* be not adjoined to it. But in caſe of a ſubject, the word (antehac) without the word unquam precedent ſhall be conſtrued *quocunque tempore præterito*. D. 20 El. 362. And ſame caſe reported with the pleading. Co. Ent. 381. adjudged. Et ibidem, 383, 384. the reaſons ſhewn of the judgment.] S. C. cited 6 Rep. 60. b. Mich. 4 Jac. C. B. in Sir Moyle Finch's caſe. [86]

[4. If the *kings grants the manor of D.* with the appurtenances, *and all* other lands, paſtures, woods, et *hereditamenta antehac* cognita, uſitata, accepta vel *reputata ut membrum* vel parcella manerii prædicti, *a wood which is not parcel of the manor truly*, and in right, ſcilicet, *in facto et jure*, ſhall not paſs, though it be averred, that the ſaid wood adtunc antea fuit reputat. & parcel' manerii predicti; without ſaying, that it had been reputed parcel *time out of mind*. For matter of inheritance cannot take any good foundation without coupling and annexing time of preſcription. Mich. 21, 22 El. in Scacc. Rot. 302. Adjudged, quod vide in the New Entries, 380, where the reaſons of the judgment are entered upon record; this was upon a demurrer between the KING and IMBER and WILKIN defendants.]

[5. And *in the ſaid caſe* if it had been *averred*, that the wood was reputed parcel of the manor *time out of mind*, &c. though in caſe of a common perſon, *proofs of ſuch iſſue might be by* vulgar and diffuſed reputation of people of the ſame vill, or * of our or of other manor and manors, or vills adjoining, &c. or of the body of the county, &c. yet in caſe of the king in ſuch iſſues [as to] the word (reput.) the evidence or proof ſhall not be by ſuch vulgar and diffuſed reputation of the people; but the proofs *ought to be by ſome matter of record or writing*, as by the expreſs valuation of it between the prince and the ſubject, in the particulars of the purchaſe, or in the ſurveys and books of accounts of the auditors and receivers, bailiffs, and ſuch officers and miniſters always entered and anſwered in the rolls and books as parcel of the manor; otherwiſe, it is not any proof of the reputation in caſe of the king. In the ſaid caſe of 21 and 22 El. between the QUEEN, plaintiff, and IMBER and WILKIN, defendants; reſolved per Curiam, as it is entered upon the record in the ſaid New Entries, 380.] * Orig. [Nottam.]

[6. If there were *two rectories and two rectors in one church*, and ſo two ſeveral advowſons, and afterwards they *are ſeverally appropriated to one religious hoſpital as ſeveral rectories, and at ſeveral times, and the rectories of them appropriated* 33 *E.* 3. *but always after enjoyed* See (Z. b) pl. 3. S. C.

* Fol. 187.

by the hoſpital *as one rectory appropriate; and ſo reputed* to be one rectory * *till the diſſolution* of the hoſpital, which came to H. 8. by the ſtatute of 31 H. 8. and afterwards *it is granted by queen Elizabeth by the name* de *tota illa rectoria noſtra*, &c. where in truth they were at the commencement ſeveral rectories, yet it ſhall be a good grant, by reaſon of the reputation that it was one rectory ſo long time. Mich. 15 Car. B. R. between GOADBIE and BARLOE, per Curiam. Reſolved upon evidence upon a trial at the bar, which concerned Mr. STAUGHTON, the patentee, for the rectory of Moreton, which was parcel of the poſſeſſions of the hoſpital of St. John's in Warwick.]

7. King John granted to the corporation of Waterford *cuſtumam vocatam* the *murage de omnibus rebus venalibus* infra dictam civitatem emptis ſeu venditis *adeo plene et integre ſicut burgenſes villa de Briſtol habebant*, &c. And it was reſolved, that by thoſe words no cuſtom or ſubſidy is granted to them, for this reaſon, (among others,) that the reference to the vill of Briſtol is uncertain and void, becauſe there is no ſuch vill or borough called Briſtol in this kingdom of Ireland; and the vill of Briſtol intended in the charter being in England, the averment that the burgeſſes of Briſtol had murage at the time of this grant cannot be tried here. Dav. Rep. 13. a. b. Mich. 5 Jac. B. R. in the caſe of cuſtoms.

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See (M. b. 2).

(M. b) Grant of the King. *Prerogatives*, [*or other Things.*] What Things he may grant over.

[1. 8 E. 4. Rot. Clauſo Memb. 6. Dorſo. *Verdun habebat omnes libertates ad coronam & regiam dignitatem pertinentes excepta tamen crocea*, and thoſe by grant of the king, &c.]

[2. 12 E. 1 Rot. Chartar. Memb. 3. *pro civibus London, vicecomitatus de London & Middleſex* granted to them by H. 3. and other liberties, *quod faciat vicecomites*, &c.]

[3. The king may *appoint another to aſſent to the election of* an abbot or *a biſhop*. 1 E. 1. Rot. Pat. Memb. 15, 16. 6 E. 1. Memb. 14. F. 10. 7 E. 1. Memb. 7.]

[4. 10 E. 1. Rot. Pat. Memb. 2. *power* given to one *to aſſent to the election of a future abbot*, &c.]

[5. 10 E. 1. Rot. Pat. Memb. 4. *poteſtas conceſſa Edmundo Com. Cornub. admittend. Nomine & vice regis majorem Oxon, cum ipſum ex parte communitatum villæ prediclæ ſibi preſentari contigerit. Conſimil.* ibidem, *pro majore & vicecomitibus London.*]

[6. Vide grant *to the cuſtos regni* of divers things. 1 E. 2. Rot. Pat. Part 2. Memb. 28.]

The king cannot give a corody in a religious houſe, or preſent one to the church of his patronage in reverſion, as is agreed in 39 H. 6. 48. For in thoſe and other like caſes, the king has only a preſentment or commendation of a perſon, when the corody or church is void. 8 Rep. 55. b. Mich. 6 Jac. in the earl of Rutland's caſe.

[7. The king cannot grant the *next lapſe of the church of D.* which ſhall happen, before it happens. Hob. R. 208.]

[8. If a *lapſe happens to the king*, he cannot grant it over; for *it is a truſt* in himſelf. Hob. R. 208.]

[9. The

[9. The king cannot grant to another *officium pincernæ*, called the butler of London, and the *butlerage and priſage of wine habend. for* 24 *years*; for it is not grantable over, it being but purveyance for wine for the king's houſe. M. 40, 41 El. B. R. Sir THOMAS VAVISOR's caſe. Dub. 5. Quere.]

[10. The king cannot grant over to another *the ſole making of gunpowder for to dig in the ſoil of other men*; for it is purveyance to dig in another's ſoil, [and] is a prerogative not grantable over. M. 10 Ja. B. Sir ROBERT JOHNSON's caſe; per Curiam.] S. P. Reſolved 12 Rep. 13. in the caſe of ſalt-petre.

[11. Trin. 2 E. 3. B. R. Rot. The king granted to the abbot of Reading, inter alia, *nec faciat milites niſi in ſacra veſte Chriſti* 106. *in qua parvulos ſuſcipere modeſte caveat, maturos autem ſeu diſcretos tam clericos quam laicos provide ſuſcipiat, &c.*]

[12. Rot. Parl. 25 E. 3. 2. Part N. 11. all the *profits of fines, amercements of the labourers, ſellers of victuals againſt the ſtatute*, granted to the commons for eaſe of the poor, in payment of tenths during this payment.] Prynne's Cott. Rec. Abr. No 11. is, that the king, in conſideration of the great dearth of corn, releaſeth the half of his proviſion appointed to be taken by the purveyors. But No 18 is, that the fines of labourers may be paid to the chief taxes of this fifteenth, in aid of the poor.

[13. If A. leaſes land, reſerving rent, and after is outlawed, and an inquiſition thereof found, and a ſeiſure of it made, and the king grants over *the* * *benefit of the outlawry quam diu in manibus ſuis*, it ſhall continue, the patentee ſhall have the *rent reſerved upon the leaſe*, which ſhall become due during the outlawry, ſo long as it continues in the hands of the king. Mich. 10 Car. B. R. between CULPEPPER and COVENEY. Per Curiam. Reſolved upon a ſpecial verdict. Intratur Tr. 7 Car. Rot. 835.] * Fol. 188.

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14. The king cannot grant to another the *year, day, and waſt* given him by the law; for he cannot transfer his mercy. Jenk. 307. pl. 83. cites 3 E. 3. Fitzh. Corone, 310. Br. Prerogative, pl. 104. cites S. C.—— S. P. By all the judges. Jenk. 79. pl. 55. cites 1 H. 5. Fitzh. Executors, 108.——S. P. Jenk. 304. pl. 77. cites 3 E. 3. Corone Fitzh. 310. Stamf. 50.

15. The king ſhall have all *tithes* which are in places that are *out of any pariſh*, as in Inglewood Foreſt, &c. and may grant them over by his letters patents. Br. Patents, pl. 33. cites 22 Aſſ. 75. Br. Prerogative, pl. 143. cites S. C.—— Br. Diſmes, pl. 10. cites S. C.—— Br. Prerogative, pl. 47. cites S. C.——Br. Scire Facias, pl. 154. cites S. C.

16. Note, That the king by charter by expreſs words may grant *to a commonalty or corporation, to make another* commonalty or *corporation*. Br. Prerogative, pl. 53. cites 49 Aſſ. 8. Br. Patents, pl. 41. cites S. C.

17. The king may grant over *a choſe in action*. Br. Choſe in Action, pl. 1. cites 3 H. 4. 8. *As* if he has an *annuity* out of the priory of D. he may grant the annuity over, and the grantee ſhall have writ of annuity. Ibid.—— Br. Prerogative, pl. 11. cites S. C.—— *So* where a man has *raviſhed the king's ward*, he may grant over his action thereof. Br. Patents, pl. 55. cites 5 E. 4. 8.——He may grant over his action and his choſe in action. Br. Choſe in Action, pl. 6. cites 2 H. 7. 8.——The king may *grant action* after that he has cauſe of action; as of debt, *and things certain, but not* of *treſpaſs* and things *uncertain*. D. 1. b. pl. 7.——S. P. Br. Choſe in Action, pl. 11. cites 5 E. 4. 8.——Br. Patents, pl. 55. cites S. C.

It was ſaid for law, that the king may grant a *choſe in action*, which is *perſonal*, as debt and damages, &c. *or a choſe mixt*, as the ward of the body, *but not a choſe real*, as action of land, &c. as rights, entries, actions, &c. which abbots may have, and that the king ſhall have thoſe by the ſtatute of diſſolution of abbeys 31 *H.* 8. thoſe choſes in action the king cannot grant. But ſee if there are not *words in this ſtatute to put the king in poſſeſſion, though the abbot was put to his action.* Br. Patents, pl. 98. cites 32 H. 8.

The king may grant a choſe in action, but *not without ſpecial words.* 3 Lev. 135. Mich. 35 Car. 2. C. B. Travel v. Cartaret. —— S. P. 12 Rep. 2. Ford v. Sheldon.

Br. Contempts, pl. 4. cites S.C.

18. If the king grants to a man to have a *ferry*, and to take of every one a halfpenny, &c. this is good; for it is quid pro quo. Br. Patents, pl. 12. cites 13 H. 4. 14.

So of pontage of every one paſſing a halfpenny, to make the bridge; for they have *quid pro quo.* Ibid.

19. *And* the king by his patent may grant to a man *to take a halfpenny of every man for incloſing of his vill, to have paſſage there,* Ibid. per Gaſcoign.

——*So of toll* for the ſame cauſe. Ibid. ——Br. Contempts, pl. 4. cites S. C. ——*But* the king by his letters patents cannot grant *murage*, &c. to take ſuch ſum, &c. becauſe it is in *charge of his people*, which *cannot be without parliament.* Ibid.

The king may grant *toll to be taken in fair or market*, but *not* to take *for paſſage in the highway*, viz. *thorough-toll*; for this cannot be taken but by *preſcription.* Br. Prerogative, pl. 102. cites 50 E. 3. —— He may grant *toll, fair, market*, &c. *but not to have aſſiſe of freſh force, nor toll traverſe*, nor *toll-thorough*; for thoſe are by cuſtom, which *cannot commence* at this day *by grant*; for the king cannot make a law by his grant. Br. Patents, pl. 100. cites 37 H. 8.

It is agreed, that the king cannot grant *toll to be taken in the highway*, which is free; but *pontage and murage* may be granted, becauſe there is *quid pro quo*; but then the payment thereof ſhall be no longer made than the bridge continues for the uſe, or the wall continues for the defence of the ſubject. Noy, 176. Darcy v. Allen.

Br. Prerogative, pl. 18. cites S.C.

20. The king cannot grant *his prerogative.* Br. Patents, pl. 13. cites 14 H. 4. 9.

Ibid. pl. 60. cites 2 H. 7. 13. S. P. Per Kebill. ——Though the king grants *jura regalia*, yet it ſhall not exclude the king himſelf. Per Heath J. Mar. 165. Hill. 17 Car. Anon.

Holt Ch. J. ſaid, he did not know any reaſon for a *difference* between the *ancient lands of the inheritance of the crown, and other eſtates* which the king has, which are of *an higher nature*, and called the *flowers of the crown*, as waifs, ſtrays, &c. as in 9 Rep. the ABBOT OF STRATA MARCELLA's caſe; alſo *hundreds* might be aliened in fee, till for ſeveral inconveniencies it was reſtrained by the ſtatute of E. 3. and the king might erect a *county palatine*, and ſeparate it from the immediate government of the king, with a power to pardon treaſons, felonies, &c. till the ſtatute of 27 *H.* 8. cap. 24. which re unites the liberties and privileges to the crown. Skin. 604. Mich. 7 W. 3. in Cam. Scacc. in the Banker's caſe.

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* The king granted to the abbot of Whitney the *cuſtody of a port* which is as it were a key of the kingdom, and therefore the grant was void, and ſo adjudged; and ſuch grants are expreſsly againſt 9 *E.* 3. 1. Godb. 254. Paſch. 12 Jac. in the caſe of clothworkers of Ipſwich. ——Roll. R. 5. in S. C. S. P. ——Jenk. 304. pl. 77.

21. The king cannot *diſpoſe of his crown by teſtament*, though it be *under the great ſeal*; nor of the * *ports* of the kingdom; *nor* of the *jewels of the crown*; nor of *power to pardon* † *treaſon or felony* within this kingdom; *nor* of power *to make* ‡ *judges, juſtices* of the peace, *or ſheriffs*; nor of ſuch which concern government in a high degree; of theſe the king can neither make a grant nor a teſtament. He may grant the ‖ *lands* which he has *in jure coronæ*, *by* his letters *patents*, *or* by his *will under the great ſeal.* By all the Judges. Jenk. 79. pl. 55. cites 1 H. 5. Fitzh. Executors, 108.

† A grant to pardon treaſons is void; but *in Scotland and Ireland*, ſuch grant to be executed in the name of the king is good. And ſo to make knights there. The *diſtance of place and ſudden occaſions*, and the king's abience make the difference. By all the Judges of England. Jenk. 171. pl. 36. cites 2 H. 7. 16.

‡ The king cannot *grant to a man to make an officer of record to ſerve the king's court, nor to make a juſtice*; quære; for cities and burghes have ſuch liberty. Br. Patents, pl. 45. cites 2 H. 7. 6.

The king cannot grant a power to any to make juſtices of oyer and terminer; but he ought to conſtitute ſuch juſtices himſelf; for it is a high prerogative. Jenk. 171. pl. 36. cites 1 H. 7. 16.

Grant

Grant of the king made *to the abbot of St. Alban's to make juſtices*, is not good; for it is a *thing annexed to the crown*, and cannot be ſevered, as grant *to make denizens, or to pardon felons* is not good; *contrary of ſteward in leet, or juſtice*, where conuſance of plea is; for thoſe are the ſtewards or juſtices of the king; but the grant above to the abbot, to make juſticiarios ſuos [is not good], and ſuch cannot *allow clergy to a felon*, nor the ordinary is not bound to obey him. Br. Patents, pl. 111. cites 20 H. 7. 6. 8. Fineux Juſtice.

‖ The king has power to alien or charge the eſtate, which he has in jure coronæ; per Holt Ch. J. Mich. 7 W. 3. Skin. 602, 603. in the Banker's caſe.

22. If the king grants to me a *fair and toll* in B. this is a good grant; per Hunt. Br. Patents, pl. 16. cites 19 H. 6. 62.

23. Præcipe in capite, the king cannot grant *to deviſe land teſtament;* nor *that the youngeſt ſon ſhall inherit;* nor *that land ſhall be ancient demeſne*, or the like, and yet preſcription and cuſtom lies of them. Br. Patents, pl. 25. cites 37 H. 6. 27.

The king cannot grant that lands ſhall be deviſable, borough Engliſh, gavelkind, nor the like; for thoſe are by cuſtom, which cannot commence at this day by grant; for the king cannot make a law by his grant. Br. Patents, pl. 100. cites 37 H. 8. ——S. P. Br. Prerogative, pl. 53. cites 49 Aſſ. 8. ——Br. Patents, pl. 41. cites S. C.

24. The king might aſſign part of the *tenths granted to him by the clergy* to certain of his creditors, and by this the clergy became debtors to them, and the collectors charged, and the king ouſted of it. Br. Grants, pl. 111. cites 1 H. 7. 8.

Br. Choſe in Action, pl. 7. cites S. C.—— Br. Charters de Pardon, pl. 37. cites S. C.——Br. Quinzime, pl. 7. cites S. C.

25. The king may grant over his *rent, and* his *condition to re-enter* for non-payment. Br. Choſe in Action, pl. 6. cites 2 H. 7. 8.

S. P. per Huſſey Ch. J. Br. Patents, pl. 46. cites 2 H. 7. 7.——S. P. per Weſton, J. Pl. C. 243. in the caſe of Wyllion v. Lord Barkley.

26. The king *may be founder, and have no corody;* as where the king *grants at the commencement, that neither he nor his heirs ſhall have the corody*, and he may releaſe it after; for the name of founder remains. Br. Patents, pl. 57. cites 8 H. 7. 12.

And ſo he may releaſe *all the tenure to his tenant, except fealty*, for there tenure remains. Ibid.——*But* he *cannot* releaſe *all the tenure*; for all land ſhall be held mediately or immediately. Ibid.

27. The queen has right to certain land by the *attainder of* J. S. who was a *diſſeiſee*. In this caſe, if ſuch *a naked right* may be granted at all, it ought to be granted with ſpecial recital by expreſs and ſpecial words, per Cur. 3 Rep. 4. b. Trin. 35 Eliz. in the Marquis of Wincheſter's caſe.——Cites 8 Eliz. Cormer's caſe, alias Cromer's caſe.

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28. A. obtained a *licence* from the king *to go beyond ſea* for a certain time, *and after* the time expired, A. *is commanded* under the privy ſeal, upon his allegiance, *to return* to England, *and does not* obey. It was reſolved by all the judges of England, that if A. in this caſe has a manor where there are copyholds, the king may grant the copyholds. Jenk. 246. pl. 35. cites 23 Eliz. D. 275. 177.

29. King H. 6. granted to the corporation of dyers within London, power to ſearch, &c. and if they found any *cloth died with logwood*, that the cloth *ſhould be forfeit;* and it was adjudged that this

this charter concerning the forfeiture was againſt the law of the land, and 9 H. 3. 29. For *no forfeiture can grow by letters patents.* 2 Inſt. 47.

30. It was reſolved, that the king may grant *wild ſwans unmarked, and their cignets*, as in Rot. Par. An. 30 E. 3. Part. 2. Num. 20. the king granted to C. W. all wild cignets unmarked between Oxford and London for ſeven years. And in eodem Rot. An. 16 R. 2. Part. 1. Num. 39. ſuch a grant of wild cignets in the county of Cambridge to B. Bereford Knight. And in eodem Rot. An. 1 H. 4. Part. 6. Num. 14. a grant was made to John Fenn, to ſurvey and keep all wild cignets unmarked, *ita quod de proficuo reſpondeat ad Scaccarium*, by which it appears, that the king may grant wild ſwans unmarked. 7 Rep. 18. a. Trin. 34 Eliz. in the caſe of Swans.

31. If *penalties* are *given by acts of parliament for relief of the poor*, the king cannot diſpoſe of them otherwiſe. Jenk. 307. pl. 83. cites Hill. 2 Jac. 7 Co. 36. b.

32. King cannot grant *reverſionem officii*; for he has no reverſion, but inheritance grantable in reverſion. 8 Rep. 57. a. Mich. 6 Jac. in the Earl of Rutland's caſe.

33. The king may grant a *rent out of a fair, or a thing not manurable*, as out of a bailiwick, tithes, &c. Jenk. 14. pl. 24.

34. The king by his grant cannot *exclude himſelf from proſecuting any plea of the crown*; for it concerns the public government, and cannot be ſeparated from his perſon. Jenk. 190. pl. 93.

35. King Ch. 2. being indebted to divers perſons in 416,000l. 8s. 2d. for the payment of the intereſt of that ſum, grants for him, his heirs and ſucceſſors, 25,000l. *per ann. to be paid out of his revenue of the hereditary exciſe.* And though it was objected, that this revenue was given by act of parliament, and that it ariſes out of the purſe of the people, and that they are not alienable, becauſe they come in the place of an inheritance, which the king could not have aliened as tenures in capite, purveyance, &c. yet adjudged that the grant was good. Skin. 601, &c. Mich. 7 W. 3. in Cam. Scacc. The Banker's caſe.

S.C. Freem. Rep. 331. in the Exchequer, Hill. 1691. And it was agreed by Atkins, Turton, and Powel, but Letchmere contra, that the grant was good to charge the ſucceſſor. It was admitted, that the king may grant an *annuity*, or charge his revenue, and cited many books to that purpoſe; but it *muſt be ſaid of whoſe lands to be received*, or elſe it is not good; for *he cannot charge his perſon*; and that it is good, notwithſtanding it is out of an incorporeal inheritance. And though it was objected that this is but an authority, and ſo void by the king's death, becauſe revocable; yet they held it an intereſt: and a licence coupled with an intereſt is irrevocable. Upon the petition of Hornbee, Williamſon, Smith, and Stone.

36. Whether the king may grant the *inheritance of a viſitation* may be a queſtion; for it may be ſaid to be privy to his perſon; but without doubt he may grant, to whom he pleaſes, to be viſitor *for a time*. Per Holt Ch. J. 12 Mod. 233. Mich. 10 W. 3. Anon.

37. An appeal lies to the king in council from a decree made in the Iſle of Man by the Lord Derby, though the grant was *made of the Iſle of Man without any reſervation of the ſubject's right of appeal* to the crown; per Ld. Ch. J. Parker; for that otherwiſe there would be a failure of juſtice; and the lords of the council proceeded

ceeded in the appeal, and determined in favour of the appellant, and the Lord Derby ſubmitted and conſented to the examination. Wms. Rep. 329. Mich. 1716. Chriſtian v. Coreen.

(M. b. 2) Grants of the King. What Things he may grant. *Diſpenſations, or Forfeitures* on Penal Statutes.

[91] See (M. b)

1. THE king cannot *grant* to any one a *power to diſpenſe with any penal ſtatute.* Juſtice and mercy are inſeparably annexed to the crown, and cannot be transferred; by all the Judges of England. Jenk. 307. pl. 83. cites Hill. 2 Jac. 7 Co. 36. b, &c. the caſe of Diſpenſations.

S. P. Hob. 183. Hill. 14 Jac. in caſe of Daviſon v. Barber.— S. P. Hob. 155. Mich. 10 Jac. in caſe of Colt and Glover v. the Biſhop of Coventry.——The king cannot grant to any ſubject power to diſpenſe with as many offenders as he pleaſes; by all the judges of England. Mo. 764. Mich. 3 Jac. Richards's caſe.

2. Queen Eliz. under the great ſeal, granted the penalty and benefit of a penal ſtatute, with power to diſpenſe with the ſaid ſtatute, and to make warrant to the Ld. Chancellor, or Keeper, to make as many diſpenſations and to whom he pleaſe. Upon a reference of this grant, it was reſolved by all the juſtices of England, that the ſaid grant was utterly againſt law; and alſo, that when a ſtatute is made by parliament *pro bono publico*, the king cannot give the penalty, benefit, and diſpenſation of ſuch act to any ſubject, nor empower any ſubject to diſpenſe with it, or make warrant to the great ſeal to grant licences in ſuch a caſe; for in ſuch caſe the king, who is the fountain of juſtice and mercy, is truſted with it pro bono publico, and this confidence is inſeparably annexed to the perſon of the king in ſo high a point of ſovereignty, that he cannot transfer it to the diſpoſition or power of any private perſon, or to any private uſe; for it was committed to the king by all his ſubjects for the public good. And if he may grant the penalty of one act, he may do ſo in infinitum; nor was ſuch grant known to have been made before; though true it is, that the king, upon reaſons moving him thereto, in reſpect of time, place, or perſon, &c. may make a non-obſtante, and diſpenſe with any particular perſon that he ſhall not incur the penalty of a ſtatute, and with this the books agree. 7 Rep. 36. Hill. 2 Jac. the caſe of Penal Statutes.

3. The king cannot grant over the *penalties of penal ſtatutes*; per all the Juſtices of England. Mo. 764. Mich. 3 Jac. Richard's caſe.

4. 21 *Jac.* 1. 3. *ſ.* 1. *It is enacted, that all commiſſions, grants, licences, charters, and letters patents, heretofore granted or made to any perſon or perſons, bodies politic or corporate, of any power, liberty, or faculty, to diſpenſe with any others, * or to give licence or toleration to do, uſe, or exerciſe any thing againſt the tenure or purport of any law or ſtatute, or to give or make any warrant for any ſuch diſpenſation, licence, or toleration, to be had, or made, or to agree, or compound*

It appears by the preamble of this act, that all grants of the benefit of any penal law, or of power to

diſpenſe with the law, or to compound for the forfeiture, are contrary to the ancient fundamental laws of this realm.

pound with any others for any penalty or forfeitures limited by any eſtate, or of any grant or promiſe of the benefit, profit, or commodity of any forfeiture, penalty, or ſum of money, that is or ſhall be due by any ſtatute before judgment thereupon had, and all proclamations, inhibitions, reſtraints, warrants of aſſiſtance, and all other matters and things whatſoever any way tending to the inſtituting, erecting, ſtrengthening, furthering, or countenancing of the ſame, or any of them, are altogether contrary to the laws of this realm, in no wiſe to be put in execution.

It was one of the articles whereupon the Spencers in the reign of E. 2. were ſentenced, that they procured the king to make many diſpenſations, and ſo by their ill counſel defeating that which the king had granted by parliament by good advice. In 50 E. 3. RICHARD LIONS, a merchant of London, and the LORD LATIMER were ſeverally ſentenced in parliament for procuring of licences and diſpenſations to tranſport wools, &c. 3 Inſt. 186. cap. 86.

† * The great inconvenience hereof appeared in the proceedings of EMPSON AND DUDLEY in the reign of H. 7. who had the office of maſters of the forfeitures, and by colour of their commiſſion and office did moſt intolerably and unlawfully oppreſs, burden, and depauperate the ſubjects. The like oppreſſion was uſed by certain commiſſioners for compoſitions to be made for offences committed againſt penal ſtatutes in the reign of Queen Mary. 3 Inſt. 187. cap. 86.

† [92]

And ſhall be for ever hereafter examined, heard, tried, and determined by and according to the common laws of this realm, and not otherwiſe, &c.

By this proviſo the judges before whom the cauſe depends, and that have power to hear and determine the ſame, who *are preſumed to be indifferent* between the king and the ſubject, may by warrant or privy ſeal, &c. compound, &c. for the king only, after plea pleaded by the defendant.

Provided alſo, that this act ſhall not extend to any warrant or privy ſeal made or directed, or to be made or directed by his majeſty, his heirs or ſucceſſors, to the juſtices of the court of King's Bench, Common Pleas, Barons of the Exchequer, &c. and other juſtices for the time being, having power to hear and determine, &c. to compound, &c.

5. 1 *W. & M. ſeſſ.* 2. *c.* 2. *ſ.* 1. *Grants and promiſes made of fines and forfeitures before any conviction or judgment againſt the perſons upon whom the ſame were to be levied, are utterly and directly contrary to the known laws and ſtatutes and freedom of this realm.*

(M. b. 3) Grant. What the King may grant. *Things not in Eſſe.*

Br. Contempts, pl. 4. cites 11 H. 4. 86. S. C.—Br. Patents, pl. 12. cites S. C.

1. THE *king granted the office of meaſurer of cloths in London to J. M. and writ awarded to the ſheriff to put him in poſſeſſion,* and the *mayor returned that there is no ſuch office;* the king *cannot make ſuch office in charge of his people* by his grant *without parliament,* and the return awarded good. Br. Retorn de Briefs, pl. 40. cites 12 H. 4.

2. It was agreed, that the king may grant *fines and amercements ariſing in his ordinary courts* whereof he is inheritable; quod nota; and yet they are not in eſſe at the time, &c. Br. Patents, pl. 16. cites 19 H. 6. 62.

3. If the king grants to his tenant *that his heir may enter without ſuing livery,* this is good, and yet it is not in the king at the time, &c. Per Yelverton, quod Markham conceſſit. Br. Patents, pl. 16. cites 19 H. 6. 62.

4. If

4. If the king grants to me, that *if I alien the manor of B. which I hold of him, that it ſhall be diſcharged of the fine*, by this I ſhall be diſcharged when I alien. Per Hody. Br. Patents, pl. 16. cites 19 H. 6. 62.

5. The queen ſeiſed of a *rectory appropriate* granted *advocationem eccleſiæ, &c.* Manwood Ch. Baron held, that the advowſon did not paſs, but remained appropriate as before, and that by the appropriation the advowſon was gone, and not in eſſe, and conſequently cannot be granted; and this grant is not helped by the ſtatute 4 & 5 *Mar.* of confirmation of the king's grants; for that *helps only miſrecitals, miſnamiag, or miſtaking, &c.* but here is no ſuch thing in rerum natura as is pretended to paſs by this grant. 2 Leon. 80. pl. 106. Trin. 26 Eliz. in the Exchequer. The Queen v. Lord Lumley.

6. In an information in the Exchequer, by Engliſh bill, for *derelict lands*, the caſe was, king James granted certain marſh-lands bordering on the ſea to T. S. and ex uberiori gratia, he *granted all the ſoil, ground, land, ſand*, and marſh land *contigue adjacen'* præmiſſis, which are *now overflowed and covered with ſea-water, & quæ ad aliquod tempus * in poſterum recuperat' forent per relictionem maris*, &c. *Non obſtante non nominando valorem, quantitatem vel qualitatem*; after this grant, 100 *acres more became derelict* and adjoining to the ſaid marſh-lands; and the queſtion was, who ſhould have thoſe lands, the king or the patentee? It was inſiſted, that the king ſhould have them, becauſe thoſe lands were derelict ſince the grant, and therefore ſhould not paſs by it; for the king cannot grant that which he had not; and that lands which he had by his prerogative will not paſs by thoſe general words in the grant; but it was anſwered, that the king may grant what is not actually in him at the time, and that here is as much certainty as the thing will admit; for it could not appear how many acres there would be; but admitting it to be incertain, it is made good by the non obſtante, which helps all defaults for want of information in the king; but it was held per Cur. (with the advice of the two Ch. Juſtices) that the grant was void as to the 100 acres, and that nothing paſſed by thoſe general words. 2 Lev. 171. Trin. 28 Car. 2. in Scacc. Attorney General v. Sir Edward Farmen.

Raym. 241. S. C.—2 Mod. 106. Attorney General and Sir Edward Turner ſeems to be S. C.—— But neither of them mentions any opinion of the Court.

* [93]

(M. b. 4) What the King may grant *during Nonage.*

1. 7 *Ed.* 6. 3. *Confirms the king's letters patents notwithſtanding his nonage, or any ſtatute heretofore made for the reſervation of tenures, rents, or tenths.*

2. *Leaſes* made by the king *of lands of the dutchy* of Lancaſter, are not voidable by the nonage of the king, in as much as they *paſs from his perſon as king*, and not as duke; for per nomen regis nomen ducis demergitur; by all the Juſtices of both Benches. D. 209. b. pl. 22. Mich. 3 & 4 Eliz. Anon.

S. P. whether the lands lie out of the dutchy of Lancaſter or within; and the law is all one where the leaſe is made of the land of the duchy, which is not in leaſe, to commence immediately,

immediately, and where it is of a leaſe of land of the dutchy to commence after another leaſe before made, the one nor the other is not avoidable by the non-age of the king; per all the Juſtices, Serjeants, and Counſel (except Ruſwell), Pl. C. 221. b. 4 Eliz. the caſe of the Dutchy of Lancaſter.

(M. b. 5) *What Things* the King may grant, *notwithſtanding a former Grant;* and in what Caſes ſuch a ſecond Grant ſhall be a Repeal of the firſt Grant.

1. THE king *granted* to W. T. a *ward, ſo long as it ſhall happen to be in our hands from heir to heir, &c.* Afterwards the *heir came to full age, and died before livery* ſued, or homage done; and after the *king granted the ward of this heir to H.* And the opinion of the Court was, that the ſecond grant is good, by reaſon that the firſt did not die in ward, becauſe he was of full age, notwithſtanding that he did not ſue his livery, nor do homage; and therefore theſe words (from heir to heir) are determined. Br. Patents, pl. 68. cites 14 E. 4. 7.

2. The king was founder of an abbey, and *granted a corody to a man who was thereof poſſeſſed;* and *after* the king *granted the ſame corody to the abbot and his ſucceſſors, and that they ſhall be quit of him and his heirs:* and ſome ſaid, that the grant was not good, becauſe the king had no corody at the time of the grant, as of an office; for the grantee is thereof poſſeſſed, and the king has no re-
[94] verſion in it; for the king himſelf cannot have the corody, nor be officer; and alſo corody is incident to the king as founder, and he cannot releaſe it any more than a tenure; and the Juſtices e contra. But in the caſe of the corody, the firſt grant was recited; and therefore the king is not deceived, and conſequently good; and this *ſhall enure by way of extinguiſhment.* Br. Patents, pl. 57. cites 8 H. 7. 12.

See (M. b. 4)

(M. b. 6) Leaſes and Grants of the King, as to the *Dutchy of Lancaſter*, Cornwall, *&c.*

Br. Feoffments, pl. 51. cites S. C.

1. *LAND of the dutchy of Lancaſter* ſhall paſs from the king *by letters patents only*, if it lies in the county palatine; *but if it lies out, then livery of and ſeiſin ought to be made* of them; for he has them as duke, and not as king. Br. Prerogative, pl. 72. cites 21 E. 4. 60.

S. C. cited 2 Lutw. 1237. in caſe of Aſtill v. Clark.

2. Grant of the *reverſion of dutchy lands* without attornment, under the dutchy ſeal, is a grant by record, and paſſes the reverſion as a fine, i. e. to *diveſt the eſtate without attornment;* but *not to make privity to have action* of *waſt*, according to Co. 4 Inſt. 209. But if the king will make *feoffment of it, livery ought to be*, as in caſe of a ſubject; for the king may do this by attorney. 1 Lev. 28. Paſch. 13 Car. 2. B. R. Carpenter v. Marſhall.

3. 5 *&* 6 *W. & M.* 18. Enacts, that *grants made by king Charles 2, &c. of any parcel of the dutchy of Cornwall ſhall be good.*

Provided

Provided that ſuch grants be for 31 years, or *determinable upon* three lives, and *not diſpuniſhable of* waſt; *and that the uſual rent be reſerved, and if no uſual, then a reaſonable rent, not being under the 20th part of the clear yearly value.*

And that covenants, *&c. ſhall bind reverſioners.*

Saving *to all perſons their rights, except the king and his heirs, and the duke of Cornwall and his heirs, &c.*

And that tenants compounding for the increaſed rent, the old rent, or other rent ſo compounded for, only to ſtand.

And that the fees, &c. for grants *of ſmall value ſhall not exceed ſuch a certain ſum, and impoſes a* penalty *upon officers offending.*

4. 12 & 13 *W.* 3. 13. Enacts, that *all leaſes, &c. made by King Ch.* 2. *King Ja.* 2. *or King William and Queen Mary, &c. of any offices, lands, &c. in the dutchy of Cornwall, ſhall be good in law, &c.*

Provided that the leaſes be not for more than three lives, or thirty-one years.

And that covenants, *&c. in ſuch leaſe or grant, &c. ſhall be good and effectual in law, according to the words.*

Saving *to all perſons, &c. their right, except the king and his heirs, and the duke of Cornwall and his heirs.*

And that tenants compounding for taking off any increaſed rent, *&c. on payment of compoſition money, ſuch increaſed rent to ceaſe, &c.*

And that the king may make any further grant of grounds, &c. being part of his manor of Greenwich, to the uſe of Greenwich Hoſpital.

5. 6 *Annæ*, 25. Enacts, that *all leaſes made of lands, &c. parcel of the dutchy of Cornwall,* by copy of court roll, *or within 7 years next enſuing, according to cuſtom of manors of the ſaid dutchy, ſhall be good in law.*

Provided that no leaſe be for more than 3 lives, or 31 years.

And that all *covenants, &c. in leaſes, &c. ſhall be good according to the words.*

Saving *to all perſons, &c. their right, except the queen and her heirs, and the duke of Cornwall and his heirs.*

And on payment of compoſition money for taking off increaſed rent, *ſuch increaſed rent ſhall ceaſe.* [95]

(M. b. 7) What the King may grant *without Record* or Inrolment.

1. *NOthing* ſhall *paſs* from the king *but by matter of record;* per the juſtices of C. B. Br. Prerogative, pl. 70. cites 14 E. 4. 2. The king may give *ſeveral things without writing, and yet* if it comes in ure *in* the *law, it is good for nothing*; per Brian clearly. Br. Prerogative, pl. 61. cites 4 H. 7. 6. *But* Shelley J. was preciſe in the time of H. 8. that it is a good gift of *chattels moveable* without writing, as of a horſe, &c. Ibid. ——S. P. Br. Prerogative, pl. 70. cites 35 H. 8.

2. If

2. If the king *grants the reverſion of his tenant for life by patent*, this is good without attornment, by reaſon that the letters patents of the king *are matter of record*. Br. Prerogative, pl. 95. cites 34 H. 6. 7, 8.

This was a temporary act, but *made perpetual by* 7 & 8 *W.* 3. *cap.* 36. *ſ.* 4.

3. 4 & 5 *W.* & *M.* 22. *No corporations, lords of manors, or others having grants by charter or other good conveyances, who have inrolled and had the ſame* allowed by the court of King's Bench, *ſhall be compelled to* plead the ſame to any inquiſition, *returned by any coroner. And if any corporations, lords of manors, or others, have or ſhall have ſuch grants from the crown for* felons goods, deodands, *or other forfeitures, they ſhall not be compelled to* inrol *their whole charters or grants, but* ſuch part thereof as may expreſs the grants of ſuch felons goods, deodands, and *forfeitures, and no more; for doing whereof the clerk of the crown ſhall receive* 20*s. for his fee, and no more; and from and after ſuch inrolment, they ſhall not be compelled to plead the ſame to any inquiſition.*

4. 10 *Annæ*, 18. *Reciting, that ſeveral grants have been made by the crown under the great ſeal, Exchequer ſeal, and under the ſeals of the dutchy of* Lancaſter, *of lands in* England *and* Wales, *to take effect in poſſeſſion, or by way of future intereſt* for one, two, or three lives, or *for ſome certain term of years,* not exceeding 50 years, *or for ſome other eſtate and term, not to exceed* 3 *lives, or* 50 *years,* from the date *of ſuch grant or leaſe, with covenants importing that the ſame* ſhall be inrolled before the auditor *of each county within a time limited, which have not yet been inrolled, ſo that the ſaid leaſes are void or voidable.* Enacts, that *all perſons, having before the* 3*d of March* 1711, *omitted to inrol ſuch leaſes, ſhall before the* 3*d of March* 1712, *bring them to the proper auditor to be inrolled; and that in ſuch caſe the leaſe ſo inrolled within that time ſhall, upon the inrolment thereof, and payment of all rent arrear, be adjudged to have its being, as if no forfeiture for want of inrolment only had been incurred.*

Provided that this act ſhall not continue any leaſe which has been adjudged in any court to be forfeited.

(M. b. 8) *Where Grantee* of the King *ſhall have* like *Prerogative* as the King ſhould have.

Br. Gard. pl. 28. cites S. C.

1. THE grantée of the king *of a ward, or of his land, of whom another holds by ſervice of chivalry, with fees and advowſon,* ſhall have prerogative; ſo that if *another ward falls, who holds of the firſt ward,* he ſhall have the laſt ward by the prerogative, *though he holds of another by priority,* who does not hold of the firſt ward, by reaſon that the *king remains guardian;* and livery ſhall be ſued out of his hands, notwithſtanding this grant made to the other; quod nota; that he ſhall have prerogative. And there the *grantee of the* king's *grantee ſhall have the prerogative,* as it ſeems; for all is one reaſon. Br. Prerogative, pl. 17. cites 12 H. 4. 18. 25.

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Br. Patents, pl. 18. cites S. C.

2. It was ſaid by Hill J. that the king has prerogative, that he ſhall have the *ward of the body of his tenant,* though he *holds of him by*

by poſteriority; and yet he cannot grant it to another by grant of the ſeigniory to a ſubject: for he ſhall not have the prerogative. Br. Prerogative, pl. 18. cites 14 H. 4. 9.

3. It was held, that if the king *has a rent-charge in my land*, he may *diſtrain for it in all my land* by his prerogative; but his grantee ſhall not do ſo. Br. Prerogative, pl. 68. cites 13 E. 4. 5 & 6.

And the king may diſtrain in all the lands of his tenant *for his ſervice*, but his grantee ſhall not do ſo; and ſo ſee that in ſuch caſes the king's patentee ſhall not enjoy the prerogative of the king, becauſe he is a ſubject. Ibid.

4. If the *king purchaſes a ſeigniory, of which land was held by poſteriority*, the king ſhall be in a better condition than the ſubject from whom he claims, and *ſhall have the priority*. And ſo ſhall his grantee alſo in ſuch caſe. 5 Rep. 56. b. Mich. 30 & 31 Eliz. C. B. in Knight's caſe, cites 24 E. 3. 65. Fitz. tit. Gard. 27. 47.

5. If the king licenſes A. to go beyond ſea for a certain time, and after this time is expired A. is commanded under the privy ſeal, upon his allegiance, to return to England, and does not obey, his goods, chattels, and *lands*, ſhall be *ſeiſed* into the hands of the king *for* this *contempt*. And it was reſolved by all the Judges of England, that if A. in this caſe, has a *manor* where there are *copyholds and timber fit to be felled each ſeaſon*, and the king grants it quam diu in manibus noſtris fore contigerit, it is good; and ſuch *patentee may* keep courts in his own name, *and grant copies, and fell ſeaſonable timber*. Jenk. 246. pl. 35.

D. 375 b. pl. 21.—D. 176. b. pl. 30. Marg. cites it held, that the king had only veſturam terræ, and could not grant copyholds. Lady Baſſet's caſe.

(M. b. 9) Grantee of the King. *In whoſe Name* he may *ſue*; and how.

1. KING granted *annuity*, which he had, over, and the grantee brought an action in his own name. D. 1. b. pl. 7. Marg. cites 3 H. 4. 8. 2.

2. If the *king's grantee of a ward be ouſted of the land, or if the rents are levied by a ſtranger by tort*, the grantee *ſhall not have treſpaſs in contemptu regis*, but ſhall have a writ of ejectione cuſtodiæ. Br. Ejectione, &c. pl. 9. cites 11 H. 4. 64, 65.

3. *Where the grant is of all iſſues, fines, amerciaments, &c. and that the patentee may levy them by himſelf or by his ſervants*; there the party may collect, and levy it, and the ſheriff of that which is warranted by the * grant, ſhall have allowance of it; but where the grant is of fines and amerciaments as above, without the words, (to levy them by himſelf or his ſervants,) there the *ſheriff ſhall levy them, and the patentee ſhall ſue to the Court for them by petition*; for they lie in allowance by the juſtices, quod fuit conceſſun; quod nota. Br. Patents, pl. 4. cites 9 H. 6. 27.

* All the editions are (grantee).

4. The king has *a bond* by *outlawry* of an obligee, who grants this over, and alſo that the grantee may ſue in his own name; and ſo he did, and adjudged good. D. 1. b. pl. 7. Marg. cites 19 H. 6. 47. 2.

Br. Conſcience, pl. 6. cites S.C.—Br. Choſe in Action, pl. 5. cites S.C.—Of *goods forfeited* by outlawry or attainder of *treaſon*, the property is in the king immediately; and the king may grant them over immediately, and the grantee may have an action in his own name. Br. Forfeitures de Terres, pl. 26. cites S. C.

5. A. was *outlawed for treaſon.*——The king made a *grant to B. who brought a bill in Chancery* for certain goods of ſuch a value *againſt C. who had A.'s goods in his poſſeſſion.* It was objected, that their remedy was at law by detinue; but it was anſwered that no action lay at common law till ſeiſure, or finding by matter of record; but however, that the king had election to proceed at common law, or in equity; and the Court held, that ſubpœna lay, and *ordered C. to make an inventory againſt the next day*, or that he ſhould be ſent to the Fleet. 39 H. 6. 26. b. Walſwyn v. Smith.

* Grantee ſued in the king's name. The defendant pleaded the grant in bar, but held no bar; and that notwithſtanding the grant the king may ſue, in his own name, and ſo may the patentee; but by Manwood Ch. J. after aſſignment of a bond, perhaps the king cannot ſue in his own name, becauſe it was not originally made to him. Savil. 2. Lee v. Brierton.

6. If *bond* be forfeited to the king by reaſon of *outlawry*, and the king gives this to a ſtranger, yet the action ought to be ſued in the name of the king, and not in the name of the grantee; but if the king * grant *recognizance* to another, he ſhall ſue this in his own name, and not in the name of the king. D. 1. pl. 7. Paſch. 4 H. 8.———The ſame difference taken by Reed J. Kelw. 169. in the Prior of Sheen's caſe.

Sav. 2. ſeems to be S. C. by the name of Lee v. Brierton.

7. B. was *attainted of treaſon*, and *having certain obligations* which became forfeited, the king *granted them to B.'s wife, without any words enabling her to ſue for them in her own name.* She brought information upon them in her own name. It was adjudged (as the reporter ſays he heard) that the action was well brought, for the king only can grant choſes in action; and, by the ſame reaſon that he has granted the obligations, which are the ſubſtance and the original of the actions, the law implies that the grantee ſhall uſe the means to come at the thing granted, &c. D. 30. b. pl. 208. Hill. 28 H. 8. Breuerton's caſe.

Nota, In truth there were *ſpecial words* in the patent that he might ſue in the queen's name; but this was *not pleaded*, and the Court held clearly, that had it been pleaded, the ſuit might be in the queen's name, for ſhe had liberty to

8. A *ſcire facias* iſſued out in the queen's name to ſhew cauſe why execution of a debt which is come to the queen by attainder of J. S. ſhould not be had. The defendant pleaded, that the queen had granted over this debt by the name of a debt which came to her by the attainder of J. S. and all actions and demands, &c. Upon which the plaintiff demurred; and the queſtion was, if the *plaintiff might ſue in the queen's name without ſpecial words?* And two precedents were cited, that he may. P. 36 Eliz. Rot. 191. in Scacc. where Green, to whom a debt was due, was attainted, and the queen granted over this debt, and all actions and demands, and a ſcire facias was ſued for him in the name of the queen. And another in the 32 Eliz. Rot. 219. Mabb, of London, was indebted by *bond*, and the debt came to the queen by the attainder, and ſhe granted it to B. and all actions and demands; and a ſcire facias was iſſued in the queen's name; and the principal caſe was adjourned; but the patentee had expreſs words to ſue in the queen's

queen's name, though it was not pleaded. Ow. 113. Paſch. 36 Eliz. Allen's caſe. grant to ſue in her name. Cro. E. 325.

S. C. —— So where the grant was *to ſue in the name of the queen and her ſucceſſors*, it is a good warrant; and in a ſucceeding king's time, all proceſs ſhall be made in the king's name, as if no grant had been made thereof. Cro. J. 82. Mich. 3 Jac. in Scacc. The King v. Wendman.

9. A. recovers *damages in action ſur caſe*, and afterwards is outlawed.—The king grants them over.—The grantee may levy this debt by action in his own name, or by extent in the king's name, though he has no words in his grant to ſue it in the king's name, as is uſual in ſuch caſes. But an *aſſignment over* of this debt, by the grantee to another, is merely void. Cro. J. 179. Trin. 5 Jac. King v. Twyne. Savill, 133. York v. Allen. S. P.

10. A *ſcire facias* is a *writ of right*, where the *patent is prejudicial to a ſubject*; and the crown ought to ſuffer the ſubject to uſe their name. Arg. by Northey, Attorney-general, (cites D. 197, 198. 11 Rep. 74. 8 Rep. Prince's caſe. Fitzh. tit. Brief, 651. 2 Vent. 344. Sir Oliver Butler's caſe. 3 Lev. 220.) 10 Mod. 260. in the caſe of the Queen v. Aires.—Adjudged Hill. 3 Geo. 1. 10 Mod. 354. B. R. The caſe of the Queen v. Aires. [98]

(N. b) Grants of the King. *Falſe Suggeſtion.* See (T. b.)

[1. IF the grant of the king be upon a falſe ſuggeſtion it *is void*, becauſe the king is deceived. Co. 11. Earl of DEVON, 90.] S. P. And if the ſuggeſtion reſts in Articles, if *any of the articles are falſe* the patent is void. Br. Patents, pl. 48. cites 3 H. 7. 6.

[2. *As* if a man *ſues* to the king by petition *to have a certain manor, and ſays* in the petition, that *it is worth but* 10*l. per annum*, and thereupon the patent is granted; if it be *of the value of* 40 *l.* the patent is void. 9 H. 6. 28. b. Co. 10. Arth. LEGAT, 112.] Jenk. 261. pl. 60. cites 9 H. 6. Legat's caſe. —S. P. If the difference of the value be found after by matter of record. Br. Patents, pl. 4. cites 9 H. 6. 27. per June. *But falſe conſideration* in a patent will not avoid the patent; *as* if the king, in conſideration *of* 100 *l. to him paid*, &c. grants, where *he paid only* 60 *l.* yet the patent is good. Br. Patents, pl. 4. cites it as ſo ſaid. 37 H. 8. Br. N. C. 37 H. 8. pl. 310.

[3. *So* if the *king has title* and right *to land of which A. is ſeiſed, and after A. is attainted of treaſon*, by which the *king ſeiſes*, if I *ſue to the king to have this* manor, *which comes to him by cauſe of treaſon*, and patent is made accordingly, it is void. 9 H. 6. 28. b. for the falſe ſuggeſtion.] Jenk. 304. pl. 77. cites 9 H. 6. — 1 Rep. 40. b. Alton-wood's caſe. —10 Rep. 109. Arthur Legat's caſe. —— Br. Patents, pl. 4. cites S. C. per June. —— Br. N. C. 37 H. 8. pl. 310.

[4. If a *leſſee for* 40 *years* of a mill and houſe *leaſe the houſe for* 20 *years, and then ſurrenders to the king, and* therein *recites, that he has all the eſtate*, title, and intereſt, which the firſt leſſee had, and which is *contained in the patent*; and thereupon the king *grants a new leaſe*, by other patent, *to him who ſurrendered* it; this is void, becauſe the recital is falſe, inaſmuch as he had but the reverſion See (Q. b) pl. 1.

of part, and this is the ſuggeſtion of the party. Ergo. P. 10 Ja. Scacc. between SAWYER and EAST. Adjudged.]

5. In aſſiſe, it was found by verdict, that *L. enfeoffed the baron and feme in fee* and after the baron *was found guilty of felony*, and arraigned, and he took to his clergy, and was delivered to the ordinary, for which the *tenements were delivered into the hands of the king*. And after the baron *broke the priſon* of the biſhop, and the *lord ſued in Chancery to have the land by eſcheat* out of the hands of the king, and had it, and a writ ſent to the eſcheator; and becauſe the feme had a joint eſtate with the baron, and the *tenements were delivered out of the hands of the king by falſe ſuggeſtion*, this ſuit was adjudged *diſſeiſin in the lord, who entered by this livery*, and the feme *recovered by award; and* becauſe ſhe *brought the aſſiſe as a feme ſole*, and the defendant *pleaded to it as to a feme ſole*, therefore it ſhall not be argued whether the baron be alive or dead; and therefore it ſeems that the king does not make [claim] but for the year, day, and waſte, and then *the entry of the lord* by the
[99] livery *obtained by the falſe ſuggeſtion* made the diſſeiſin, and there was no diſſeiſin during the poſſeſſion of the king. Br. Aſſiſe, pl. 114. cites 4 Aſſ. 4.

6. *Tenant in tail*, the *reverſion to the king*, *purchaſed licence to alien in fee, and to retake eſtate to himſelf and his feme in tail, the remainder to his right heirs*. This licence ſo purchaſed by falſe ſuggeſtion is void, and the *alienation is no diſcontinuance of the reverſion of the king*, where the king is deceived in his licence. Br. Diſcontinuance de Poſſeſſion, pl. 16. cites 40 Aſſ. 36.

7. If a man makes ſuggeſtion to the king to have an office, and obtains it; if the ſuggeſtion be falſe the *patent is void*; becauſe the king is deceived in his grant. Br. Patents, pl. 26. cites 37 H. 6. 27. per Billinge.

8. *Matter in fact expreſſed* in the king's patent, *which is falſe*, ſhall not prejudice, nor is it material; *as if* the king *reciting* in his patent *the good ſervice which J. S. has done him ultra mare*, or the like, grants to him ſuch land, *where in fact he did no ſuch ſervice*, yet the grant is good. Per Fitzherbert Juſtice, quod *mirum*. For it appears elſewhere, and in 9 H. 6. 28. that if the king makes a grant upon *falſe ſuggeſtion*, which is only matter in fact, *the patent is void*; but Brooke ſays, there ſeems to be diverſity between *falſe ſuggeſtion* and *falſe conſideration*. Br. Patents, pl. 1. cites 26 H. 8. 1.

9. Haule had a dutchy *leaſe gotten upon untrue ſurmiſes*, and the king beſtowed the land upon the earl of Devon for his ſervice done in Ireland. This leaſe the earl ſought to avoid by law; Haule prays to have the matter examined in Chancery, and to have the ſuit ſtayed by injunction; which was denied, for that the leaſe was granted by fraud, and the fee ſimple to the earl in poſſeſſion, and not in reverſion; and nota, that the Lord Chancellor ſaid, that where lands are granted in reverſion, if the grantee will avoid the leaſe for a rent paid, but not at the day; in that caſe, he will relieve, but not where the leaſe is granted upon a wrong

wrong ſuggeſtion, for that were to relieve fraud in Chancery. Cary's Rep. 45. cites 23 Jan. 1 Jac.

10. King Ph. and Queen M. ſeiſed of the manor of Wimondham in the right of their crown, ex ſpeciali gratia, &c. granted to G. H. (inter alia) *omnes illas duos pecias terræ noſtras called N. and W. lying in W. now or late in the tenure of J. C.* &c. *Quæ quidem omnia* * *a nobis, &c. concelata* & detenta, &c. and it was found by verdict, that the *manor was not concealed* or detained from the king, *but* that it *was in onere & computo, and the rents* and profits were *paid to the king, except only of the ſaid two parcels* of lands, which were not paid to him. It was adjudged, that though the grant was ex certa ſcientia, gratia ſpeciali & mero motu; and notwithſtanding the certainty as to the thing, the quantity, the ville, the county, the occupation, and the title; yet it being *made upon a falſe ſuggeſtion* of the party, that the manor was concealed from the king, when in truth it was not, the grant was therefore void. 10 Rep. 109, &c. Mich. 10 Jac. C. B. Arthur Legat's caſe.

* 2 And 19. S. P.

(N. b. 2) Falſe Suggeſtion. *Puniſhment* thereof. *Meſne Profits.*

1. TENANT of the king in tail obtained *licence to alien in fee to two*, and *retook* of them *by fine for life* the *remainder to E. and J. his feme, and to the heirs of E. who was ſon of the firſt feoffor, who was tenant of the king.* The *feoffor died, and E. his feme got livery upon office found;* and after fine was found in the Treaſury, by which it appeared, that the *feoffor had nothing but in tail at the time of the alienation*, which was ſent into Chancery, and from thence by writ; whereupon ſcire facias was awarded againſt baron and feme, if they had any thing to ſay, why the land ſhould not be reſeiſed according to the ſtatute of Lincoln, and to remain in the hands of the king during the nonage of [E.] who is within age, and heir to the feoffor; and it was reſeiſed by award, becauſe the *licence was void;* for the king was deceived in his grant, inaſmuch as he knew not but that the feoffor had been ſeiſed in fee, quod nota; and it appears often in the Book of Aſſiſes, that licences obtained upon falſe ſuggeſtions are void. Br. Alienation, pl. 28. cites 21 Aſſ. 15.

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2. Suggeſtion was made in Chancery, that *tenant in tail* the *reverſion to the king purchaſed licence* of the king *to alien in fee, and to retake to him and his feme in tail, the remainder to his right heirs;* the which was obtained, and the eſtate made accordingly; the *baron died, the feme married K.* and after the *feme died*, and *ſcire facias iſſued* upon the ſuggeſtion *againſt K. to ſay why the king, who now has the ward of the heir of the firſt baron, ſhould not be reſtored to the iſſues for the time of the nonage for the time which K. occupied;* and becauſe this licence was in deceit of the king, and his reverſion by this not diſcontinued, it was awarded, that in right of two parts of the land, he ſhall be charged for the time which he occupied, and

Br. Iſſues ret. pl. 11. cites S. C. —Br. Alienation, pl. 13. cites S. C.—Br. Diſcontinuance de Poſſeſſion, pl. 16. cites S. C.—— Jenk. 44. pl. 85. cites S. C.

and that of the third part he ſhall be diſcharged, becauſe of this the feme was dowable. Br. Patents, pl. 37. cites 40 Aſſ. 36.

(O. b) In what Caſes the King ſhall be ſaid to be * *deceived* in his Grant, [*and ſo the Grant void.*]

See (P. b) * There is a difference to be obſerved in all caſes where the king is ſaid to be deceived in his grant: if the matter which is

[1. †IF the king *grants an office for life, and after grants it in reverſion to B. which is void, and afterwards recites the grant to B. as a good grant, and grants it to commence after it,* the king is deceived in this laſt grant, and therefore void. Co. 11. Auditor CURLE, 4. b.]

falſe in the letters patent *be ſuggeſted on the part of the grantee, and that to the prejudice of the king,* there the king ſhall be ſaid to be deceived in his grant ſo as to make it void. Adjudged 12 Mod. 78. Trin. 7 W. & M. King v. Kemp.—*But* where the words of the letters patent are *words of the king,* although the king *appears by his inference to be miſtaken even in his law,* yet the king ſhall not be ſaid to be deceived ſo as to avoid his grant. If the king grants an eſtate in *poſſeſſion when he intends only to grant it in reverſion,* or where the thing granted is of a *greater value* than it appears in the grant to be of, theſe are ſuggeſtions of the grantee, and the death of the king in theſe caſes ſhall make the grant void; but if the king be not deceived by any matter ſuggeſted by the grantee, but is *only miſtaken in his own affirmation or ſurmiſes,* although it be in the law itſelf, ſuch grants are good, and ſuch conſtruction of them ſhall be made as tend to their ſupport; and upon this difference the books are plentiful. 8 H. 7. 3. Dy. 197. b. 352. a. 2 Cro. 34. 2 Brownl. 242. 11 Co. Auditor Curle's caſe. Mod. Rep. 197. So that where he is not ſo deceived, the grant ſhall not be void, if by any conſtruction it can be made good. Adjudged 12 Mod. 78. Trin. 7 W. & M. The King v. Kemp.

† A. has office for life, the king, *reciting the grant, and that A. is alive,* grants the ſame to E. of R. for life, without ſaying, after the death, &c. of A. This grant is good to commence after the death, &c. of A. 8 Rep. 55. Earl of Rutland's caſe.——S. C. cited 12 Mod. 79. in the caſe of the King v. Kemp.

The king may grant an eſtate in an office to commence in futuro, or upon a contingency, which eſtate ſhall ariſe out of the inheritance he hath in the office itſelf; for ſuch he may have in point of intereſt, though not in execution. Per Curiam, 4 Mod. 280. Paſch. 6 W. & M. B. R. in the caſe of the King v. Kemp.

The king granted to J. S. Sciatis *quod de gratia noſtra ſpeciali conceſſ.* &c. quantum in nobis eſt, *that he may give a houſe in E. to the abbot of F.* and the *houſe was held of the king,* and *no mention* that he may give, &c. *though it be held of us in capite*; and ſo the king, not apprized ‡ of his grant But per Knivet, Ch. J. the grant is good; for the intent of the king appears. Br. Patents, pl. 38. cites 41 Aſſ. 19.——*So* where *two manors* are *held of the king,* the *one in chivalry,* the *other in ſocage,* and the *king grants by words as above, that he may amortiſe both,* this is good; and yet the one manor is a greater loſs to the king than the other; and, becauſe it was the will of the king, that the houſe ſhould be amortiſed, and the grant is *de gratia ſpeciali,* therefore it was awarded that the grant was good. Ibid.

[2. If the king *ex gratia ſpeciali grants licence to* B. *to alien certain land in mortmain.* B. may alien the land in mortmain by force of this, though he holds it of the king in chief, and the king ſhall not be ſaid to be deceived. 41 Aſſ. 16. Adjudged.]

‡ [101]

See (Q. b. 2) pl. 5. The vicarage of Yatton, &c. came to the queen by lapſe, the biſhop of the

[3. If the *king preſents A. and upon refuſal brings quare impedit, and, pending this, B. procures letters patents to preſent himſelf, without mention of the firſt preſentment,* and this is obtained by fraud and in deceit of the king, it is a void preſentment, and therefore ſhall not repeal the firſt. Dy. 17 El. 339. 47. Adjudged.]

dioceſe collated L. to it by lapſe, and afterwards the queen preſented one to the vicarage, who brought a quare impedit againſt the biſhop and his collatee; pending which ſuit, the collatee by *fraud and covin obtained a preſentation from the queen, without mentioning her pleaſure to revoke the firſt preſentation.* The queen by letter certified the court, that ſhe had forgot her former preſentation, and ſaid her pleaſure was, that it ſhould ſtand; judgment was given for the queen, becauſe the fraud and deceit made to the queen

was

was confeſſed by L.'s demurrer, though the notification of it was not under the great ſeal. D. 339. b. pl. 47. Hill. 17 Eliz. The vicar of Yatton's caſe.—*But* if the king preſents one to a benefice, and before admiſſion he preſents another *without fraud or covin in the ſecond preſentee*, this is a good revocation of the firſt preſentment, without expreſs clauſe of repeal in the patent; but *if the firſt preſentee be admitted and inſtituted*, then ſuch ſecond preſentation is no repeal of the former preſentment, without a recital thereof, and of the admiſſion and inſtitution thereupon; and alſo there ought to be expreſs clauſe of revocation of the ſaid firſt preſentment, and of the admiſſion and inſtitution thereupon, mentioned in the ſecond letters patents of preſentment; and this difference was adjudged. D. 239. b. Marg. cites Paſch. 9 Jac. in the Exchequer. Calvert v. Kitchen.

[4. If the *king preſents, and after repeals it, and gives notice thereof to the ordinary, and yet the ordinary afterwards inſtitutes and inducts him; and after the king recites, that where the incumbent was canonice inſtitutus of his preſentment, he confirms it* to him for his life. This is a void confirmation, becauſe the king is deceived, inaſmuch as he was not inſtituted of his preſentment. D. 12 El. 292. 70. Adjudged. 25 E. 3. 47. Adjudged.]

[5. *So* it would be in the ſaid caſe *if the ordinary after the repeal* made, *and before notice* of it to the ordinary, *had inſtituted and inducted him*; for the notice is only material to make the ordinary a diſturber. D. 12 El. 292. 70. 25 E. 3. 47. Adjudged. And no notice alleged.]

[6. If a *benefice above the value of* 20*l. per annum, comes to the king by lapſe*; and *the chancellor being informed, that it was under the value of* 20*l. preſents to it under the great ſeal*, and the preſentee thereupon inſtituted and inducted, he cannot be afterwards removed; for the preſentment is by the king, being under the great ſeal; and there is not any difference in form, when it is for the king, and when for the chancellor, ſaving, that for the moſt part, the one is *mandantis*, and the other is *rogantis*, the confuſion of which words are not of any moment. Hob. R. 289. Lord Chancellor's caſe. * C. 272.]

Fol. 189.

Hob. 214. pl. 273. S. C.—Jenk. 292. pl. 33. S.C. S. P. was referred to Hobart, Ch. J. and Tanfield, Ch. B. to certify whether this was merely void. [The book ſays] It remained good until it was avoided. Trin. 19 Jac. Parſon and Morlee's caſe.—[* The letter (c) ſeems to ſtand for (caſe); but if ſo it is miſprinted, and ſhould be (caſe 273.).] Winch. 19.

[7. *But*, in the ſaid caſe, *if the preſentment* itſelf under the great ſeal *had recited, that the benefice had been under the value of* 20*l.* there the preſentment had been void, becauſe there the king was deceived. Hob. R. 289. C. 272.]

Jenk. 202. pl. 33. S.C. Hob. 214. pl. 273. S.C.

8. Where *the biſhop of W. had conuſance of pleas, fines, and amerciaments in D. and the king had it tempore vacationis*, and *granted them to the mayor and burgeſſes of D. a* ſcire facias iſſued againſt them to repeal the patent, becauſe the king was deceived in his grant. Br. Prerogative, pl. 99. cites 16 E. 3. and Fitzh. Brief, 651.

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9. 1 *H.* 4. 6. *To the intent that the king might not hereafter be deceived in his grants, he is content (by the aſſents of the lords ſpiritual and temporal, and at the requeſt of the commons) to be hereafter concluded by the wiſe men of his council in things touching the eſtate of him and his realm, ſaving always his liberty.*

Neither the queen nor the king's ſon are reſtrained by this ſtatute concerning grants by

In a petition to the king for lands, annuities, offices, &c. their value ſhall

the king. Co. Lit. 133. S. P. Br. Livery, pl. 16. cites 7 H. 4. 41.

ſhall be therein expreſſed; otherwiſe the letters patents thereupon had, ſhall be void.

10. The king *granted* the *land in ward to one for life*, the *remainder over in fee*, and was deceived in his grant, and therefore he, at the ſuit of the heir, by ſcire facias repealed the letters patents, and reſumed the land, and made livery to the heir; quod nota. Br. Patents, pl. 10. cites 7 H. 4. 42, 43.

11. If the king be *ſeized of an advowſon in fee*, and *grants it to J. S. habend. after the death of W. N.* this is a void grant; becauſe he is ſeiſed in fee, and has no reverſion therein. Br. Patents, pl. 29. cites 38 H. 6. 34, 35.

S. P. For this founds in fee ſimple, whereas, it ſeems, the king *intended only an eſtate tail*, which is not ſo expreſſed, and therefore now he is only tenant at will, but contra in the caſe of a common perſon. Br. Patents, pl. 104. cites S. C. Lovel's caſe.

12. If the *king gives land to W. N. and to his heirs male*, the patent is void, and he is only a tenant at will; for the king is deceived in his grant. Br. Eſtates, pl. 84. cites 18 H. 8.

* *As* if the king *grants his manor of D. in D.* and there *is not any ſuch will*, yet the grant is aided by the ſtatute, becauſe the name of the manor is certain enough; *but when the certainty of the thing granted does not appear*, it is otherwiſe; as where the king grants an *advowſon appendant, where it is in groſs*, it does not paſs becauſe it is not the ſame thing. Ibid. —— So if the king grants the *manor of D. in ſuch a county*, where there are *two manors of the ſame name in the ſame county*. Ibid.

13. The queen by the words of *ex certa ſcientia, & mero motu granted* to A. *the manor of D. which ſhe had by attainder of Sir T. Wyatt*; whereas, in truth, *ſhe was ſeiſed by deſcent*: Dyer thought the grant void, and Brown and Weſton J. agreed, that it was void at common law; for in every caſe where the king is deceived in himſelf, or of the information of the party, the patent ſhall not be allowed contrary to the king's intent; but in this caſe the patent is *ſupplied by the ſtatute of miſrecitals; for when the ſubſtance of the thing granted appears certainly*, the * ſtatute ſupplies all other defects. Mo. 45. pl. 137. Mich. 5 Eliz. Anon.

† This reaſon does not appear in Dier. —Mo 416. S. C. cited by Coke Attor. Gen. Arg. in WELSH's caſe; and that it was adjudged upon ſcire facias in Chancery, in 19 Eliz. that *the queen having a fair* in Torrington, *to be held in the feaſt of St. Michael*; ſhe *incorporated the town, and without mentioning her fair*, ſhe *granted to the corporation* to have *a fair* to be held in *vigilia in feſto & in craſtino, &c.* and adjudged the grant void, by the aſſiſtance of the Judges; becauſe the queen is to have the old fair, and ſo the grant void; and then no *fractions* can be *to give a fair to the corporation in vigilia & craſtino.* — D. 276. pl. 52. is, that the queen granted to the corporation a market every Saturday, and two fairs in vigilia & craſtino Sancti Michaelis, *& aliam in die Sancti Georgii Martyris, & duobus diebus proxime ſequentibus.* But it does not appear in Dy. whether the grant was adjudged void. — In the caſe of Alton Woods. 1 Rep. 50. a. Popham. Ch. J. ſays he was of counſel in this caſe, and that it is not fully reported in Dyer. He ſtates it to be adjudged a void grant; for

14. The king was ſeiſed of the manor of Torrington, with a *market* held every week on *Saturday*, and a fair *in vigilio feſti & craſtino Sancti Michaelis*, and incorporated the ſame, & ex certa ſcientia granted to them to have a market every *Saturday*, and two fairs every year, one *in vigilio feſti & craſtino Sancti Michaelis*, and the other on the feaſt of St. George the Martyr. Adjudged, that this grant was void; for the king was † not apprized of what he granted; for his intent was ex ſpeciali gratia, & ex certa ſcientia, *to grant a new fair* at Michaelmas, and not to grant that fair *which they had before*. Nelſ. Abr. 900. pl. 2. cites Dy. 276. the caſe of Torrington.

for the *old fair* cannot paſs, becauſe it was plainly the queen's intent to create *a new one*; for, he adds, there was a *clauſe* in the grant, (viz.) *niſi mercatum & nundinæ illæ eſſent ad nocumentum vicinorum mercatorum & vicinarum nundinorum*; which words are always uſed in the granting a new fair. But in the caſe of a *common perſon*, the *old* one ſhould have paſſed without queſtion; and for that cites Dy. 252. 18 Eliz. —— It did not appear to the king that he had an old fair, but he intended as the words import to grant a new one, and not the fair in eſſe, and therefore the grant is void. 2 And. 156. cites S C.

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15. King H. 7. being ſeiſed of the *two manors* of Ryton and Condor in Shropſhire, he *granted* ex certa ſcientia, &c. *totum illud manerium*, of Ryton and Condor, &c. and the grant was adjudged void; for that the king was deceived in it; yet in the caſe of a common perſon, it had been good. So where queen Elizabeth being ſeiſed of the manors of Sapperton and Milborne in Lincolnſhire, granted to one totum illud manerium de Milborne cum Sapperton; it was held that neither of them paſſed. 1 Rep. 46. a. b.—cites 29 Eliz. & 39 Eliz.

16. *Scire facias* by the queen to repeal a *patent* granted to Cotton and his wife, anno 35 of her reign, *reciting that H. and G.* conjunctim et diviſim, *were bound in a bond* of 1000 marks to the queen, anno 31, *which was forfeited;* reciting alſo, that the queen, by patent, anno 33 of her reign, *had granted* unto Cotton and his wife, *the ſaid bond, and the* 1000 *marks ſo forfeited;* reciting alſo, *that* at the ſuit of Cotton in the queen's name, *judgment was given* in the Exchequer, *that the queen ſhould have execution for the ſaid* 1000 *marks.* And to the intent that Cotton might have the ſaid bond, the queen by the ſaid patent anno 35 in her reign, reciting the judgment obtained in the Exchequer, ex certa ſcientia & mero motu, &c. granted him the ſaid bond, and the 1000 marks, and all the benefit and advantage of the ſaid judgment. In this grant the queen was deceived, and the grant thereby void. 1. Becauſe the *obligation was forfeited at the time of the grant;* whereas the queen *recited that it was (to become forfeited).* 2. Becauſe ſhe recited, *that ſhe had granted the obligation before by the patent of* 33, *whereas in truth nothing paſſed* by this patent, *for want of true recital of the condition of the obligation.* 3. Becauſe *the judgment was given of* 12*d. coſts and* 12*d. damages, as well as of* 1000 *marks;* whereas *the grant of totum beneficium & advantagium of the judgment aforeſaid, extends as well to the coſts and damages as to the* 1000 *marks,* which was the principal debt, and ſo the queen deceived, which Lord K. Egerton thought was hard in conſcience, becauſe *the fault was in the clerk,* who wrote the privy ſeal, and the bill ſigned was well; but the law was with the queen in extremity. Mo. 448. pl. 610. Paſch. 38 Eliz. The Queen v. Cotton.

17. The *queen* was *tenant pur auter vie*, and *made a leaſe for* 40 *years;* though in this caſe ſhe cannot abſolutely contract for ſuch leaſe, yet without any recital or mention of eſtate for life, the leaſe is good; for the leaſe for years is in judgment of law leſs than an eſtate *pur auter vie*, and the queen does no wrong or prejudice to any by the demiſe, and is not deceived in her grant; for in *judgment of the law, this is a leaſe for* 40 *years if ceſty que vie lives ſo long.* But if ſhe had granted a greater eſtate than ſhe lawfully might, as an eſtate tail, or in fee, there, becauſe ſhe cannot law- S. C. argued Mo. 303. to 337.

fully do it, ſhe was deceived, and by conſequence her grant void. 7 Rep. 12. Reſolved. Mich. 33 & 34 Eliz. in the Exchequer. Englefield's caſe.

Judge Jenkins ſays, this is a *hard caſe*. Where the king is not deceived in the conſideration, nor in the eſſence of the eſtate,

18. The king *ſeiſed of a manor in tail remainder to his right heirs, granted* this manor by patent to A. *in fee*, this patent is void; for the king intended to grant one entire eſtate in fee, and not by *fractions*; firſt for the king's life, and afterwards to be made void by the ſucceſſor, heir in tail, and then to be revived again, where the king dies without iſſue. By all the Judges. Jenk. 251. pl. 42. cites 41 El. 1 Co. 40. b. Alton Wood's caſe.

and where the king has no prejudice, but the poſſible prejudice is to the patentee, the king's patent ought not to be avoided. The grant is good in the caſe of a common perſon. Principis beneficium decet eſſe manſurum. It is for the king's honour to maintain his patents, and it is a diſhonour to him to avoid them by too nice and ſubtle conſtructions; and frequently it is to the grievous loſs of the patentee. Jenk. 251. pl. 42.

19. If the queen in her letters patents *of preſentation miſtakes her title*; as if ſhe has title to preſent in reſpect that ſhe is the *very patron, and ſhe preſents ratione lapſus*; ſuch preſentation is void;
[104] for ſhe is deceived in her preſentation. 6 Rep. 29. b. Trin. 44 Eliz. B. R. The third reſolution in Green's caſe.

20. The king makes a *leaſe for* 21 *years to A.* and afterwards reciting this leaſe, *grants the reverſion* of this land to *B.*—*A.* had ſurrendered his leaſe before the ſealing of the ſecond patent. The ſecond patent is void; for the king had not the reverſion but the poſſeſſion at the time of the ſealing the ſecond patent; but where the king has the *reverſion* of land, or a manor, *expectant upon a leaſe for years*, made by a common perſon, and grants the land or manor by patent by ſuch words, the reverſion will paſs; for the reverſion of the land or manor is the manor or terra revertens. Jenk. 303. pl. 67.

Le. 30. Sir Walter Hungerford's caſe, but not S. P.—*But if the king grants* 120 *acres of his waſt in D.*

21. Note the difference agreed by the Court. If the king *grants* to A. *all the waſte in D. after an ad quod damnum returned*, and that the waſte contains 120 *acres; yet if it contains* 300 acres, all paſs; for the grant is general, and the *ad quod damnum* was to inquire of the damages, and not for the quantity of the waſte. Noy, 29. Brand v. Todd.

and the *ad quod damnum returns*, that it is not to his damage, and that the waſte contains 300 acres, there nothing paſſes, for it is *uncertain which* 120 *acres* were intended, and the party ſhall *not* have any *election againſt the king*; all which was agreed upon evidence to the jury. Noy, 29. Brand v. Todd.

22. The king *poſſeſſed of a chattel* intereſt in lands, for a debt, *grants* them *in fee*. It was reſolved to be void, the king being deceived. 3 Lev. 135. Mich. 35 Car. 2. C. B. Travel v. Carteret.——Cites 1 Rep. 52. a. and the caſe of H. 7. there cited; and Mod. 415.

(P. b) Where the King ſhall be ſaid to be deceived in his Grant.

See (O. b)

[1. IF the *king ſeiſed of the advowſon of a prebend in fee which is preſentative*, and *he grants totam rectoriam ſive præbendam noſtram* de Itching abbas in Com. South. *cum omnibus decimis quibuſcunque eidem pertin. &c. monaſterio de Winton. nuper ſpect. in tam amplis modo & forma as the late abbateſs held it.* Though the abbateſs was ſeized in fee of the advowſon, yet the advowſon ſhall not paſs by this grant, but the king is deceived; for *he intended to paſs the rectory and tithes as a lay thing, and not the advowſon.* Hill. 14 Car. This caſe was referred to the arbitrement of the Lord Keeper between the preſentee of the LORD MARQUIS OF WINCHESTER and one POPE the preſentee of the king, and he awarded upon hearing of counſel as a clear point in law, that nothing paſſed by this grant, and ſo the preſentee of the king obtained the church, and was inſtituted and inducted.]

(Q. b) Grants of the King *falſe Recital.* In what Caſes a falſe Recital ſhall make a Patent void.

See (Y. a. 2) —(M. c)

[1. IF *leſſee for years of the king makes an under-leaſe of part of the land* to another, and after dies, and his wife executrix takes B. to baron, who *ſurrenders his term* to the king, and after the *king reciting the firſt demiſe*, and that the intereſt thereof is *come to B. *and that he had ſurrendered* to us, he demiſes to B. as well in conſideration of 20l. paid, as pro eo quod the ſaid B. ſuper ſe aſſumpſit to repair the premiſes at his own coſts. This falſe recital ſhall avoid the leaſe; for the king intended the whole eſtate of the firſt demiſe to be ſurrendered to him, and this was the cauſe of his grant. M. 8 Ja. Scacc. between SAYER AND EAST. Dub.]

S. C. argued Lane, 74. to 79. and Ibid. 108 to 112. the argument of the barons, 3 of whom held the grant void, but Snig baron e contra. 1 Rep. 43. a. in Alton Wood's caſe.

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[2. If the *king recites, that where by letters patents dated, &c. the office of the marſhal of B. R. was granted to J. S. for his life, and that the ſaid J. had ſurrendered them to him*, the which he accepted, in conſideration of this ſurrender the king grants the office to J. D. for life. If the office was not granted to J. S. or if he did not ſurrender the letters patents, this new grant made to J. D. is void; becauſe thoſe are the conſiderations of the new grant.—Mich. 13 Car. B. R. between SIR JOHN MEADE and SIR JOHN LENTHALL. Reſolved per curiam on evidence at the bar in a trial for the office of the marſhal of B. R. in an action upon the caſe, and thereupon Sir John Meade was nonſuited.]

3. A man made *ſuggeſtion* to the king, *that he was ſeiſed in fee*, and *obtained licence* of the king *to alien in fee, and to retake for life*, the *remainder over in fee*, where it was found that he who got the licence

licence had not but for term of life; by which it was awarded, that the land upon ſcire facias ſhould be re-ſeiſed, by reaſon that the king was deceived in his grant; quod nota. Br. Patents, pl. 77. cites 21 Aſſ. 15.

*It was ſaid, that the ſtatute 4 & 5 P. & M. 1. of miſrecitals does not aid offices, but they are excepted, and ſo patents of offices remain as they were at common law, and the truth of this caſe was, that *the cuſtody of the caſtle was an office of conſtableſhip of the ſame caſtle*, though no word of it was in the patent; and at length the plaintiff, viz. K's ſervant, was nonſuited. D. 194. b. 195. a. b. pl. 35. Hill. 3 Eliz. Kemp v. Mack-Williams.——[But I do not obſerve that any judgment was given.]

4. Queen Mary, in a grant by her made of the *cuſtody of a caſtle to D. recited a ſurrender* to her *made* of a former grant thereof dated *anno* 33 *H.* 8. when in truth it was dated *anno* 32 *H.* 8. Afterwards Queen Elizabeth, ex ſpeciali gratia, granted the ſaid office to K. Adjudged, that by reaſon of this miſrecital of the date, the grant to D. was void notwithſtanding the act 34 H. 8. and other * acts of miſrecital. Neſ. a. 896. pl. 4. cites Kemp v. Mack-Williams. Dyer, 195. 1 Rep. in the caſe of Alton Woods. S. P.

5. One who *had only a leaſe* of lands *for* 60 years, *made a leaſe* of the ſame lands *for* 80 *years*. The reverſion came to the crown. The 60 years expired; the *leſſee ſurrendered* to the queen the indenture, eſtate, and intereſt, to the intent ſhe ſhould make a new leaſe to him for 20 years, which ſhe did, and in her grant ſhe recited the leaſe for 80 years, and that in conſideration of a ſurrender thereof, and for divers other good conſiderations, ſhe ex certa ſcientia, &c. demiſed the ſame for 20 years rendering the ancient rent. It was held by Wray, Southcot, and Manwood, that the demiſe was void; becauſe the queen was deceived. But Dyer held e contra; becauſe there is no ſuggeſtion or information but a conſideration, which though it be falſe is yet nothing to the purpoſe. D. 252. pl. 26. Trin. 18 Eliz. Anon. cites Fitzh. 27. H. 8. and Br. Patents, 37 H. 8.

Cro. E. 368. Hall v. Combes.

6. King H. 8. ex certa ſcientia, and *in conſideration of* 300*l.* granted all thoſe *meſſuages in the tenure of B.* and lying *in the pariſh of D.* when in truth they did not lie there, but in the pariſh of S. It was adjudged, that though the meſſuages were in the tenure of B. yet becauſe by the grant they were *reſtrained to a particular place* where they were not, and there was no other convenient certainty to fix the premiſes, therefore the grant was void. 2 Rep. 32. b. Mich. 36 & 37 Eliz. Doddington's caſe.

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The caſe was, H. 8. was tenant in tail to him, and the heirs male of his body, and afterwards the *reverſion came to the crown by the attainder of the reverſioner, and* it was enacted by parliament, that H. 8. ſhould have the ſaid manor, and ſhould be adjudged thereof ſeiſed

7. *King H.* 8. being *tenant in tail* of the manor of Abbotesly, *granted* it *to* his ſervant *Walter Welſh, and to Elizabeth his wife, and to the heirs of the body of the ſaid Walter*, and in the patent it was recited, that the king was ſeiſed of the ſaid manor in fee; and upon demurrer it was inſiſted, that this grant was void, or if not, it was good only during the life of the king; becauſe, he having only an eſtate-tail himſelf, could grant only for his own life; for he could not grant a greater eſtate than he had, ſo that being non informatus, or mis-informatus of his eſtate, he was deceived in granting it. Neſ. a. 898. pl. 25. cites Moor, 413. Welſh's caſe.

ſeiſed to him, his heirs and ſucceſſors in fee ſimple, ſaving to all perſons, except the reverſioner and his heirs, all right &c. It was argued, that though the king had the reverſion in fee at the time of the grant, yet the *patent to W.* ſhould not *enure firſt upon the king's eſtate for life, and then to be void againſt the iſſue, and to be good again after the failure of iſſue*; becauſe ſuch operation of the grant imports in part grant of the reverſion which the king had, and ſo there ought to have been a recital of the eſtate in poſſeſſion, which there is not, and that the ſaving no ways betters the caſe, but the grant muſt be conſidered as it was at the time of the making, when the king was *tenant in tail* with *reverſion expectant in fee* to him. And that *fractions of eſtates cannot be in grants of the king*, viz. that the grantee ſhall have for a time, and then the king, and then the grantee again. But afterwards, upon arguing the caſe by the barons in 38 & 39 Eliz. Ewens and Periam Ch. B. were againſt the queen [and for the grantee] in omnibus; and Clarke B. in omnibus with the queen. Nota, that Periam ſaid, that if tenant in tail be, remainder in tail, remainder to the queen; and tenant in tail does treaſon, and the queen makes leaſe, and then tenant in tail dies without iſſue, and afterwards he in remainder dies without iſſue, the leaſe ſhall continue good upon the reverſion. Mo. 413. pl. 570. Mich. 37 & 38 Eliz. Welſh's caſe.

8. The *prior* of W. being *ſeiſed of the rectory* of L. *leaſed the tithe-corn and hay* for years, *reſerving 4l. rent, and the leſſor to pay 3s. 4d. per annum for bringing the rent to the priory*; the priory coming by meſne deſcents to *the queen* after the ſtatute of diſſolutions, &c. ſhe *leaſed the rectory, and all the glebe with the appurtenances uſually let with the ſame* heretofore, *under the yearly rent of 3l. 16s. 8d.* to hold the premiſes under the ſaid yearly rent of 3l. 16s. 8d. It was adjudged, that the leaſe made by the queen was void, becauſe ſhe was deceived in the conſideration; for ſhe intended to leaſe no more than what the prior had leaſed before, and to have the ſame rent which he had: now the prior leaſed only the tithe-corn, and hay, and had 4l. per annum; for *the 3s. 4d. was not to be deducted out of the rent, but paid by way of covenant*; whereas the queen had but 3l. 16s. 8d. for the whole rectory, ſo that it is plain ſhe was deceived in the recital. Yelv. 42. 47. Hill. 1, & Trin. 2 Jac. B. R. Chambers v. Maſon.

9. King H. 7. *granted the manor of B.* to G. B. *in tail* male, *and after by another patent, reciting the former, and that in conſideration of the ſurrender thereof virtute cujus he was ſeiſed in fee*, he de gratia ſpeciali, certa ſcientia & mero motu *re-granted* the ſaid manor to the ſaid G. B. and J. his wife, and *to the heirs of the ſaid G. B.* It was reſolved, that the recital of the eſtate tail, and that the patentee had ſurrendered or delivered the ſaid letters patents to the chancellor to be cancelled, were both in judgment of law the information and ſuggeſtion of the party; but the clauſe (virtute cujus he was ſeiſed in his demeſne as of fee) was only the collection of the king himſelf as a conſequence upon the ſurrender, in which the king miſtook the law. 6 Rep. 55. b. Trin. 4 Jac. Lord Chandois's caſe.

10. *Alſo* the party informed the king, *that he had delivered his patents to the chancellor to be cancelled*, whereupon *the king affirmed, (quæ quidem literæ patentes adtunc & ibidem cancellatæ fuerunt)* this is not the information of the party, but the *affirmation of the king*: and the collection or affirmation of the king *upon the information of the party when it is not any parcel of the conſideration ſhall not avoid his grant*; for all that the party had informed was true, and the error was in the conſequence or inference made by the king upon it; therefore in as much as the party had truly informed the king [107]

of

of the eſtate tail, and of the delivery of the patent to be cancelled, though the king had miſtaken the law or the matter in fact, yet this being no part of the conſideration ſhall not avoid the grant; for *no default was in the party*. 6 Rep. 55. b. Trin. 4 Jac. Lord Chando's caſe.

11. By letters patent the *king granted omnes illas pecias terræ* vocat' B. and C. exiſt' in man' de D. nuper in tenura J. S. *quæ quidem omnia præmiſſa a nobis, &c. concelata & detenta* fuerunt, & redditus, &c. inde non reſponſa, habendum, &c. In ejectment *it was found, that the manor of D. of which the premiſes in queſtion were parcel, non concelat'* nec detent' fuit, ſed fuit in onere & compoto, *and that the rents, &c. of the ſaid manors (except of the premiſes in queſtion) were anſwered* to the king. It was reſolved, that the grant was void for the falſe recital; for the manor itſelf being in charge to the king, the premiſes which are part of it cannot be ſaid to be concealed or detained from the king, though in fact they were in the poſſeſſion of an intruder, who anſwered nothing for them; nor can any land, of which the king is ſeiſed, be ſaid in law to be detained from him. And therefore the recital of the quæ quidem, &c. which is to be conſidered as the ſuggeſtion of the patentee, being falſe, the grant is void, and cannot be aided by the particular deſcription or certainty of the lands granted, nor by the words, ex certa ſcientia, &c. 10 Rep. 109. Mich. 10 Jac. C. B. Legat's caſe.

12. The queen *granted an houſe* and lands in Fingergoe in Eſſex *to* one *T. S. who ſurrendered the ſame* to the queen, and ſhe made a *new leaſe* of them to him in this manner: viz. Whereas T. S. hath ſurrendered his eſtate in *Fingergoe in Suſſex*, &c. in conſideration thereof I grant to him the houſe and lands in Fingergoe in *Eſſex*; it was objected, that there was no good conſideration for the new leaſe, and that the queen was deceived, for it is in conſideration of his ſurrender of his eſtate in Fingergoe in *Suſſex*, whereas there is no ſuch place there, but in Eſſex: ſed per Coke and Dodderidge, the leaſe is good, for the ſtatute 43 *Eliz. cap.* 1. enacts, that letters patents ſhall be good notwithſtanding any miſnoſmer of the town or county, and this *is but a miſnaming of the county*, and not any material miſtake. 1 Roll. Rep. 23. Paſch. 12 Jac. B. R. Godfrey v. Sparrow.

13. By a deed dated 10 *May*, anno 31. the *parſonage of H. was granted by S. to H.* 8. and on the 21*ſt July following* the *king granted the parſonage of D.* to the ſaid S. and his heirs, *in conſideration of the parſonage of H.* to him granted, not ſaying if granted by deed or how. Afterwards, viz. *on the* 26 *July, the deed was* acknowledged by S. and *inrolled* ſecundum formam ſtatuti; Hobart Ch. J. held, that though the conſideration expreſſed in the king's grant was falſe, for that the *rectory was not granted* to him *till the deed was inrolled*, which was after his grant to S. yet his grant ſhall be good; for the king is not deceived at all in effect; for he has the parſonage of H. and that by the grant of S. which was made before

before the king's grant, and muſt be ſo pleaded as made 10 May. And though it be true that it was not compleat for want of inrolment at the time of the king's grant, yet *when the inrolment came, it takes its effect*, not from the inrolment nor by it, but from and *by the firſt act*; and therefore between the parties it ſhall bind to all purpoſes ab initio, though this be in a collateral reſpect. Hob. 221, 222. Needler v. Biſhop of Wincheſter.

14. Queen Elizabeth, *anno* 19 of her reign, *granted* the *office of clerk of the council of the marches of Wales to A. for life*; and by another grant *anno* 25 of her reign *ſhe granted to the ſame A. the office of ſecretary there*; *King James* anno 1, without *reciting theſe* former *grants* made as aforeſaid, *granted the ſame offices to the ſame A.* for life; afterwards King James, *anno* 9 of his reign, *by another patent, reciting the patent of anno* 1, *granted theſe offices to J. S. for life, when* ever they ſhould be *void by the death, ſurrender, or forfeiture of the queen's patentee*; afterwards by another grant, *anno* 14, *reciting both the void grants made by himſelf, but omitting the good grants made by the queen*, he *granted the ſaid offices to W. U. and J. M. for their lives, after the death, forfeiture, or ſurrender of A.* who was ſtill living, *and of J. S.* cum poſt mortem, ſurrender, forfeiture, &c. of the ſaid A. or J. S. non obſtante male recitando, &c. and *non obſtante non recitando aliquod donum, &c. præantea factum de officiis prædictis*; adjudged, that the grants of 1 & 9 Jac. are void; becauſe the laſt recited thoſe grants which were void, and the firſt omitted thoſe which were good, and that ſuch falſe recitals or falſe ſuggeſtions ſhall not be helped by the non obſtante in the laſt grant; per omnes juſticiarios præter Hide Ch. J. who held clearly the contrary; and Jones J. who ſeemed to doubt thereof. And the other juſtices held further, that theſe are not properly miſrecitals or falſe recitals, but falſe informations whereby the king was deceived; for by intendment the king conceived thoſe grants to be good which were void, and granted thoſe offices after determination of thoſe grants vel alio quocunque modo, &c. ſo the king is deceived, and the *non obſtante ſhall not aid ſuch falſe informations* and falſe ſuggeſtions. But there was not any certificate made of theſe judges opinions, becauſe the parties compounded. Cro. C. 197. Trin. 6 Car. B. R. Ld. Brook v. Ld. Goring. [108]

15. The king granted the *advowſon of the church of L. lately belonging to the Archbiſhop of Canterbury*, whereas *the Archbiſhop of Canterbury never had it.* Adjudged that the church being particularly named, and the king not being deceived either in the title or value, the grant is good enough. Freem. Rep. 178. pl. 190. Mich. 1674. The King v. Sir Francis Clarke and the Biſhop of Rocheſter.

In arguing this caſe by the judges, theſe diverſities were taken in the conſtruction of grants. 1ſt, *Where there are only general words, with the pronoun illa, as omnia illa*, &c. there *all the ſubſequent deſcriptions muſt be true*, or elſe the grant will be void as well in the caſe of the king as of a common perſon. 2dly, Where the *thing is named by a particular name that doth ſufficiently aſcertain it, though the ſubſequent deſcriptions are falſe*, yet the grant is good enough in the caſe of the king or a common perſon; only *with this difference*, viz. if it *appears* either *that the king was deceived* in his title, or in the value of the thing, or in any thing relating to his profit, the grant is void againſt the king. Freem Rep. 178. in S.C. —— S. C.

S. C. adjudged 1 Mod. 195. Hill. 26 & 27 Car. 2. C. B. And in the argument thereof a difference was taken, when the king *miſtakes his title to the prejudice of his tenure or profit*; and when he is miſtaken *only in ſome deſcription of his grant, which is but ſupplemental, and not material nor iſſuable.*——— S. C. cited by Holt Ch. J. Skin. 663.

16. If the king grants the *manor* of Dale *of 5l.* per ann. value to A. *where it is of the value of 10l. per ann.* the patent is void for the value *in the ſame ſentence* with the grant; but if the value be mentioned in another ſentence, and not in the grant, the grant is good. Utile per inutile non vitiatur. Jenk. 261. pl. 60. cites Cro. J. 34.

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(Q. b. 2) Grants of the King. *Recital* of Leaſes [and Grants.] In what Caſes a Recital is *neceſſary*.

Leaſes of record ought to be recited *where the king grants the reverſion*, but not leaſes not of record; for the ſubject has not proper means to come to the knowledge of them. A *non obſtante* in the patent helps the non-recital of leaſes of record. Jenk. 303. pl. 77.

[1. IF the king grants any land, or, &c. which is in leaſe for life, or years, and does not recite it in the letters patents, if the *leaſe be not of record*, the grant is good, notwithſtanding the non-recital of the leaſe. In time of H. 8. and E. 6. Br. Patents, 93. Co. 6. LORD SHANDOIS, 56.]

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* S. P. For this word (manor) includes all eſtates and degrees of eſtates of or in the manor. 6 Rep. 56. a. Trin. 4 Jac. The Lord Chandos caſe.

[2. *As if land in leaſe comes to the king by the attainder of him who is ſeiſed of the reverſion, or by the diſſolution of an abbey*, the grant of the king of the land, without recital of the leaſe made by him who was attainted, or of the abbot, is good; becauſe thoſe leaſes are not of record. In time of H. 8 E. 6. Br. Patentees, 93. Co. 6. LORD SHANDOIS, 56. in caſe of a reverſion expectant upon an eſtate tail created by him who was attainted. D. 6, 7 El. 233. 10, 11. Where the prior of Wells leaſed for life the demeſnes of a manor, and after the manor came to the king by the diſſolution of the priory, and he granted the manor without recital of the leaſe, and yet good, and the *reverſion of the demeſnes ſhall paſs by* * *name of the manor only.*]

So where a *ſubject has an office in fee.* and *grants it to A. for life*, and afterwards grants *the reverſion to the king in fee*, if the *king grants this office in fee, to B.* without reciting the grant to A. although it is not of record, the grant to B. is void; for the grant of an office has reference to the exerciſe of it in preſenti, and another had the poſſeſſion and exerciſe of this office at the time of the king's ſaid grant to B. Jenk. 303. pl. 77.

[3. If the king grants an *office* for life, he cannot after grant *the reverſion* of this office without a ſpecial recital of the eſtate for life; but it is void. Co. 8. Earl of RUTLAND, 56. b.]

Cro. 8. 231. S. C. For though by the taking the ſecond leaſe the firſt was drowned, yet at the inſtant time of the taking of the ſecond leaſe, it was in eſſe, and therefore ought to have been recited, eſpecially

[4. If the *king leaſes land* to another, *and after makes a new leaſe to the ſame party*, this is void, without recital of the firſt leaſe, though the acceptance of this ſecond leaſe * operates as a ſurrender in an inſtant... between HARRIS AND WING adjudged, cited and agreed, H. 38 El. B. R. in HALESWELL AND AYLEWORTHIE's caſe. Vide the caſe of Harris and Wing argued. P. 32 El. B. R. Mich. 5 Ja. in Scacc. per curiam.]

eſpecially being *a leaſe upon record*; *but* of a leaſe *by matter in fact*, they agreed *there* need *be no recital*. —— S. C. cited as adjudged. Mo. 415. in Welſh's caſe.—3 Le. 242 to 251. Mich. 32 Eliz. S. C. adjudged. —— * S. C. cited Cro. C. 198. contra, that it was held to be no ſurrender of the former leaſe.

[5. If the *king preſents his clerk* to a benefice, *and after preſents another*, without mention of the firſt preſentation, this ſecond preſentation is good, without any recital of the firſt, for the *firſt is revoked in law by the ſecond* preſentation, without mention of the firſt. Mich. 8 Ja. Scacc. Hill. 8 Ja. between * CALVERT AND KITCHIN adjudged; for the firſt preſentee had not any eſtate nor intereſt in the church nor at will by the preſentation. Dub. D. 16 El. 327. 4. 17 El. 339. 47. but there adjudged void, becauſe it was obtained † pending a quare impedit, in deceit of the king.]

See (O. b) pl. 3. —— * S. C. Lane, 71 & 100. and Ibid 102. Altham Baron, cited 38 E. 3. 3, 4. by which it appears that a ſecond preſentation made by the king

was good, without a repeal of the firſt; and that by Gaſcoign, 7 H. 4. 32. if the king makes a preſentation to one, and then preſents another, without recital or repeal of the firſt, yet the biſhop ought to receive the later preſentee; for it is good without actual repeal. —— † S. P. 6 Rep. 29. b. Trin. 44 Eliz. in Green's caſe.

6. The king grants *a copyhold by letters patents*; it need not be recited that it *was copyhold*. Per Newdigate J. 2 Sid. 139. Hill. 1658. in caſe of Field v. Boothby.

7. If the king *grants an office to W. N. for term of life*, and *after grants the ſame office to a ſtranger*, the firſt patentee dies, yet the ſecond grant is void; becauſe the firſt grant was not rehearſed in the ſecond patent. Per Keble, for law. Br. Patents, pl. 54. cites 6 H. 7. 14.

8. 6 *H.* 8. 15. *If any make ſuit to the king for lands, offices, or other things formerly granted to any perſon during the king's pleaſure, the firſt patentee being ſtill in life, the laſt grantee ſhall expreſs, in his petition or patent, the former patent, and the determination of his pleaſure concerning the ſame, otherwiſe the laſt grant ſhall be void.*

This law was made on purpoſe that the king might not be deceived in his grant.

‡ Arg. 4 Mod. 277. in caſe of the King v. Kemp. —— If the king grants to me *to be ſurveyor of his manors at B. and to take timber for the buildings of the king, durante beneplacito*; and the king grants after *the like grant to another, not making mention of the firſt patent* juxta formam ſtatuti, &c. Yet the laſt patent is good; becauſe *no fee nor profit is granted* by the firſt patent; as if a man had granted to me that I ſhould carry his wood, and after grants the like grant to another, &c. Br. Patents, pl. 2. cites 27 H. 8. 28.

King Charles I. by letters patents *granted to P. the office of under-ſearcher, durante beneplacito noſtro.* Afterwards Cha. 2. ſends his *privy ſignet, to confirm the ſaid P. in his place*, and *afterwards grants the ſame place to F. by patent, without taking notice of the patent to P.* The queſtion was, whether this ſecond patent was void by the ſtatute 6 *H.* 8. *cap.* 15. The Lord Chancellor, Windham, and Rainſford inclined that the patent was determined, and the ſcire facias to be quaſhed without better cauſe ſhewn. Freem. Rep. 70. Hill. 1672. in Canc. The King v. Foſter.

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9. If the *king tenant in tail makes a leaſe for years, or* for *life*, and dies, the *heir may make another grant without reciting them*; for they are void by the death of the king tenant in tail who granted; and ſuch grant is no diſcontinuance without warranty; for the king upon his grant does not make livery. Br. Patents, pl. 101. cites 38 H. 8. and alſo 37 H. 8. S. P. between the King and Sir Anthony Lee.

S. P. And if the king tenant in tail makes a leaſe for years, his ſucceſſor may avoid it,

or if he will he may accept the rent reſerved, and ſo affirm the leaſe; and when ſuch ſucceſſor grants theſe

theſe lands, he need not recite the void leaſe; for though it be by patent of record, it is null. If the ſucceſſor accepts the rent reſerved by the king tenant in tail, a recital of this, or a non obſtante that it is not recited, is neceſſary; but where leaſes are made by common perſons, and the reverſion comes to the king, the king's grant of this reverſion, without any recital or non obſtante, is good; for the perſon who purchaſes ſuch reverſion from the king, has no means to know whether there be ſuch leaſes or not; for they were made in the country, and are not of record. Jenk. 204. pl. 28. cites S. C.

But where his ſecond grant implies a grant in poſſeſſion

10. The king in his grant need not recite his *own eſtate*. Per Periam Ch. B. 1 Rep. 48. a. b. Trin. 42 Eliz. in Altonwood's caſe.

which cannot be by reaſon of a former grant in poſſeſſion, the ſecond grant muſt recite the firſt, or is void by the reaſon of the common law. 1 Rep. 50. in Altonwood's caſe.

See (I. c. 2) pl. 3.

(R. b) What ſhall be a *ſufficient* Recital of Leaſes; and *what Things will ſupply* the Recital of them.

Br. Patents, pl. 93. ſays, that this was granted to be law in time of H. 8. in Sir Thomas Ingleſield's caſe; and that it ſeems, to him to be ſo.

[1. IF the king recites, that *where J. S. holds for his life of his grant, he grants the reverſion to J. N.* this is good recital of the leaſe, *without mention of the letters patents, or date* of them; for the king is not deceived, inaſmuch as he takes notice upon him of the former intereſt for life. 37 H. 6. 37. b. Per Danby. In time of H. 8. Br. Patentees, 96. Sir THOMAS ENGLEFIELD's caſe.]

For *it is ſufficient in pleading to ſay that the king, reciting how he leaſed to W. N. for life, has granted to A. B. the reverſion*

[2. If the king *recites a former leaſe for life made by himſelf by letters patents, bearing date &c.* and *miſtakes the date, and then grants the reverſion*, yet this will not make the grant void, inaſmuch as the king takes notice of the ſtate, and the date is not material. 38 H. 6. 37. b. Per Danby, time of H. 8. Br. Patentees, 96.]

; per Danby Juſtice, and the court in a manner agreed to it: and therefore it ſeems that if the king *miſrecites the date of the firſt letters patents*, or the like, *yet if he well recites the eſtate, and the thing, and the name of the leſſee*, that then the grant of the reverſion is good; for where the king *takes notice of his tenant for life, and of his eſtates*, and grants the reverſion, he is not deceived in his grant; for he takes upon him notice of the former intereſt for life; and then the date of the firſt patent is not material. Br. Patents, pl. 96. cites 38 H. 6. 37.

[3. If the king *grants land, which is in leaſe of record, without recital of the leaſe*, but with theſe words, *notwithſtanding that it be in leaſe for life or years of record or otherwiſe*; this is a good grant,

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and ſhall paſs the reverſion; for the king is not deceived, and divers inconveniences will ariſe by the recital of the leaſes. Co. 4. BOZOUN, 35. b. Reſolved.]

Fol. 191.

[4. *So* if land be in leaſe of record, and the king without recital of the leaſe *grants the land, and further grants the reverſion thereof depending*, or expectant *upon any eſtate for life or for years*; the grant is good for the cauſe aforeſaid. Co. 4. BOZOUN, 35. b. Reſolved.]

5. 34 & 35 *H.* 8. *cap.* 21. Enacts, that *all letters patents, and grants made by the king ſince the 4th of February, or which ſhall be hereafter made by him within ſeven years next after the making of this act, ſhall be good notwithſtanding any miſ-naming, miſ-recital, non-recital, not finding of offices, miſ-recital or non-recital of leaſes, uncertainly miſcaſting, rating, or ſetting forth of the yearly values, or rate of the things granted, or of the yearly rents thereof, want of attornment, and livery of ſeiſin, or of the miſ-naming of the places where the things granted do lie, or of the tenants or farmers of them, or any of them.*

Provided alſo, that this act ſhall not extend to revive any letters patents, or any office granted by the king, which have been made void by authority of parliament, judgment, decree, or any otherwiſe.

This act ſhall not be prejudicial to any letters patents, indentures, or writings made after the 4th of February, in the 27th year of his reign, and before the 28th of April, in the 28th year of the king's reign, or to any other ſtatute made for the corroboration of ſuch letters patents, indentures, or writings.

6. 1 *E.* 6. *cap.* 8. *Such another ſtatute made for the confirmation of all grants made, and to be made by E.* 6. *from the 28th of January, in the firſt year of his reign, and ſo during his life, with ſuch proviſoes and limitations as in the former act of* 34 & 35 *H.* 8. *are contained. See the ſtatute.*

The *abbot* of W. with conſent of his convent, 21 H. 8. *leaſed land*, of which the abbot was ſeiſed in fee, to Sir T. *More, who was afterwards attainted* of treaſon, and the leaſe thereby forfeited, and *the king* poſſeſſed, &c. and he being ſo poſſeſſed, the abby and reverſion came to the king and his heirs, who *after the 32d of H. 8. made a leaſe to R. for twenty-one years; the reverſion deſcended to E.* 6. *who leaſed to P. habendum, after the term of the ſaid Sir. T. More ended, for 21 years.* Afterwards *R. ſurrendered his term, and took a new leaſe for* 30 *years*; adjudged, that P.'s leaſe was void, and not confirmed by any ſtatute; becauſe the term made to Sir T. More was ended before P.'s leaſe was made, and then the leaſe of the king as to the commencement has not any ſenſe, and the ſtatute of miſ-recital and non-recital *extends only when leaſes in eſſe are miſ-recited, or not recited, and not when the king intends a leaſe to continue, which is ended* and determined. And. 6. pl. 12. Paſch. 2 Eliz. Holt v. Roper.——Bendl. 84. pl. 129. S. C. and that the ſaid leaſe made to Sir T. More was long before extinct, in the poſſeſſion of King H. 8. by *unity of poſſeſſion of the ſaid term and reverſion*; and ſo the leaſe made by E. 6. cannot commence immediately after the ſurrender of the leaſe of R. becauſe the words of the commencement of this leaſe will not ſerve it, and thereupon the parties agreed. The reporter ſays he was of counſel with the defendant; and that the opinion of divers of the juſtices of C. B. was with the defendant as above. [But mentions nothing of any judgment given.]—3 Le. 5. pl. 14. S. C. ſays, the leaſe to B. was adjudged utterly void, for that the king was deceived in his grant, and not helped by the ſtatute of 1 E. 6. cap. 8.—S. C. cited Arg. 4 Mod. 276.

E. 6. *ſeiſed in fee of the 9th ſheaf of corn in E. as parcel of the poſſeſſions of the abby of L. in the county of York*, by patent under the great ſeal in 7 E. 6. *granted to W. R. & W. S.* and their heirs, *totam illam medietatem nonæ garbæ bladorum & granorum vocat. the ninth ſheaf de & in E. in com. Eborum*, modo & nuper *in tenura* ſive occupatione *W. W.* ac nuper monaſterio L. in com. Eborum diſſolut. ſpectant. By this patent the *plaintiff claimed the intire 9th ſheaf*; for in truth *all was in the tenure of W. W.* by a leaſe made 36 H. 8. reſerving rent, *but* E. *was in the county of L. and not of York.* The queſtion was, whether the intire ninth ſheaf paſſed by reaſon of the ſtatute of miſ-recital made 7 E. 6. For as to the *miſpriſion of the county* where E. lay, it *was* agreed on both ſides to be *not material*, it being helped by the ſtatute, and ſo held Popham and Clench J. in the abſence of the other juſtices; but Popham ſaid, that the patent could not convey more than the moiety, if it could convey that; for the makers of the ſtatute intended not to aid a grant, in which the king was deceived. As if the king grants the moiety of two acres, it is not reaſonable to conſtrue the patent to paſs two acres; and that is the *difference* as to the *quantity where the certainty is plain*; *as* whe e the king *grants two acres called the manor of D. whereas the manor contains* 100 *acres*, it is a good grant of all the manor, and all the acres; *but* if he had granted *all his manor of D. containing* 100 *acres, whereas it contained* 20 *acres*, nothing had paſſed by common law, but it is aided by the ſtatute. There is *alſo* a difference *as to the quality and nature of the thing*; as where H. 8. granted to Sir T. More *totam turbariam ſuam in D.* where a former patentee, having ſuch a grant, had before *converted part thereof into arable, and part into paſture*, Sir T. More ſhould have only that which was then turbary, and the ſtatute does not remedy ſuch a grant; for turbary is a profit parnable, which may be in one place and not in another after converſion; *but*, had it been a *great moor*, and after ſuch converſion the king had granted *totam moram ſuam*, it had been otherwiſe; for that it is provided for by the ſtatute; and if he had *granted all his eſtovers in ſuch a wood, whereas he had not any eſtovers in the ſaid wood, but a coppice only*

only therein, he was not aided by the ſtatute; and judgment accordingly for the plaintiff, with the aſſent of Clench J. cæteris juſticiariis abſentibus. Cro. E. 632. Mich. 40 & 41 Eliz. B. R. Brownlow v. Farr.

Non recitals of eſtates tail are not aided by this ſtatute; but if tenant in fee ſimple

7. 4 & 5 *P. & M.* 1. *Another like act made for the confirmation of all grants made, and to be made, to or by the queen, or to the king and queen, from the firſt of July in the firſt of her reign, and ſo during her life, with ſuch proviſoes and limitations as in the ſaid former acts of H.* 8. *and E.* 6. *are contained.*

was attainted, and the queen, after the death of the party attainted, had granted the land, no office being found, this ſhould have been confirmed by this ſtatute, and the patent which was void, ſhould have been made good thereby. 2 And. 35. Anon.

* The maſter and fellows of Magd. Coll. 15 Eliz. by indenture

8. 18 *El.* 2. *Another like confirmation of all grants * made to, for, and by the queen, or to be ſo made within ſeven years next after the end of this ſeſſion, with like proviſoes and limitations as in the former ſtatutes.*

inrolled, granted to the queen an houſe in fee, rendering 15s. rent, upon condition, that ſhe, before 1 Apr. ſhould convey to B Spinola, a denizen, and his heirs. She granted accordingly. It was reſolved, that this ſtatute of 18 Eliz. cap. 2. has not given any vigor or effect to the ſaid grant made to the queen, contrary to the ſtatute of 13 Eliz. cap. 10. which makes void all ſuch leaſes, gifts, &c. but that after this act of the 18th, the grant remains of the ſame force as it was before this act; for it is out of the letter of this act, which eſtabliſhes ſuch conveyances only as are made for ſatisfaction of debts, and ſums of money, or other good conſideration, which words in the preamble are connected to the body of the act; for immediately after the ſame words, the ſtatute ſays (for the better aſſurance, &c. whereof be it enacted); and therefore though the words in the body of the act are (for any debt, ſums of money, or other conſideration whatſoever), leaving out (good) before the word (conſideration), and ſince the ſaid grant was not for any debt, ſum of money, or other good conſideration, it was out of the letter of the ſaid act, nor did ſhe ever pay the ſaid rent; for ſhe granted it over before the day of payment, and beſides the want of good conſideration, there was alſo fraudulent practice; but admitting there was good conſideration, yet this ſtatute of the 18th extended not to it; for there are 5 *diſabilities whereby conveyances to the queen may be impeached.* 1ſt, In reſpect of the perſon of the grantor, and that by the common law, and abſolutely, as infants, monks, or ſecundum quid, and not ſimpliciter, as ideot, non-compos, feme covert, unleſs by fine and recovery, &c. or by the ſtatute, as deans, &c. by 13 Eliz. & archbiſhops, &c. by 1 Jac. cap. 3. 2dly, By reaſon of the nature of the thing granted; as if donee in tail holds of his donor by fealty, and the donor by deed inrolled, grants the fealty to the king, it is merely void; becauſe it is an incident inſeparable to the reverſion; ſo of grants of founderſhip by the founder. 3dly, In reſpect of the eſtate of the grantee, as if tenant in tail of land by deed inrolled, grants it to the queen by deed inrolled in fee, this will not bind his iſſue. 4thly, In reſpect of the manner of the grant; as if one ſeiſed in fee of land grants it after his death to the queen, her heirs and ſucceſſors, &c. which have no legal foundation, and are againſt the rules of law. 5thly, In reſpect of omiſſion of any circumſtance requiſite by law, but having firm commencement; as if, in ſatisfaction of a debt, or for money, or other good conſideration, he grants to the queen, her heirs and ſucceſſors, and this deed never was inrolled. 11 Rep. 66. b. 76. a. &c. Paſch. 13 Jac. Magd. Coll. caſe. —— But the reporter, page 77. b. 78. tells the reader, that there is a *difference* between a *general act*, viz. (by or from any perſon or perſons, bodies politic, or corporate) as the ſaid act of 18 Eliz is, and an *act which ſpecifies particular kinds of bodies politic and corporate*; as the ſtatute of E. 6. cap. 14. of chantries, which enacts, that every gift, &c. made to the late king, his heirs, &c. or to the now king, his heirs, &c. by any archbiſhop, biſhop, &c. of any manors, &c. to the ſaid archbiſhop, &c. belonging, ſhall be good and effectual in the law, to all intents and purpoſes; and the reporter ſays, that if *tenant in tail grants* his land *to the queen*, ſuch grant is good againſt the iſſue by the ſtatute 18 Eliz. For the perſon of the tenant in tail is able, and he has power upon the land; and that ſo in VAUGHAN'S CASE, Mich. 32 & 33 Eliz. B. R. *But* if *baron and feme* by deed grant the land of the feme to the queen, this is not made good by the ſaid act, to bind the feme after the coverture, or her heirs; for there the perſon of the feme covert is diſabled to convey her land, unleſs by fine upon due examination, and ſo alſo was it held in Vaughan's caſe. —— There is a note in Cro. J. 364. Hill. 12 Jac. B. R. where the laſt above mentioned diſtinction is ſaid by Coke upon the argument of Warren and Smith's caſe, to have been adjudged in 30 Eliz. in BAWD'S CASE. [But this ſeems to be meant Vaughan's caſe, and only miſprinted; but for the better explaining the difference, obſerve the diverſity taken by Lord Coke, as above, between the two ſtatutes of 1 E. 6. cap. 14. and this of 18 Eliz. cap. 2. the above diſtinction holding in the one caſe, but not in the other.]—This ſtatute extends only to make good *imperfections in circumſtances and not in ſubſtance*, which is the reaſon that it makes not good a leaſe to the king by an infant. Arg. Le. 334. pl. 467.

Provided,

Provided, that all patentees, who have ſince Nov. 18, *or ſhall, during the ſpace of ſeven years, purchaſe or get of the queen any manors, &c. which, at the making of patents, were, or ſhall be of more yearly value to the queen, and ſo anſwered in yearly rent, or ferme, than ſpecified in any ſuch patents,* * *or in the particulars or rate thereof, made by any auditor, ſurveyor, or officer; then every ſuch patentee, &c. their heirs, executors, &c. within one year after office, or other due proof, order or decree thereof, had or made, or to be made within ten years after the end of the preſent ſeſſion of parliament, &c. ſhall pay for ſuch overplus after the rate of* 60 *years purchaſe, according to the value anſwered at the time of making ſuch patents.*

The queen was ſeiſed of the ſcite and demeſnes of a priory of the annual value of 6l. 3s. 10d. and of divers other lands in Wells, of the yearly value of 19l. and of the rectory of A. of the value of 10l. and J. S. intending to purchaſe of the queen the ſaid ſcite and demeſnes procured a particular to be made accordingly, and obtained letters patents, by which letters patents *the queen, without intention of the purchaſer to have more paid to him than the ſcite and demeſnes, gave the ſaid ſcite and demeſnes, and the other lands and rectory*; and ſo the patentee had more than was any ways meant or intended. The queſtion was, If the patentee ſhould anſwer according to the rate of 60 years purchaſe, mentioned in this ſtatute? for in the particular, no rate or value was made of any of the lands or rectory, but only of the ſcite and demeſnes, nor was there in the patent any value of any part: wherefore, ſince the ſtatute ſays, that the 60 years purchaſe ſhall be paid for the overplus and value, which is more than is contained in the patent, particular, or rate; and here is no value of them in the particular or patent, it was held by ſome that nothing ſhould be paid to the queen; but the caſe conſidered, it appears, that the intention was, that ſhe ſhould have ſatisfaction for ſo much as ſhe did not intend to paſs according to the annual value; and the words are to this purpoſe; for though there is no value of the greater part of the tenements granted by her, made in the particular or patent, yet they were demiſed for rent, which was a rate made by the officer, and ſo remains in the account of the auditors; but if the queen had *granted a wood or other thing, which never had been rented*, it was held by the two Ch. J. and Baron of the Exchequer, that in ſuch caſe ſhe had not been aided by the ſaid ſtatute. And. 110. pl. 155. Anon.

H. 8. in the 33d year of his reign made a *leaſe for years* to the earl of B. *of the rectory of Bridgwater, and of the tithes of two hamlets in W. parcel of the rectory of W. the reſidue of which rectory was demiſed by the king at* 10l. *a year rent, and ſo continued in demiſe till* 2 *Eliz. when A. purchaſed of Queen Eliz. the rectory of W. at the value of* 10l. *a year, and had general words of the tithes of two hamlets, but no recital of the leaſe of the Earl of B. then in eſſe, and thereby ſhe granted the rectory of B. and the tithes of two hamlets, and all contained in the earl of B.'s leaſe, to the corporation of Bridgwater.* Afterwards Boſſeville, the ſon of A. after this ſtatute of 18 Eliz. which had retroſpect to the beginning of her reign, claimed the tithes of the ſaid two hamlets againſt the corporation; upon this a bill was preferred in the court of wards, and it was agreed by counſel on both ſides, that the patent made to A. was void at the firſt, as to the tithes of two hamlets, for want of recital of the leaſe thereof then in eſſe to the earl of B. and ſo continued void till the ſtatute of 18 Eliz. Two queſtions were made: 1ſt, If the ſtatute of 18 Eliz. will make the grant good by relation againſt the corporation of B. who had taken new grant of the tithes of the two hamlets in 3 Eliz. becauſe the ſtatute is, *that patents made ſince* 2 *Nov.* 1 *Eliz. ſhall be good againſt the queen's majeſty, her heirs and ſucceſſors, notwithſtanding non-recital.* 2dly, If the deceit in under-valuing the ſaid tithes of the two hamlets, which made the grant void, be remedied by the ſtatute alſo by relation of the patent made, or of the ſtatute made; and it was argued, that the patent, without recital, is made good againſt the queen, her heirs and ſucceſſors, but not againſt others, and conſequently not againſt the corporation of B. Afterwards, by the opinion of the two Ch. J. it was agreed againſt Boſſeville. Mo. 131. pl. 278. Trin. 25 Eliz. Boſſeville v. the Corporation of Bridgwater.—2 And. 100. S. C. by name of HALLISWELL v. THE CORPORATION OF BRIDGWATER ſays, the grant to the corporation of Bridgwater was for 21 years, and the grant to A. was to him and his heirs, and the leaſe to the corporation was agreed to be good; for the intention of the ſtatute was not to make good grants void, but void ones good, and that the inheritance ſhall be in Boſſeville, by reaſon of this ſtatute, which makes it good againſt the queen. And that if there are two leaſes made by the king, whereof the firſt is void, &c. and the 2d good, the ſecond remains good and the firſt void. ——Sav. 58. S. C. reported thus, viz. J. S. was poſſeſſed of a *leaſe for years* of a manor, of the demiſe of the queen. *A. took a new leaſe* in 2 Eliz. for 21 years, *without reciting the leaſe to J. S.* for which reaſon this ſecond leaſe is void. Afterwards *Boſſeville got a third leaſe for* 30 *years, with a recital of the former intereſts.*— It was agreed by all the juſtices and barons aſſembled at Serjeant's Inn, that by this ſtatute all patents are made good againſt the queen, her heirs, &c. but not againſt her patentees and aſſignees; and that to make the leaſe to A. to be good, which was void at the commencement, would be a hard conſtruction of the ſtatute.

The queen *made a leaſe* of lands to A. *and granted the reverſion to J. S. miſreciting the tenant's name*, and afterwards *made a third grant to W. R. with a true recital of the tenant's name*; and *afterwards this ſtatute was made*: this ſhall not revive the firſt [2d] *grant*, becauſe it was *utterly defeated before*

the ſtatute. Cro. E. 868. ſays, this was cited to be reſolved by advice of the judges in the court of wards, in one BRIDGWATER's caſe; and that all the juſtices now affirmed it to be good law. Hili. 43 Eliz. C. B. in c ſe of Child v. Low.

A. ſeized in fee, was attainted in a premunire, but before trial gave his land in tail to J. S. Afterwards he was attainted of premunire, and this was found by office under the Exchequer ſeal. Queen Elizabeth granted theſe lands to C. under the great ſeal, within the time of the proviſo of 18 Eliz. cap. 2. Reſolved that the grant by the queen was not good at common law, becauſe upon the attainder the frank tenement was not diveſted, and veſted in the king till an office found thereof, which ought to be an office of intitling, and not of information only of the particulars of the lands; and alſo reſolved, that this grant is not aided by this act of 18 Eliz. for *the intention of that ſtatute was to make a grant good, where the eſtate of frankitenement was ſettled in the king, and no office found*; in ſuch caſe this ſtatute aids the defect of finding an office, according to the ſtatute of 18 H. 6. cap. 6. but not to make a grant good, where the king has not any eſtate before office found. 2dly, This * ſtatute makes the grant good againſt the king, his heirs and ſucceſſors, and not againſt a ſtranger; and therefore does not defeat the eſtate of the donee in tail; and ſo upon this point without argument, judgment was given for the defendant. Jo. 217. Mich. 5 Car. B. R. Groſſe v. Gayne. ——Cro. C. 172. pl. 18. S. C

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9. The *queen demiſed a rectory* to the churchwardens of S. *for* 21 *years*, and *afterwards* by letters patents, *reciting the firſt grant*, and that the church-wardens had ſurrendered all their eſtate for years, (modo habentes & ad præſens poſſidentes,) &c. ſhe, *in conſideration of* the ſaid *ſurrender, and* for *a fine of* 20*l.*, &c. *demiſed* the ſaid rectory *to them for* 50 *years*. It was adjudged, that there need not be any actual ſurrender of the firſt leaſe, becauſe the words in the ſecond leaſe, (viz.) modo habentes & ad præſens poſſidentes, import, that they were then poſſeſſed of the firſt leaſe, and their acceptance of the new leaſe for 50 years *was in judgment of law a ſurrender of the firſt leaſe for* 21 *years*, and ſhall precede it, and that a corporation may make a ſurrender of their term by an act in law without writing, though not an expreſs ſurrender without writing. And the reporter adds, that he had ſeen ſeveral other letters patents made on the like conſideration of a *ſurrender, with the words (modo habens & poſſidens)* in none of which there was ever any actual ſurrender made. 10 Rep. 66. b. Trin. 11 Jac. in Scacc. Church-wardens of St. Saviour's caſe.

(R. b. 2) Recital and *Pleadings*.

S. C. cited 1 Rep. 43 a. in Alton-wood's caſe. ——S. C. cited Pl. C. 455. Trin. 13 Eliz. in Sir Tho. Wroth's caſe.

1. IN the patent to A. to be quit of collection of tenths it was recited, that *for as much as the abbey is the free chapel of the king, he granted that the abbot ſhall be diſcharged of collection of tenths*, and therefore he ought *to aver the recital of the king*, upon which it is [viz. that it is] (the free chapel of the king) and becauſe he did not, therefore ill; but Huſley Ch. J. e contra. And per Cur. the patent was diſallowed becauſe it was ill pleaded, in as much as he pleaded it *quod continetur inter alia, that ſuch a thing was*, &c. and *did not aver it in fact*; but it was ſaid per Cur. that at another time he ſhall have advantage of the patent, and ſo it is not loſt for ever. Br. Patents, pl. 71. cites 21 E. 4. 47.

S. C. cited Pl. C. 455. in Sir Tho. Wroth's caſe.

2. *And* where the king *recites, that whereas I have done him good ſervice, and am decrepit* and lame, *therefore he grants* to me, &c. there I need not *to aver the ſervice* nor reſidue in the rehearſal, where the patent is *ex certa ſcientia & mero motu*; for there the

rehearſal is void, and the patent good; Per Huſſey Ch. J. Ibid.

3. *Otherwiſe* it is *where the ſurmiſe comes of the part of the party.* Ibid.

4. *As* where the king *grants a manor which eſcheated* to him, &c. and *in truth it is his inheritance*, the patent is void; for it ariſes of a falſe ſurmiſe of the party himſelf, but where it comes from the king, and not from the party, the rehearſal is void and the grant good, quod Curia conceſſit. Ibid.

5. *But* where the king *grants land, inaſmuch as the grantee ſhall releaſe all his right in ſuch lands to the king*, there he ought to *aver that he has releaſed accordingly.* Ibid.

6. *So* where the king *for ſervice performed grants* to a man land, this is good, though he *did no ſervice*; per Fairfax Juſtice, and therefore it ſeems, that there is a *diverſity where the king himſelf takes conuſance of the* * *ſurmiſe* or conſideration, *and where* the king *has it by information* and ſurmiſe of the patentee. Ibid.

S. C. cited Pl. C. 455. Trin. 15 Eliz. in Sir Thomas Wroth's caſe.

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(S. b) Grant of the King. *Repealed* by or without Scire Facias. In what Caſes a Patent may be repealed and made void *without Scire Facias.*

[1. IF the *patentee* of the king *of an office commits a forfeiture by condition in fact, or in law broken*, the king may ouſt him before any ſcire facias granted, or office, or making of any new patent. Co. 9. Sir G. Reynell, 95. b. Dy. 3 El. 198. 50. and 211. 29. contra.]

Where there is *but one patentee who has committed a cauſe of forfeiture of an office, whereof the king has not made any new patent*, there the patentee ſhall not be ouſted by the king unleſs by ſcire facias at the king's ſuit; per the Reporter, D. 198. a. pl. 50. who ſays, he infers it from certain precedents there cited, and that the reaſon ſeems to be, that he who is *placed in an office by matter of record, whereof the king has notice, ought not to be removed but by matter of record*; viz. by ſcire facias, and avoidance of the letters patents, &c and cites S. P. between Sir Robert Cheſter and Ld. Haſtings.

If the forfeiture be of an *office for life*, though the conviction be of record, yet there muſt be a ſcire facias; per Holt Ch. J. 12 Mod. 79. but otherwiſe of an office *at will*. The King v. Kemp.

[2. If the *king grants land by his letters patents under the great ſeal*, and in the lower part, after all the patent ended, it is put *(per warrantum commiſſion.)* this being done by warrant of the commiſſioners *of defective titles* upon compoſition with them made, *if the commiſſioners had not an authority by their commiſſion* to make any compoſition in this caſe by force of their commiſſion, and ſo this is out of their commiſſion, thoſe letters patents are void in law without any ſcire facias to repeal them; and it is good pleading [*to ſay*] *non conceſſit, &c.* againſt thoſe letters patents. Trin. 12 Car. B. Rot. 344. 345. between Bestney, Betts, and Otway, for the vicarage of Cateras in com. Cambridge, in a quare impedit; reſolved per Curiam upon evidence at the bar, and the plaintiff nonſuited upon this reſolution. (But quære how *this averment dehors* may be taken againſt the letters patents, the words

per warr. commiſſ. not being within the body of the patent, but after all the patent ended.) But it ſeems this averment may well be, inaſmuch as in the commiſſion it is appointed, that upon the warrant of the commiſſioners, the patent ſhall paſs under the great ſeal without other warrant; and in the end of the patent is put (per warrant. commiſſionar.). Mich. 16 Car. B. R. between PITKIN, &c. AND ..... PSON, and others, per Curiam upon evidence at bar.]

Scire facias to repeal the king's patent can only be in Chancery.

3. Patent of the king ſhall be *reverſed in Chancery by ſuit there only, by petition, traverſe, or monſtrans de droit, and ſcire facias thereupon.* Br. Juriſdiction, pl. 102. (bis) cites 21 E. 3. 46. Petition, pl. 11. cites 21 E. 3. 47. ——Where the *king grants the land* by patent, and *one comes and traverſes the office*, he ought to have ſcire facias in Chancery againſt the patentee, before iſſue joine. Br. Scire Facias, pl. 185. cites 14 E. 4. 1. 6. ——Br. Traverſe de Office, pl. 39. cites S. C.

4. If the *king be ſeiſed*, be it *right or wrong*, a man ſhall ſue to him by petition; per Wilby; quod nota; and this where the king
[116] enters or ſeiſes without office as it ſeems, but upon falſe office a man may traverſe. Br. Petition, pl. 12. cites 24 E. 3. 55.

5. A man *ſtruck a juror at Weſtminſter* who paſſed againſt him, *for which* he was adjudged to priſon for his life, and his hand to be cut off, and *his lands ſeiſed into the hands of the king*, and *the king*, thinking it had been forfeited, *granted it to W. N. and afterwards* he *pardoned all the offence to the offender, and all that to him belonged*, by which the *heir ſued ſcire facias, reciting the act, the grant, and the pardon, to ſay why the land ſhould not be re-ſeiſed*, and livery made to the heir; and the *tenant demanded judgment, becauſe the ſcire facias was not founded upon record, and the charter is no warrant of the judgment*, &c. et non allocatur, but execution was awarded. Br. Scire Facias, pl. 160. cites 41 Aſſ. 25.

Br. Confirmation, pl. 1. cites S. C. —Br. Procedendo, pl. 12. cites S. C.

6. *Quare impedit* brought *by the king by reaſon of the cuſtody of a ward*, becauſe the grantor of the anceſtor of the infant of this advowſon had preſented; and the *grantee obtained ratification of the king*; and becauſe it was perceived that it ſhould be *prejudicial to the king*, the ratification was repealed, and procedendo granted in the quare impedit; quod nota. Br. Repellance, pl. 1. cites 45 E. 3. 19.

7. Where the king *re-ſeiſes* or reſumes *land after livery made to a prior alien*, &c. *without cauſe ſhewn*, the party ſhall have *petition and ſcire facias againſt him who has the land; but if* it be re-ſeiſed or *reſumed for cauſe* ſhewn, he ſhall have *traverſe* to the cauſe, *and ſcire facias* againſt him who has the land; per Cur. and ſo it was done there. Br. Scire Facias, pl. 55. cites 2 H. 4. 10.

Brooke ſays, the law ſeems to be the ſame *upon every ſcire facias* to repeal a patent, *if the patentee* be warned *and makes default.* Ibid.

8. *Traverſe* was taken *to an office which intitled* the king *to the land by ward which was granted by patent to A. B.*——*C.* came and *traverſed the office*, and had ſcire facias *againſt A. B. who was warned, and did not come*; and therefore per Cur. his letters patents are void. Br. Scire Facias, pl. 131. cites 4 H. 6. 12.

9. *Where*

9. *Where the king ſeiſes for felony and leaſes for life, and a ſtranger has title*, there the king ſhall reſume and make livery to the party; for there he has reverſion. And where the king makes *feoffment of land in ward*, in this caſe the letters patents ſhall be repealed, and the land reſumed into the hands of the king, and livery made to the heir; for there the king had not fee ſimple to give. Br. Scire Facias, pl. 58. cites 7 H. 4. 20. Br. Livery, pl. 13. cites S. C. Br. Reſeiſer, pl. 6. cites S. C.

10. Scire facias was ſued to repeal letters patents, inaſmuch as king *E.* 3. *was poſſeſſed of land in ward, and died*; and this came to king *R.* 2. who *granted it for life, the remainder over in fee*; and the land was re-ſeiſed, and livery made to the heir ſine exitibus, and the letters patents revoked and annulled; quod nota. Br. Scire Facias, pl. 63. cites 7 H. 4. 41. Br. Livery, pl. 16. cites S. C.

11. Writ of *error* was ſued *upon an outlawry of felony*, by which *ſcire facias was awarded againſt the lords* mediate and immediate, *and* againſt the *tertenants* who were warned; and *one came and alleged grant by the king for term of life*, and *prayed aid of the king*, and had it; and after procedendo, they were *at iſſue, if the party was impriſoned at the time of the outlawry* pronounced or not, and *found for the outlaw*; by which *he prayed that the outlawry be reverſed, and the letters patents repealed*; which was denied him; whereupon *judgment was given that the outlawry be reverſed, and he reſtored to the common law*, and to all that he loſt for this cauſe; and as to the letters patents they would adviſe; but by this judgment of reſtitution he ſhall re-have his land; per Gaſcoign and Huls; but Tyrwhite contra, before another ſcire facias ſued; and he held ſtrongly, that he *ſhall have another ſcire facias*, and thereupon the outlaw pleaded pardon of the king of the felony; and it was allowed. Br. Scire Facias, pl. 76. cites 11 H. 4. 53.

12. If *traverſe of office is tendered*, and the *plaintiff takes the land to farm according to the ſtatute*, and finds ſurety, and after it is *awarded that the traverſe does not lie*, by this the *farm and ſurety is diſcharged, without* ſuing *ſcire facias to repeal the patent of the farm*. Br. Scire Facias, pl. 172. cites 4 E. 4. 29. [117] Br. Patents, pl. 74. cites S. C. for now it appears that the plaintiff has no title.

13. Where a man *traverſes office for land, office*, &c. *which paſſes for him*, and againſt the king, there *he ſhall have ſcire facias againſt him who has it of grant of the king of eſtate certain*, as for life, or durante minore ætate, or the like; *contra againſt him who has only the occupation at will*. Br. Scire Facias, pl. 173. cites 5 E. 4. 3.

14. Where the king by his letters patents, dated *1ſt May, grants* to me an office or other thing, and after by other patents dated *2d May, he grants the ſame thing to a ſtranger*, thoſe ſecond patents are merely void; and yet I ſhall have ſcire facias againſt the ſecond patentee, and avoid thoſe laſt patents by judgment of the Court. Per Cur. Keilw. 196. b. Mich. 9 H. 8.

15. Scire facias to repeal the grant of the office of *remembrancer of the Exchequer* to one Blague, made 18 H. 7. and afterwards in the 3 H. 8. he was made baron of the Exchequer, quam diu ſe bene geſſerit in eodem officio baronis. Afterwards H. 8. at the requeſt of Blague, granted the ſaid office of re-

membrancer to Blague's ſon for life, to have after the ſurrender or demiſe, ſeu aliquo modo quocunque & quandocunque vacare contigerit. And becauſe Blague had no legal eſtate after his being made baron, upon ſcire facias returned, and default made, judgment was given to revoke the laſt patents, &c. D. 197. b. 198. pl. 47. cites Hill. 15 H. 8. Blague's caſe.

16. Scire facias iſſued to repeal a grant of the *office of bailiff of the hundred* of C. *which P. the plaintiff had by inheritance in fee ſimple*, and was expulſed, &c. by colour of letters patents. Upon the ſcire facias returned, and nil dicit, the patent was revoked, and P. reſtored to the office una cum exitibus, with a ſalvo jure cujuſlibet. D. 198. a. pl. 49. cites Hill. 28 H. 8. Penwarren's caſe.

17. The Lord Ch. J. Brooke *granted* to G. *the office of protho-notary* of C. B. and *afterwards revoked it* without a ſcire facias, *becauſe* he was *incapable* to execute that office, and granted it to another; and thereupon a precedent was ſhewed, 5 Ed. 4. where the office of the *clerk of the crown* was granted to one Vynter, and Croxon who died; and then Vynter exhibited his patent, and prayed admittance; but the Court would not admit him to the office, becauſe he was unexperienced in it, and his diſability being ſignified to the king, ore tenus, without a ſcire facias, he commanded them to ſwear and admit another. Dyer, 150. b. pl. 1. Mich. 4 & 5 Ph. & M. Vynter's caſe.

2 And. 118. S. C.

18. Sir Maurice Berkley having the *office of banner-bearerſhip* in the field, *ſurrendered the ſame before a maſter* in Chancery *out of court*, but *did not deliver up his letters patents to be cancelled*; this ſurrender was accepted and recorded by the ſaid maſter; and thereupon the office was granted to Sir John Sullyard. Afterwards Sir Maurice Berkley brought a ſcire facias to repeal the grant to Sullyard. And the queſtion was, whether the ſaid record was ſufficient to make a ſurrender or not? But the matter was compounded by the Lord Keeper, ex aſſenſu partium; and Sir J. S. was removed, and Sir Maurice was reſtored ſine exitibus vel feodis medio tempore receptis. D. 176. pl. 29. Hill. 2 Eliz. Sir Maurice Barkley v. Sir John Suliard.

19. The tenant of the plaintiff *conveyed* the land *to the king*, and the *king conveyed to a corporation*; ſo as in rigour of law the ſeigniory of the plaintiff was extinguiſhed; but the king was deceived in his grant; for he was made an *inſtrument* to do wrong, *to deprive the plaintiff of his ſeigniory*, and therefore the king's grant was void. Upon the whole matter, foraſmuch as the plaintiff's tenant cannot have the land, becauſe he has conveyed it to the king, and the king cannot have the land, becauſe of the wrong it would do to the plaintiff as to his ſeigniory, therefore the ſaid letters patents ſhall be repealed. If the plaintiff's tenant had conveyed the land to the king by deed inrolled, or had been attainted of treaſon, and the king had granted it to a common perſon to hold of the king; now the ſeigniory of the lord in this caſe had been extinguiſhed; but the king upon petition ought to repeal this patent, and grant it ſo that the ſeigniory of A. ſhall revive —Jenk. 22. pl. 40.

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20. Upon

20. Upon a ſcire facias againſt Richard earl of Dorſet, and others, members of Sackvill-college in Eaſt-Grinſted in Suſſex, to ſhew cauſe *why the patent of incorporation ſhould not be repealed*, ſo far as it concerns Edward earl of Dorſet, and the heirs males of Robert earl of Dorſet the founder, the writ recited the will of *Robert*, who *deviſed to his executors*, &c. *that they ſhould found and endow the ſaid hoſpital, and make bye-laws, and that the heirs of the founder ſhould have the patronage and viſitation* thereof. It recited alſo, that *the king* intending to incorporate the ſaid hoſpital according to the ſaid will, *conſtituted the corporation*, and granted licence to purchaſe the endowment intended; *and* alſo that Edward earl of Dorſet, who was *heir male of the founder, ſhould have the patronage and viſitation*; reciting further, that the lady Thanet and the lady Compton are heirs of the founder, and that Edward earl of Dorſet had taken upon him the patronage and viſitation, to the diſinheriſon of thoſe ladies; upon this ſcire facias Richard earl of Dorſet demurred. As to the queſtion between the heirs general of the founder, and the heirs male, Twiſden J. held, that the letters patents to Edward earl of Dorſet and his heirs male are void, and ought to be repealed, and may be repealed, though they are void; and cited Hill. 12 H. 7. Keilw. 19. a. per Keble. And that they are void appears, 1ſt, Becauſe they are contrary to the king's intention, as Hob. 223. Anne Needler's caſe; 10 Rep. 110. b. Vow's caſe. 2dly, The king cannot deprive the patron of thoſe rights which are appendant to him, which are jus patronagii and jus viſitandi, which are in earl Robert and his heirs; but the Lord Ch. Baron Hale gave ſeveral reaſons why he could not give opinion to repeal this patent without great cauſe. He held, that ſuch ſcire facias lies not in point of form. 1ſt, A patent may be repealed in part; but this ſhall be only in clauſes independent. Fitzh. Petition, 19. 2dly, There will be an infinite inconvenience, if by this way part of this patent may be repealed; for by this way a good patent may be made nought; & e contra. 3dly, The king had ſaid how he will have this corporation qualified, and he is dead, and now he will make other patrons after his death. 4thly, The king hath ſaid how it ſhall be governed, and not otherwiſe. And here is no neceſſity to repeal this; becauſe if there be void clauſes they may be tried in aſſiſe, and therefore the writ is ill. 2dly, It doth not lie for the matter. 1ſt, Becauſe the king takes notice of the clauſes in the will, which was deſired to be repealed; and therefore he is not deceived in this grant. In the creation of the hoſpital, ſunt tres actores fabulæ, 1. Earl Robert. 2. The king, whoſe right is to grant the incorporation. 3. The executors, which ought to endow this hoſpital. 2dly, The executors are not at any prejudice, becauſe they are not compellable to endow this corporation, if it be not according to the will of earl Robert. 3dly, If the executors have endowed the hoſpital, being ſo created, it is a breach of truſt. There is no patronage till the foundation of the hoſpital, and the heir of Robert hath not to do with it till the foundation; and the executors do not break

break the truſt. The Lord Keeper would adviſe; and ſo it was adjourned. Raym. 154. Trin. 18 Car. 2. B. R. and 177. Paſch. 21 Car. 2. B. R. The caſe of Sackvill-college.

21. In error of a judgment in ſcire facias in the petty-bag, which ſet forth, that the city of Rocheſter was an ancient city, and incorporated time out of mind till 1 Ed. 4. who incorporated
[119] them by a new name of, &c. that before and after that time they had a market there, held every Wedneſday and Friday, and toll, &c. And that the king by letters patents, 7th of March laſt paſt, recited an inquiſition upon an *ad quod damnum*, by which it was *found, that it would not be to the damage* of the king, or of any other perſon, *if the king ſhould grant to the defendant a market* in Chatham, to be held there every Tueſday, whereupon he granted to the defendant a market, to be held there every Tueſday, cum omnibus proficuis, &c. prout per literas patentes apparet; and that whereas Chatham is within a mile and a half of Rocheſter; and whereas datum eſt nobis intelligi by the mayor, &c. of Rocheſter, that *the writ of ad quod damnum was executed on the day it bears date at* 30 *miles diſtant from Rocheſter, and without notice* given to the mayor, &c. ſurreptiſioſe & fraudulenter; and that the grant is ad damnum of the city of Rocheſter, and of the market there; and by reaſon thereof the grant is void; therefore the ſheriff of Kent is commanded to warn the defendant, &c. to ſhew cauſe why the letters patents ſhould not be cancelled. The defendant demurred, and the Attorney-General joined in demurrer. And the Lord Chancellor Finch, aſſiſted by North Ch. J. and Jones J. gave judgment, that the letters patents ſhould be cancelled and vacated: whereupon the defendant brought a writ of error in the Houſe of Lords; and there it was objected, that this ſcire facias doth not lie to repeal letters patents, becauſe there is another remedy at common law, by aſſiſe of nuiſance, or quod permittat, where the matter may be tried by a jury. But the judgment was affirmed, and it was reſolved that the king hath a right to repeal a patent by ſcire facias, in which he was deceived, or the ſubject prejudiced. 3 Lev. 220. Trin. 1 Jac. 2. in the Houſe of Lords, the King v. Butler.

22. A grant was made by the crown, for the ſetting aſide whereof an *Engliſh bill* was brought, and it was argued, that it was the proper remedy in this caſe; for that no ſcire facias would lie, it not being a record of this court, and if it would, yet it would not reach the fraud objected, it not appearing within the body of the grant; and that in this caſe equity did but follow the law, and that it was not fitting it ſhould be left in the power of the king's officers, by their connivance in paſſing grants, to put the king without relief in a caſe of *fraud and ſurprize*; and though there was *no precedent of ſuch ſuit*, yet all precedents had a beginning, and that, in this caſe, was ſufficient ground for a decree, there being all the *badges of fraud and ſurprize imaginable*, &c.— In the paſſing the grant there was *no warrant to the auditor to make out the particulars; nor to the ſurveyor to return an eſtimate*; nor *bill with a docquet, ſigned by the attorney*; nor any of the uſual methods obſerved, *but only a warrant under the ſign manual* for paſſing

paſſing the grant in queſtion *to the chancellor, and counterſigned by him;* which is making a warrant to himſelf, a thing never before heard of. And though a patent may paſs by immediate warrant under the privy ſeal or ſignet, yet this is in effect no warrant, being only under the ſign manual, and no ſeal, either privy or ſignet, to it. That this matter was *diſpatched with great hurry*, the warrant being ſigned the 29th, and the patent paſſed the dutchy ſeal the 31ſt of the ſame month, though it would take a week's time to ingroſs it; and that here the *petition, propoſal, the chancellor's report*, and *warrant for the grant*, are *all of the writing of the grantee's ſervant;* and that the *over-value was exceſſive*. And for thoſe reaſons the patent was ſet aſide by the Chancellor, aſſiſted by Jones Ch. J. and Montague Ch. B. See Vern. 277 to 282. Mich. 1684. And. 370. 382 to 392. Hill. 1685. Attorney-General v. Vernon, Brown, and Boheme.

(T. b) What ſhall be good Cauſe to repeal a Patent upon a *Scire Facias*. [120]

[1. IF the *king grants a patent by fraud or falſe ſuggeſtion*, by which he is *deceived*, he may avoid it upon a ſcire facias jure regio. 21 E. 3. 47. Co. 11. MAG. COLLEGE, 74. b.]

The Earl of Kent ſued petition to the king, for that *E.* 2. *gave to his father* 60*l. rent out of the will of C. in tail*, his *father died, he within age*, and the *king ſeiſed by ward the plaintiff*, who is *yet within age*, and the *king by his letters patents gave to the Lord J. M. in fee*; and becauſe the king is bound to render to the heir as fully as it came to him, he prayed that the patent be repealed, and the rent reſeiſed; upon which the petition was indorſed, that the archbiſhop of Canterbury and certain others, calling to them the chancellor, ſhould do that which is fair according to law and reaſon; upon which *ſcire facias was iſſued to warn J. M. to appear in the Chancery*, to ſay, why the patent granted by *falſe ſuggeſtion* ſhould not be repealed, and the rent reſeiſed; which ſuggeſtion was, *that the land came to the king by the attainder of R. F.* whereupon J. M. came and ſaid, that foraſmuch as this ſuit is to defeat frank-tenement, and to reſtore it to another, that this ſhall be at the common law, et not allocatur, becauſe it is to repeal patent of the king, which cannot be but only in Chancery. Br. Petition, pl. 11. cites S. C.——Br. Patents, pl. 14. cites S. C.——Br. Scire Facias, pl. 104. cites S. C.

M. was ſeiſed of an *houſe*, &c. which he *held of the biſhop of Wincheſter, and would convey the ſame to the friars Carmelites, but the biſhop would not conſent*; whereupon the friars and the tenant agreed, *tenant ſhould grant it to the king, and he to the friars*, which was done accordingly; and afterwards upon averment of this fraud by the biſhop, the patent was repealed, and the biſhop reſtored it to his ſeigniory. Cited Roll. R. 168. in the caſe of Warren v. Smith, per Houghton, Doderidge, and Coke, as 17 E. 3. 59. Meriot's caſe.

The queen *preſented where ſhe had no right*, and quare impedit was brought againſt the incumbent and the biſhop, and adjudged for the plaintiff. The defendant afterwards perceiving this, brought treſpaſs againſt the plaintiff, whereupon the ſaid plaintiff (now defendant) was outlawed, and then the (now) defendant *reſigned, and the queen preſented him again*; whereupon he was inducted; and after the plaintiff brought a writ of error and reverſed the outlawry; and then brought ſcire facias upon the judgment in the quare impedit againſt the defendant, where all this fraud appeared to the court, and therefore he recovered the preſentation. Cited by Doderidge J. as Trin. 30 Eliz. Rot. 139. B. Beverley v. Corbet.

2. Scire facias upon *ſuggeſtion, that tenant in tail*, the *reverſion to the king, had purchaſed licence to alien in fee, and retook to him and his feme in tail, the remainder to his right heirs;* and exception was taken, inaſmuch as it was not warranted by any record, et non allocatur; for it ſuffices upon ſuggeſtion. Br. Scire Facias, pl. 159. cites 40 Aſſ. 36.

3. Scire

Br. Scire Facias, pl. 223. cites 8 H. 4. 21.

3. Scire facias was ſued to reverſe certain letters patents made by the king, who was *intitled by office* before the eſcheator, *that J. N. committed treaſon where he was never indicted* of the treaſon, and the tenant prayed in aid of the king, and had it; and after procedendo came, and he ſaid nothing; by which the Court bid the plaintiff ſue procedendo to judgment; for this title is not ſufficient for the king, becauſe the party does not loſe the land until he be attainted. Br. Scire Facias, pl. 66. cites 8 H. 4. 21.

So a patent *for a market* where another ancient market was within a

4. Scire facias was ſued to repeal certain letters patents of a grant of a fair, ita quod non ſit præjudicium vicinis feriis; and becauſe it ſurmiſed to be *nuſance to another market or fair*, therefore writ iſſued, &c. Br. Scire Facias, pl. 71. cites 11 H. 4. 5.

mile and a half of it, which was much damaged by it, was decreed by Finch C. and aſſiſted by North Ch. J. and Jones J. upon a ſcire facias, to be repealed, *though an ad quod damnum had iſſued*; and was returned, that it was not to the damage of any. 2 Vent. 344. Hill. 31 & 32 Car. 2. in Canc. Sir Oliver Butler's caſe.—This decree was affirmed in the Houſe of Lords. Trin. 1 Jac. 2. 3 Lev. 220. the King v. Sir Oliver Butler.——Cites 2 E. 3. 34. Scire facias to repeal a patent of toll. And 17 E. 3. 59. b. Of market, 11 H. 4. 5. Of market, D. 197, 198. 276. And they ſaid, there never was any queſtion, whether the writ lay, but only of the manner, and other incident matters.

Scire facias was brought to repeal the grant of the office of the *ſerjeant at arms, for not attending his office*,

5. Scire facias to repeal a grant of an office of auditor for a *forfeiture* in not producing an account at ſuch time as he ought to do; and being returned warned, he made default; whereupon judgment was *given for the forfeiture, and that the letters patents and the inrolment thereof be annulled. D. 197. b. pl. 46. cites Mich. 14 H. 8. Toly's caſe.

ſo that the king's buſineſs remained not done, in contemptum regis, &c. And upon two nihils returned and default, judgment was given accordingly, and that the office be ſeized into the king's hands as forfeited, &c. D. 198. a. pl. 48. cites Trin. 26 H. 8. Eſton's caſe.

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6. Although the king, as to his natural perſon, may be within age, yet his natural perſon being joined with his politic, they are one indiviſible body. And he ſhall not avoid his *grants made within age*, nor his leaſes by nonage, whether he be ſeiſed in tail, or in right of the dutchy of Lancaſter, or in right of his crown. The lands of the dutchy of Lancaſter are ſevered from the poſſeſſions of the crown, as to the manner of granting them; but for age, aid, and ſuch perſonal relations, the duke is as king; but the king may avoid his grants *by dureſs*; as in caſe of rebellion, if the rebels having the king in cuſtody extort grants from him, as it happened in the caſe of H. 3. in the barons' wars. Jenk. 265. pl. 69. cites 2 Eliz. Plowd. 213.

7. In a great *vein of lead*, part of the earth *fell upon a miner, and killed him*; only that parcel, and not the whole vein, was forfeited for a deodand. The *king*, by his letters patents, *granted the ſaid vein to J. S.* The *lord chancellor* of England, on the prayer of the owner of the ſaid vein, *called in the ſaid J. S. by ſcire facias*, in the king's name, *and* by the prerogative law *cauſed the ſaid letters patents to be revoked; becauſe* they were *obtained ſurreptitiouſly*, and in deceit of the king. Jenk. 64. pl. 21.

(U. b.) *Who may ſue* the Scire Facias.

[1. IF by an *office a tenure is found of the king*, and that A. B. is in ward to the king, and thereupon the *king grants the wardſhip* of A. B. of body and land; and after *C. D. comes and traverſes the office*, he ſhall have a ſcire facias *againſt* A. B. to repeal his patent. 4 H. 6. 12.]

[2. If the king grants *two ſeveral patents of the ſame thing*, the *firſt patentee* may ſue a ſcire facias *againſt the laſt* patentee, to repeal the laſt patent. 37 H. 6. 14. D. 3 El. 197. 45. Divers precedents ſhewn accordingly.]

S. P. Jenk. 126. pl. 56. cites 6 E. 4. 9. and adds, that if the firſt patentee be ouſted, he has his election to bring an aſſiſe or ſcire facias, if the patents are for lands or for an office for life. By the juſtices of both benches. Judge Jenkins ſays, that regularly the law is, that the firſt patentee may have ſcire facias againſt the ſecond, but the ſecond patentee may have it againſt the firſt.——Where *two patents* are granted *of one and the ſame thing*, though it be *known by the name of the manor of B. and of the manor of S.* yet if the laſt ouſts the firſt, ſcire facias lies to repeal the patent; and if it be of divers things, aſſiſe lies, and not ſcire facias. Br. Scire Facias, pl. 176. cites 8 E. 4. 6. Br. Patents, pl. 63. cites S. C.——Scire facias was awarded for a firſt patentee to repeal letters patents of a ſubſequent patentee to be *park keeper*; and upon return thereof, and a judgment by nil dicit, the judgment was given in Chancery, that the letters patents be revoked. Dyer, 197. pl. 45. cites 10 H. 8. Hunt v. Coffin.

[3. If the king grants two patents of one and the ſame thing, *the ſecond patentee ſhall not* have a ſcire facias *againſt the firſt* patentee to repeal the firſt patent. D. 10 El. 277. 54. Where it is ſaid, that this is contrary to the books and precedents and the common courſe. 39 H. 6. 33. Contra.]

[4. If the king grants a *patent of land, or of an office*, he may ſue a ſcire facias againſt the patentee to repeal the patent *upon an expreſs condition broken, or for a forfeiture by force of a condition in law.* D. 3 El. 197. 47. 4 El. 211. 29.]

Fol. 192.

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[5. If the predeceſſor *king aliens by charter any of the poſſeſſions of the dutchy of Cornwall*, the *eldeſt ſon of the ſucceſſor king, being duke of Cornwall*, may bring a ſcire facias *in the name of the king* to avoid this patent. Co. 8. the PRINCE's caſe, 1. So done and admitted. And ibidem, fol. 22. b. 23. Divers precedents cited accordingly, without any allegation of any fraud or deceit in the obtaining of it.]

Hill. 3 Jac. 1.

[6 6 E. 4. 8. b. The *firſt patentee* of the office *of clerk of the crown ſued* a ſcire facias, *in the name of the king, to repeal a ſecond patent*; but there reſolved in Cam. Scacc. fol. 9. b. by the juſtices, that both ought to be of the *ſame thing*; for if the patents are of *ſeveral things*, and the *firſt* patentee *is ouſted by the ſecond* patentee, *the firſt* patentee ſhall not have any remedy by ſcire facias, but *is put to his aſſiſe*. [Baggot's caſe.]

Br. Scire Facias, pl. 175. cites S. C.—

7. Where the king is *intitled by falſe office*, and grants the land over, *he who is grieved* may traverſe the office, and have ſcire facias thereupon againſt the patentee. Nota. Br. Scire Facias, pl. 69. cites 9 H. 4. 6.

Br. Traverſe de Office, pl. 6. cites S. C.

8. Where

8. Where a patent is granted *to the prejudice of the ſubject*, the king of right is to permit him upon his *petition* to *uſe his name* for the repeal of it in ſcire facias at the king's ſuit, and to hinder multiplicity of actions upon the caſe; for ſuch action will lie, notwithſtanding ſuch void patent. Per Finch. C. 2 Vent. 344. Hill. 31 & 32 Car. 2. in Canc. in Sir Oliver Butler's caſe.

9. Scire facias out of Chancery, returnable in B. R. to repeal letters patents of the *rectory* of Algate; it was held, that if letters patents are granted *to the prejudice of any ſubject*, he may have a ſcire facias, upon the inrolment of them in Chancery, to have them repealed, as well as the queen may. As if a *fair* be granted to the damage of mine, I may ſue ſcire facias to repeal ſuch grant. Mod. Caſes, 229. Mich. 3 Annæ, B. R. Brewſter v. Weld.

(X. b) *What* Thing ſhall be [or amount to] *a Repealing.*

[1. IF the king *brings a ſcire facias* againſt a patentee to repeal his patent, and *the patentee is returned warned, and makes default, and thereupon judgment* is given againſt him, by this the letters patents are annulled, made void, and of no effect. D. 3 El. 198. 50.]

Ward of the land and body was granted to A. B., and C.—D. came and traverſed the office; and had ſcire againſt A. B. and was *warned and made default*; & per Curiam, *by this default his letters patents* of the ward *are void*; Brook ſays, quære if the ſame law be upon every other ſcire facias to repeal a patent, and ſays it ſeems clearly that it is. Br. Patents, pl. 20. cites 4 H. 6. 12.——*And* upon this another patent was *granted* of the land by the king to *C. D. until it ſhould be diſcuſſed between him and the king in the traverſe*, and after *C. D. was nonſuited*; and per Cheney and Hales Juſtices, by the nonſuit *this is a diſcuſſion of the traverſe*, and therefore the ſecond letters patents are void alſo, quod nota. Br. ibid. S. P. And *this judgment ſhall be pleaded againſt the patentee in any court.* Br. Patents, pl. 23. cites 37 H. 6. 14.——Br. Scire Facias, pl. 138. cites S. C.

[2. *So* the king granted at ſeveral times *two ſeveral patents of one and the ſame thing* to ſeveral patentees, and the *firſt patentee brought a ſcire facias* againſt the ſecond patentee to repeal his patent, who is *returned warned, and makes default, upon which judgment* is given againſt him. His patent is by this annulled, made void, and of no effect. D. 3 El. 198. 50. 37 H. 6. 14.]

3. *The king granted to A. B.* theſe liberties, viz. *to be exempt from juries and inqueſts*, &c. and *after all, franchiſes granted by this king were repealed by act of parliament.* Quære, if liberties are repealed by this word franchiſes? Br. Repellance, &c. pl. 7. cites 34 H. 6. 25.

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4. The chancellor of England demanded of all the juſtices, that where *the inheritance of the crown of England, and of France, with all pre-eminences and prerogatives, were given by act of parliament to H.* 7. and to the heirs of his body, *whether the liberties and franchiſes were by this reſumed;* and they anſwered that they were not; the reaſon ſeems to be, inaſmuch as it *ſhall be intended ſuch things were in the crown at this time*, and not thoſe which other men had by good title. Br. Repellance, &c. pl. 5. cites 1 H. 7. 13.

5. 34 & 35 H. 8. 21. *Provides that (notwithſtanding this act) the king's grants of offices, and their fees for keeping of caſtles, houſes, parks, chaſes, foreſts, or block-houſes, ſhall be void, when the cauſe of exerciſing ſuch offices is determined.*

(X. b. 2) Patentee. *Ouſted, how.*

1. WHERE the *king is intitled by office to a ward*, or ſuch like, and *grants the land* over by patent, and *during the nonage one* comes and *traverſes the office, or makes petition, and this matter is found for him*, ſcire facias ſhall be awarded againſt the patentee, to ſay why the party ſhould not have execution; and ſo ſee that the patentee ſhall not be ouſted without being warned by ſcire facias. Br. Scire Facias, pl. 156. cites 37 Aſſ. 11. Br. Petition, pl. 17. cites S. C.

2. If the *king cauſe his valect to be admitted to a corody in an abbey, of which he is not founder in jure coronæ*, by which the abbot ſues by petition, and upon the matter diſcharges the corody, he ſhall have ſcire facias againſt the valect to remove him, though the name of valect be not named in the petition; per juſticiarios; *but in a petition of land he ſhall not have ſcire facias againſt the tertenant for term of life of the leaſe of the king*, &c. *unleſs he be named in the petition*; for *it ought to appear in the petition in whom the franktenement is*; quod nota, the difference; for there the land is demanded; but in the other caſe the corody is not in demand, but it is to diſcharge the corody. Br. Scire Facias, pl. 169. cites 5 E. 4. 122.

(X. b. 3) Patents Repealed. *Pleadings.*

1. AN *office found, that M. the tenant of the king died ſeiſed, his heir within age*, and the *king granted the ward* to W. and the *feoffees traverſed the office, that the tenant infeoffed them, abſque hoc, that he died ſeiſed*, and had ſcire facias againſt the grantee to repeal the patent, who came and ſaid, that *another office* is *found that the feoffment was by colluſion to toll the king of the ward*, and demanded judgment, if he ſhould be anſwered to the ſcire facias, this office not being traverſed, & non allocatur, becauſe it was found pending the writ; but yet the defendant was ſuffered to plead the ſame matter to ſave his patent; and ſo he did, and ſaid, that the feoffment was by colluſion, &c. and thereupon were at iſſue. Br. Scire Facias, pl. 79. cites 11 H. 4. 80. Br. Traverſe de Office, pl. 11. cites 21 E. 3. 2.

2. Where the *king has a manor in ward*, which is *known by the name of the manor of B. and of the manor of S.* if he *grants the cuſtody of the manor of B.* to one, *and after* grants *the cuſtody of the manor of S. to another*, and he ouſts the firſt grantee, and he brings ſcire facias to repeal the patent, he *ought to ſurmiſe, that the manor of S. and B. are all one*, &c. ſo that it may appear, that the patents are of one and the ſame thing; for if they are *of divers things, aſſiſe* Br. Scire Facias, pl. 176. cites S. C. [124]

aſſiſe lies, and *not ſcire facias*. Br. Patents, pl. 63. cites 8 E. 4. 6. per Markham and Choke.

3. Where ſcire facias iſſues at the ſuit of the king, *the cauſe of the forfeiture of the thing is touched in the writ*, but *otherwiſe* in other ſcire facias's ſued *by one patentee againſt another*. D. 198. b. pl. 50. And vide Ibid. 197. pl. 45.

(Y. b) *What* ſhall be [ſaid to be *a*] *Grant againſt* the *Law*.

[1. IF the king grants to another *that he ſhall not be puniſhed for any felony which he ſhall do in the time to come*, this is void; becauſe it is againſt common right and juſtice. 19 H. 6. 62. b.]

So if the king *grants to J. N.*

[2. *So* it is if he grant that he ſhall not be puniſhed *for any treſpaſs* which he ſhall do hereafter. 19 H. 6. 62. b.]

that I ſhall not have action againſt him, where he is indebted to me, this grant is not good; per Cott. Juſtice. Br. Patents, pl. 15. cites 8 H. 6. 19.

Grant by the king, *that a man ſhall not be impleaded* is void. Br. Juriſdiction, pl. 39. cites 8 H. 6. 18. S. P. Br. Patents, pl. 15. cites 8 H. 6. 19.

S. P. Noy in the caſe of Andrews v. Webb.

[3. The king cannot grant to any *to hold a court of equity*; becauſe this is in derogation of the common law. Hob. R. 87, 88. between MARTIN and MARSHALL. Not *to the queen*.]

Br. Juriſdiction, pl. 39. cites S. C.

4. Treſpaſs of goods carried away againſt T. C. who pleaded to the juriſdiction, becauſe he is chancellor of Oxon. and *H. 4. granted to* J. K. *chancellor of Oxon.* and his ſucceſſors, *that they ſhould not be impleaded by writ of treſpaſs, nor contract for things done by their office*, and ſhewed that *he diſtrained by his office for not making of a pavement*; and the opinion of the Court was, that the grant is not good; for it is *contrary to law and juſtice*, that a man ſhall not be impleaded in any place. Br. Patents, pl. 15. cites 8 H. 6. 19.

5. *And* alſo the ſaid T. C. came, and ſaid that he is chancellor of *Oxon.* and that king R. 2. had granted to J. K. chancellor, and his ſucceſſors, that they ſhould have *conuſance of all pleas moved in curia regis, whereof the one party was clerk of the univerſity, and abiding there*, and ſaid that he is clerk, ſcilicet doctor of divinity, and abiding there, and prayed the conuſance; and by the opinion of the court he ſhall not have it, becauſe he is party, and cannot be indifferent in his own caſe. And per Martin and others, the grant is not good, unleſs it were *licet idem cancellarius fuerit pars*, and if it had thoſe words, yet it is not a good grant, unleſs the grant be alſo, *that then he may make a deputy, or conſtitute another man to be judge*; for he himſelf cannot be judge and party by theſe words (licet fuerit pars) and the other juſtices in the ſame opinion. Br. Patents, pl. 15. cites 8 H. 6. 19.

6. A man has liberty to ſue where he will, but the king may prohibit him of it; as if he grants to J. S. *that of all treſpaſſes done in his manors the plea ſhall be before him*; per Babington, Ch. J. Ibid.

7. Where

7. Where *rape is made felony by ſtatute*, it is not inquirable as felony, unleſs before juſtices who can hear and determine felony; the king *cannot make it inquirable in leet* by his grant, *nor grant the leet to be of other nature than at common law.* Br. Patents, pl. 53. cites 6 H. 7. 4. by the juſtices.

Brook ſays, and ſo ſee that the king *cannot alter a law by his grant*, and yet he

may grant conuſance of pleas, but *not to alter the nature of the plea nor* the nature of a court. Ibid.

8. It ſeemed to ſome, that *by common law* the king might *prohibit the importing goods*, and that for doing contrary to ſuch prohibition *the ſhip ſhould be forfeited*; but this law is *altered by ſeveral ſtatutes*, viz. 11 *R.* 2. 11. 25 *E.* 3. 2. *&c.* But quære, if the king makes ſuch grant *with ſpecial non obſtante of thoſe ſtatutes.* Sid. 441. Hill. 21 & 22 Car. 2. B. R. in caſe of Horne v. Ivy. [125]

9. The king by his patent cannot grant *that a ſubject's goods ſhall be forfeited* by his doing a thing which his patent prohibits. Sid. 441. Mich. 21 & 22 Car. 2. B. R. Horne v. Ivy.

See Vent 47. Contra per the Ch. J. Mich. 21 Car. 2. S. C.

(Z. b) Grant of the King *limited. [By Reference to Words, &c.]*

See (I. b)—(K. b)—(L. b)—(A. c) to (E. c) and (R. c) Jenk. 325. pl. 40. —— S. C. cited 2 Mod. 107.

[1. IF the king *grants the manor of D.* to J. S. and his heirs, *and within the ſaid manor to have waifs, ſtrayes, bona & catalla felonum, &c. dicto manerio ſpectant. & pertinent.* Thoſe words, *dicto manerio ſpectant.* & pertinent. do not refer to the goods of felons or other franchiſes which lie in point or charter which cannot be by any uſage or time appendant or appurtenant to a manor; but they ſhall paſs by this grant, though they were not ever demiſed or uſed with the manor. Co. 9. Ab. Stra. Mar. 27. b. per Curiam.]

[2. If a *portion of tithes in Lougham appertaining to the rectory of* Greſenhall which was a rectory preſentative, *and all the other tithes were parcel of the rectory of* Lougham, which was appropriated to the abby of D. which came to the king by the diſſolution of the abby, and the *king grants* * *totam illam portionem decimarum & garbarum ſuarum in Lougham in com. Norfolk, cum omnibus aliis decimis ſuis quibuſcunque in Lougham in dicto com. Norf. tunc vel nuper in occupatione Johannis Corbet*, where in truth *John Corbet never had any* tithes in Lougham in his occupation. This grant is utterly void; for the laſt words, in the occupation of John Corbet, refer to all the ſentence, as well to the firſt words as to the ſecond words, and here a portion of tithes in groſs was intended to be paſſed and not all the rectory, and here all ought to paſs or nothing. Co. 4. BOZOUN, 34. b. reſolved.]

Godb. 35. Mich. 27 Eliz. S. C. by name of Futter v. Boroome.

* Fol. 193.

[3. If *two rectories appropriate in one church in one pariſh* comes by 31 H. 8. to the king by the diſſolution of a hoſpital to which it was appropriated, and the *king grants this by the name of a rectory, but before this grant in the ſame patent* there *is a general grant of all the lands and hereditaments which ever belonged to the hoſpital, and the hoſpital itſelf, and after the grant of the rectory*, there *is alſo a general*

(L. b) pl. 6. S. C. Jo. 446. Stoughton v. Palmer. S. C.

a general grant of all lands, *tithes, and hereditaments in the vill, where thoſe rectories lie, at any time to the ſaid hoſpital* [belonging]. Though the grant be void in the grant of the rectory, it being two rectories, yet the general words ſhall paſs it. Mich. 15 Car. B. R. per Curiam, reſolved upon evidence upon trial at bar, which concerns Mr. STROUGHTON for the rectory of Mourton in com. Warwick, which came to king H. 8. by 31 H. 8. by the diſſolution of the hoſpital of St. John's in Warwick to which it was appropriated.]

4. Ed. 6. being ſeiſed of the rectory of D. in Hampſhire, granted it to B. by theſe words, *totam illam rectoriam de Dale, ac omnes decimas*, &c. *Quæ quidem omnia & ſingula præmiſſa modo extenduntur ad* verum valorem de 32*l. per annum.* At the time *when this grant was made, there was a farm* in the pariſh, *which, with the tithes* thereof, *was in leaſe made by the abbot anno* 16 *H.* 8. *reſerving rent, which continued till the* 16 *Eliz.* And the queſtion was, whether the grantee of the rectory, after the expiration of the leaſe, ſhould have the tithes of this farm? And adjudged, that he ſhould; for though the words (quæ quidem omnia) in the grant refer to the value of the other tithes and not to thoſe of the farm, (becauſe they were then ſuſpended by being in leaſe with the farm,) and probably the king intended to grant no more than tithes of that value expreſſed in the grant; yet *by the* general *words of totam rectoriam, the tithes of this farm will paſs*; but otherwiſe, if there had been any ſpecial words. 2 Roll. Rep. 118. Mich. 17 Jac. B. R. Dixon's caſe.

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See (I. b)—(K. b)—(L. b)—(Z. b) (E. c)—(C. c)—(D. c) (E. c)

(A. c) What Things ſhall paſs by *General Words* [*of Reference to former Grants.*]

Gawdy and Popham held, that the clauſe being general, of all liberties and privileges, &c. it is to be intended of ſuch liberties and privileges which the dean and chapter had, and were not reſumed by any ſtatute, but this liberty to be diſcharged of purveyance was reſumed by the ſtatute 27 H. 8. wherefore it ſhall not be revived by general words, but by a ſpecial grant of thoſe liberties by expreſs name with an expreſs non obſtante of that ſtatute, ſo

[1. THE dean and chapter of P. were ſeiſed of divers manors in Eſſex in fee, and in the 1 E. 4. the king granted to them and their ſucceſſors, that they *ſhould be diſcharged of all purveyors of the king in their manors in Eſſex*, and after by 27 *H.* 8. *cap.* 4. it was *enacted, that the purveyors of the king might purvey* in all for the proviſion of the king, *as well within liberties as without, notwithſtanding any grant to the contrary*; and after, in 35 H. 8. the dean and chapter *ſurrendered thoſe manors to the king*, his heirs and ſucceſſors, and *afterwards the king granted thoſe manors* to the anceſtor of the lord Darcy *with tot tales tantas & hujuſmodi libertates, as* the dean and chapter or any of their predeceſſors *habuerunt, aliquo ſtatuto non obſtante.* In this caſe, in as much as the ancient liberties were extinct by the ſtatute, this general grant ſhall not create de novo the ſaid liberties which the dean and chapter had before. Tr. 38 El. B. R. adjudged. Vide, that by the ſurrender to the king they were extinct if they had not been extinct before.]

ſo that it might appear that the king intended to grant them notwithſtanding that ſtatute. Lord Darcy's caſe. S. C. Cro. E. 512.

[2. The biſhop of Coventry, among other liberties, *had a liberty de catallis felonum* within his manor of B. and after this manor came to K. 8. by attainder, and he granted it over with *tot tales tantas & quales libertates as* the biſhop or his predeceſſors had. The grantee ſhall not have by this grant the ſaid liberties which the biſhop had. For when they are *once extinct, words of revivor* will not be ſufficient, but there ought to be *words of grant*, and ſuch general grant will not be ſufficient. 25 El. in Scacc. Lord PAGET's caſe, per Curiam, cited per Coke 38 El. B. R. quære.] S. C. cited as agreed in the Exchequer about 20 Eliz. Cro. E. 513. in the Lord Darcy's caſe.

3. Where the vill of L. claims liberties by grant of the king, by theſe words *ſuch liberties and franchiſes as the vill of N. has*, &c. they ought to ſhew *record or preſcription proving what liberties* and franchiſes *N. has*, and then it is well, as it ſeems there. Br. Patents, pl. 31. cites 20 E. 3. and Fitzh. Avowry, 129.

4. If garter dies, and the king grants the *office with ſuch like fees* and wages *as garter had*, this is a good grant; per Choke; which was affirmed, that is to ſay, to have ſuch fees as garter had. Br. Patents, pl. 60. cites 5 E. 4. 8. S. C. cited Pl. C. 12. in caſe of Reniger v. Fogoſſa.

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5. In treſpaſs, &c. the defendant juſtified, for that Northampton is an ancient town, and that king H. 7. granted to the mayor and burgeſſes a fair to be held yearly upon the feaſt, &c. cum omnibus libertatibus, &c. to the ſaid fair belonging; then he ſet forth, that W. R. at a fair there holden, ſold a cow to the plaintiff, for which the defendant demanded one penny for toll; and becauſe the defendant refuſed to pay it, he as bailiff diſtrained the cow; upon a demurrer to this plea, it was adjudged, that by the grant of a fair, cum omnibus libertatibus, toll was not due nor demandable, becauſe it is not incident to a fair; it is true, that ſuch liberties which a common perſon hath either by grant or preſcription, and which the king himſelf ſhould have throughout England, as *waif, eſtray, wreck*, &c. there if a common perſon hath them by grant or preſcription, and they come to the king by forfeiture or otherwiſe, they are extinguiſhed in the crown; and the queen ſhall have ſuch liberties by her prerogative, and they cannot afterwards be granted but by a new creation. But where a common perſon hath liberties, which the king would not have by his prerogative, if ſuch common perſon had them not, as *warren, park, fair, market with toll*, &c. if theſe come to the crown, they are not extinguiſhed, but remain in eſſe; for if the king ſhould not have them, by his means they would be loſt. Wherefore, abſente Clench, it was adjudged for the plaintiff. Cro. E. 558. 591. Mich. 39 & 40 Eliz. B. R. Heddy v. Wheelhouſe.

6. The *king* was *lord* paramount, the *abbot* of Weſtminſter *was meſne, and C. was tenant* of the manor of R. The *tenant was attainted of treaſon*, and after *office found*, the *king granted the manor* to Sir J. M. and his heirs, *to hold de nobis & ſucceſſoribus noſtris*, and other chief lords of the fee, *per ſervitia inde debita*, &c. It

was inſiſted, that the tenure ſhould be of the king, becauſe the meſnalty being extinct by the attainder of the tenant, (for where there is no tenant there can be no meſne,) there could not be any ſervices due to him; but adjudged, that the words are ſufficient to create a tenure in the meſne as it was before the treaſon; for ſuch was the king's intention; and it is conſonant to equity, that he who never offended ſhould not loſe his ſervices, and therefore the grant ſhall be taken beneficially for the honour of the king and the relief of the meſne, and the word tenendum cannot have any other reaſonable conſtruction. 6 Rep. 5. b. Hill. 40 Eliz. in the Exchequer, Sir John Molyn's caſe.

See (I. b)—(K. b)—(L. b)—(Z. b)—(A c)—(C. c)—(D. c)—(E. c)

(B. c) Grants of the King. [*To what the Words ſhall extend.*]

Br. Patents, pl. 32. cites S. C.——

[1. IF the king grants to another *all iſſues, forfeitures, fines, and amercements of his tenants*, and a tenant, who holds of the grantee *and of another*, * be amerced, the grantee ſhall not have this amercement, becauſe he is not *his ſole tenant*. 22 Aſſ. 49. per Richm.]

* Fol. 194.

——S. P. Br. Grants, 146. cites 2 R. 3. 4. But he ſhall have fines and amerciaments of thoſe who *hold of him only*.——But Br. Patents, pl. 90. cites 2 R. 3. 4. Contra, that he ſhall have it of thoſe who hold jointly of him and of others, as it was ſaid. But Brooke makes a quære.——Where the king grants *fines and amerciaments* to J. N. in his manor of D. and he does *treſpaſs*, there he ſhall not have fines and amerciaments depending upon it. Br. Grants, pl. 31. cites 21 E. 3. 3, 4.——The king's grant to A. of all *fines and amercements to the tenants of A.* does not paſs *fines and amercements impoſed in the King's Bench, Common Pleas, or Exchequer*, nor before juſtices of *gaol delivery*, juſtices *of the peace*, † *or clerk of the market, upon any of the king's officers who are tenants to A.* for theſe fines are royalties, and ought to have ſpecial words to paſs them. Jenk. 103. pl. 100. cites D. 268. 2 H. 7. 7. 22 Aſſ. 49.——*So where* there are tenants of A. and *a fine or amercement is aſſeſſed upon one who is tenant both of the king and A.* this fine, &c. does not paſs *without ſpecial words* to grant the fines and amercements *integre tenentium & non integre tenentium*. Jura regis ſpecialia non conceduntur per generalia verba. Jenk. 103. pl. 100.

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[2. If the king grants *all his lands and hereditaments of ſuch a priory in ſuch a city, a mill whereof the king is ſeiſed with other lands parcel of the priory ſhall paſs* by thoſe general words, though a mill ought to be demanded in a writ by ſpecial name. H. 37 El. B. R. per Curiam.]

D. 350. b. pl. 21. Paſch. 18 Eliz. caſe of the rectory of Weſt Bodwin.

[3. *So* if the king grants *all his lands, tenements, and hereditaments in D. the advowſon of the vicarage ſhall paſs* by it. H. 37 El. B. R. in the ſaid caſe held.]

——Bendl. 252. S. C.——S. C. cited 10 Rep. 65. b. in Whiſtler's caſe.——In quare impedit, where the *king, ſeiſed of a manor with advowſon appendant, grants the manor without ſpeaking of the advowſon*, the advowſon does not paſs; *but* where it is appendant, and the king grants *the manor, habend. una cum the advowſon*, this paſſes well; for it is appendant. Br. Patents, pl. 29. cites 38 H. 6. 34, 35.——*Contra*, if it was advowſon *in groſs*; for there the grant is void as to the advowſon, unleſs it be *expreſſed as well in the grant as in the habendum*. Br. Patents, pl. 29. cites 38 H. 6. 34, 35.

Dav. Rep. 16. a. Mich. 5 Jac. B. R. S. C. in

[4. H. 2. granted to the burgeſſes of Dublin *quod ſint quieti de theolonio* paſſage pontage, *& omni conſuetudine per totam terram* noſtram Angliæ, Normaniæ, Walliæ, & Hiberniæ, *ubicunque venerint*

venerint ipſi & res eorum. Though the citizens have been always ſince this grant till this day exonerated of the great cuſtom which is called *magna antiqua cuſtuma in Anglia, & magna nova cuſtuma in Hibernia*, yet they ſhall not be diſcharged of the ſaid cuſtom by this charter; for the words (theolonium & conſuetudo) may be applied to divers things; and *where the words in the king's grants may be applied to divers things, they ſhall not be extended to* the ſaid grand cuſtom, which is *the ancient inheritance of the king*, by any uſage whatſoever. M. 16 Ja. Scacc. Reſolved. Quære.]

THE CASE OF CUSTOMS. And it was alſo reſolved by the Lord Ch. Baron, and other referees here in England, that the ſaid grant (that they ſhould be quieti de omni conſuetudine) did not diſcharge them of the grand cuſtom; becauſe conſuetudo eſt nomen æquivocum, and ſignifies ſeveral kinds of cuſtoms; and ſo, being a general word, ſhall never paſs this ſpecial royal duty. —— *So* where the king granted to the burgeſſes of Drogheda, that they ſhould be diſcharged de theoloneo, paſſagio, pannagio, *laſtagio*, &c. And it was reſolved by the Ch. Baron, and other referees in England, that by force of this word (laſtagio, &c.) they ſhould not be diſcharged of the grand cuſtom of 13s. 4d. payable for every *laſt of hides*, becauſe there is a laſt of *herrings*, and a laſt *of powder, and of ſeveral other things as well as of hides*. Dav. Rep. 17. a. in the caſe of cuſtoms. ——— *But* where H. 5. granted to the mayor, bailiffs, and citizens of Waterford in Ireland, *cuſtumam* dictæ civitatis *vocatam le cocquett* capiendum per manus dicti majoris & ballivorum in perpetuum. And it was reſolved that the ancient cuſtom of wool, woolfels, and hides, was well granted to the ſaid corporation by the words of (cuſtome vocat. le cocquett); for this ancient cuſtom is commonly called and known by the name of the cocquett cuſtom in all ports of England and Ireland; and (cuſtuma dictæ civitatis) ſhall be intended cuſtom payable for merchandizes in dicta civitate; for favourable interpretation ſhall be made of ſuch grants, according to the uſage and allowance. Dav. Rep. 14. a. Mich. 5 Jac. B. R. in Ireland, in the caſe of cuſtoms.

5. Preſentment was made againſt an abbot for *ſuffering a bridge to fall, which he and his predeceſſors lords of the vill had uſed to repair* time out of mind. The *abbot pleaded the charter of H. 3. to be quit of reparation of all bridges*, walls, and cauſeways, and that this charter had been allowed in quo warranto, &c. yet this plea was not allowed; for this was a *ſpecial charge* or duty *by reaſon of his ſeigniory*, which is *not diſcharged by this general clauſe*; for where there are * words in the grant of the king, which under a general name comprehends things royal, and baſe things, it ſhall be taken in favour of the king, and the baſe things ſhall paſs, and the royal things ſhall remain in the crown. Dav. Rep. 17. cites 3 E. 3. Fitzh. 445.

* S. P. Pl. C. 333. in the caſe of mines.

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6. If the king grants *fines and amercements in D.* this will not ſerve for fines *pro licentia concordandi*, as it is ſaid there. Br. Patents, pl. 107. cites 44 E. 3. 28.

Br. Conuſance, pl. 12. cites S. C. — S. P. Though the

grant be ex certa ſcientia, ſpeciali gratia, &c. they belonging to the king in ſo high a degree of his prerogative. 2 Inſt. 515. —— King E. 4. granted to the dean and chapter of Paul's *all fines pro licentia concordandi* of all their homagers and tenants, reſiants and non-reſiants within their fee; Gawdy J. held, that this grant did not *extend to the poſt-fines*; for fine pro licentia concordandi is the queen's ſilver and not the poſt-fine. But Wray held that all ſhall paſs by it; for it is about one and the ſame matter, and they were of opinion to give judgment for the plaintiff. 1 Leon. 249. pl. 383. Paſch. 32 Eliz. Strait v. Bragg.

7. Note, by the opinion of the Court, that by grant of *conuſance of pleas, and of executions of it*, a man cannot *levy fines, nor bring writ of right, and make proteſtation in nature of writ of covenant*. Per Perſey, it is uſual to levy a fine in ancient demeſne in E. by bill of covenant; per Knivet, non valet; for a man cannot by proteſtation in writ of right change this to a perſonal covenant, and yet the grant was quod habeat *executionem omnium placitorum, & quod in omnibus actionibus placitari poſſint per breve de recto patent.*

It is ſaid in the books, that if a city or town corporate have uſed time out of mind to *hold all manner of pleas, as well real as*

perſonal, or has any ſuch franchiſe by grant of the king, that yet they cannot levy fines.

patent. or to make proteſtation in natura cujuſcunque brevis. And yet by the opinion of the Court, he *cannot levy fines without expreſs words* of it; therefore quære, and it ſeems that ſuch matter ut ſupra does not lie in grant. Br. Fines, pl. 22. cites 44 E. 3. 38.

But Brook ſays, that if they have *uſed to levy fines*, it is good enough. But Coke ſays, that he cannot ſee how ſuch fines can be good; for it is expreſsly againſt the ſtatute of *modus levandi fines*, which *provides that no fines ſhall be levied but only in C. B. or before juſtices of eyer*; ſo that none can be levied elſewhere, unleſs eſpecially given by ſtatute, (as he thinks,) as fine cannot be levied in *ancient demeſne*, for the cauſe aforeſaid, and becauſe it is no court of record; but they may be levied within the county palatine of *Lancaſter* or *Cheſter*; but that he apprehends to be by divers acts of parliament. And it may be *in cities and towns corporate, where they have uſed to levy fines, if all their uſages and cuſtoms are confirmed by act of parliament*, they may levy fines there; but that ſuch fines ſhall not bar any eſtate tail, nor any ſtrangers who have preſent or future right. Co. R. on Fines, 9.

8. Grant was made to John of Gaunt Duke of Lancaſter of *all ſtrays within his fees*, and a prior of Spalding *held of the grantee certain lands in B. in frankalmoign*; and a ſtray came there, and the grantee claimed it by his grant: and the beſt opinion was, that he ſhall have it; for he has tenure there, and therefore has fee there; for if the houſe be diſſolved, he ſhall have the eſcheat, and the tenant may have writ of meſne, or ne injuſte vexes. Br. Patents, pl. 61. cites 7 E. 4. 11.

Nor by this word *placitum* a man cannot have *aſſiſe*; for it is *querela*. Ibid.

9. By grant of *tenere placita*, a man ſhall not have conuſance of pleas. Br. Patents, pl. 4. cites 9 H. 6. 27.

And grant to me and my heirs *to be quit of tax and toll* is good, though *no tax or toll be in eſſe at the time.* Ibid.

10. Treſpaſs upon the caſe, where the king *granted* to J. biſhop of Sarum and his ſucceſſors *certain liberties in all his lands and fees*; this *ſhall not extend but to thoſe lands and fees which he had at the time of the grant.* But per Billing and Priſot, if the grant be *in all his lands, and in lands to be purchaſed by him or his heirs*, this ſhall extend to his land which he had at the time of the grant, and to land which he or his heirs ſhall purchaſe hereafter. Br. Patents, pl. 28. cites 38 H. 6. 10.

11. If the king *grants to J. N. to amortiſe certain land*, yet if he gives *land held of the king in capite* in mortmain, the land ſhall be ſeiſed for fine for the alienation; and therefore it *is uſed to put in* ſuch patents now, [viz.] *though it be held of us in capite.* Br. Patents, pl. 44. cites 2 H. 7. 13. per Keble.

S. C. cited Jenk. 303. pl. 77.

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12. A. was leſſee for life of the ſcite and demeſnes of a manor rendering rent, the *reverſion* thereof, and *of the* reſidue of the *manor, to the king, who granted the appurtenances* to W. D. for years, together with all rents, ſervices, profits and hereditaments thereunto belonging; but did not expreſsly mention the reverſion, nor was there any recital of the leaſe of the ſcite and demeſnes aforeſaid; but a rent of 74l. was reſerved to the king upon the leaſe of the manor. By the beſt opinion the reverſion paſſed by name of the manor. D. 233. pl. 10. Mich. 6 & 7 Eliz. Aprice v. Rogers, alias Sir Walter Dennis's caſe.

13. King H. 8. granted to A. *turbariam ſuam* in D. for 21 years; the grantee plowed part of it, and then Q. Mary granted to B. *totam* illam turbariam before demiſed to A. It was adjudged, that

that the plowed land did not pafs, but only that which was turbary. Owen, 67. 23 Eliz. C. B. Farrington v. Charnock.

14. The king *granted the manor of B. to J. S. in tail* male, and afterwards *by another patent, reciting the former, and the furrender thereof, &c.* de gratia ſpeciali, ex certa ſcientia, &c. he *re-granted the ſaid manor to the ſaid J. S. and M. his wife, and to the heirs of the ſaid J. S.* It was reſolved, that by the grant of the manor without the word reverſion, the reverſion paſſed; for the word *manor includes all eſtates* and degrees of eſtates of or in the manor. 6 Rep. 56. Trin. 4 Jac. Lord Chandos's caſe.

As if A. gives the manor of D. to B. in tail, and afterwards the *donor is attainted of treaſon,* by which the king is ſeiſed of the reverſion, and afterwards by his letters patents *grants manerium de D.* to another and his heirs; in this caſe, though the king grants the manor of D. as in poſſeſſion, yet the reverſion ſhall paſs; for the king has an eſtate (viz. the reverſion in fee) grantable in him, and the eſtate tail by a common perſon need not be recited. And this is not like to ALTON WOOD'S CASE; for the king was not conuſant, nor informed of his true eſtate, viz. that he was ſeiſed in tail with the reverſion expectant to his heirs and ſucceſſors; and his grant in the ſame caſe cannot take effect without fraction of eſtates, or doing a tort, and therefore not like to the principal caſe; for here the party hath informed the king of the truth of all matters of fact, viz. of the eſtate tail, and of the delivery of the former patent; ſo that in true judgment of law upon the matter contained in the patent, the king has only reverſion in fee expectant upon eſtate tail. And in this caſe no tort is done to any, nor is there any fraction of eſtates; and here the *intention of the king was to depart with all his eſtate, and leſs ſhall paſs by this grant (viz. the reverſion) than he intended* to paſs; *for he intended to paſs the poſſeſſion, and ſo he is not at any prejudice.* But if more ſhould paſs than he intended, as where he intended to paſs only a reverſion, and there a poſſeſſion ſhould paſs, in ſuch caſe it would be otherwiſe; beſides, this grant being made ex certa ſcientia & mero motu, ſhall be taken in the moſt benign and liberal ſenſe, according to the king's intention and meaning expreſſed in his grant. 6 Rep. 56. S. C.

(C. c) Grant of the King. [What ſhall *paſs by General Words.*]

See (I. b) (K. b) (L. b) (Z. b) (A. c) (B. c) (D. c) (E. c)

What he can grant only by his prerogative

[1. THE *right of the king* ſhall not paſs *by general words.* 8 *H.* 4. 2.]

can never paſs by general words; and therefore *choſes in action* will not paſs without ſpecial words. 12 Rep. 2. Paſch. 4 Jac. Ford v. Sheldon.

[2. By a grant de *bonis & catallis felonum,* goods of a *felo de ſe* ſhall not paſs. 8 H. 4. 2.]

Br. Forfeiture de Terres, pl. 11. cites S. C. Per Till.——S. P. Nor *debts* of felons. Vent. 32. Anon.——Saund. 275. The King v. Sutton.——Le. 99. Arg.——Roll R. 399. The King v. the Biſhop of Durham.——Sid. 142. Southampton (Mayor) v. Richards.——Nor *obligations*; per Shute. Owen, 155. 30 & 31 Eliz. in caſe of Biſhop of Canterbury v. Hudſon, cites 19 H. 6. 42.——*Unleſs by ſpecial words.* 2 Le. 51.——Nor thoſe *goods which the felon has ſtolen*, but only his own proper goods. Per Coke C. J. 3 Bulſt. 148. in Prinſton's caſe.——12 Rep. 73. S. P.—Jenk. 325. pl. 40.——But ſuch grantee ſhall, without doubt, have the ready money; for *ready money* may be granted by that name, though not demanded by the name of bona. 2 Show. 133. Mich. 32 Car. 2. B. R. Anon.

The admiral in his patent has granted to him *bona piratarum.* Reſolved by all the judges, that the *goods of pirates* paſs by this grant, and *not piratical goods.* Jenk. 325. pl. 40.

* Quære, If the *preſentation of a church*, which becomes vacant during an *outlawry* of the patron, ſhall paſs by the words in a grant of bona & catalla felonum fugitivorum & utlagatorum, Walmeſly and Periam were of opinion that it would paſs, but Shute and Anderſon e contra. Owen, 155. The King v. the Archbiſhop of Canterbury & Hudſon.

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[3. *Nor* of a *clerk convict.* 8 H. 4. 2.]

Br. Forfeiture de Terres, pl. 11. cites S. C. Per Till.

[4. *Nor* of one *who is put to penance.* 8 H. 4. 2.]

S. P. Raym. 242. cites S. C.——S. P. Unleſs in a county palatine. Per Coke, Ch. J. 3 Bulſt. 156. in caſe of the King

King v. the Biſhop of Durham. ——— D. 268. b. pl. 18. Quære. ——— They will not paſs unleſs there are words ſpecially extending to the goods of ſuch; becauſe one adjudged to his *penance* for ſtanding mute, does *not ſeem to ſuffer as a felon*, being neither attainted nor convicted of any felony, but as a perſon refuſing to ſtand to the law of the land. And it ſeems rather the ſtronger opinion, that they paſs not by the grant of all *goods of felons and fugitives, of all perſons within ſuch a* diſtrict; ſo that if ſuch perſon for any treſpaſs, or other fault, ought to loſe life or member, or ſhall fly and refuſe to ſtand to judgment, or do any other treſpaſs for which they ought to loſe their chattels. 2 Hawk. P. C. 3. 31. cap. 30. ſ. 21.

In appeal the defendant was adjudged to penance for

[5. By a grant of the goods *eorum qui pro aliquo delicto vitam vel membrum amittere debeant*, the goods of one *who is put to penance* ſhall not paſs. 8 H. 4. 2. Dubitatur.]

ſtanding mute, and he had goods, and the biſhop of L. claimed them by grant of the king, that he ſhould have *catalla felonum & fugitivorum de omnibus hominibus & tenentibus in terris ſuis, & de omnibus reſidentibus in terris prædictis. Ita quod ſi prædicti homines tenentes aut reſidentes aut eorum aliquis in terris prædictis pro aliquo delicto aut tranſgreſſione vitam vel membrum amittere debeant aut debet, aut fugerint vel fugerit, aut judicio ſtare noluerint aut noluerit, vel aliquam aliam tranſgreſſionem fecerint pro qua ipſi catalla perdere debeant in quocunque loco juſtitia de eis fieri debeat ſive in curia noſtra ſive in alia curia ipſa catalla ſint ipſius epiſcopi & per miniſtros ſuos in manibus ſuis ſeiſiri poſſint ſine clameo fiendi*'. And by Gaſcoin, Tirwit, and others, the biſhop ſhall not have the goods, for the *felon was not judged for the felony, but for the contempt*, and ſhall not paſs from the king by ſuch general grant; for if a man commits *treaſon*, there the biſhop ſhall not have the forfeiture. But Huls, Skrene, and others, to the contrary, for he loſes his life by this judgment, therefore the biſhop ſhall have the goods. And by the ſtatute of Weſt. 1. c. 12. if a man ſtands mute in appeal, he ſhall be convicted and ſhall forfeit his goods as non defendendo, and the ſtatute gives no more but that he ſhall be put to penance. But it was agreed by all, that the goods are forfeited, & adjornatur. Br. Forfeiture de Terres, pl. 11. cites 8 H. 4. 1 & 2.

[6. If the king grants *all forfeitures of the tenants of the grantee for any treſpaſs or any other offence, for which they ſhall loſe life and member, or aliquo alio delicto for which they ſhall loſe their chattels*; yet forfeitures for *contumacy*, as forfeiture of goods upon *outlawry in treſpaſs*, ſhall not paſs thereby. 11 H. 6. 50. b. So forfeiture of goods upon *premunire*.]

Br. Patents, pl. 4. cites S. C. ——

[7. The king may grant *iſſues and amerciaments by general words*. 9 H. 6. 27. b.]

So of grant *de catallis felonum & fugitivorum*. Br Patents, pl. 4. cites S. C.—*So* of grant *of conuſance of pleat in quibuſcunque curiis noſtris*. Br. Ibid.—If the king *grants to me all fines and amerciaments in the county of B.* and *I am amerced there*, I ſhall not have the amercement; for it ſhall not be intended the will of the king. Per Martin. Br. Patents, pl. 15. cites 8 H. 6. 19.

[8. *By ſuch grant* forfeitures of goods *upon a premunire for non-appearance*, by which the party is put out of the protection of the king, do not paſs. 11 H. 6. 50. b.]

Where the king *has a corody by reaſon of patronage* of

9. *Prerog. reg. cap.* 15. 17 *E.* 2. *The king's gift or grant of land or manors cum pertinentiis conveyeth not knight's fees, advowſons, or dowers, without expreſs words.*

a priory, and *grants the patronage* to another, *without making mention of the corody*, he who has the patronage ſhall have the corody; and the king cannot grant or give the corody, by expreſs words; nor the king cannot reſerve the corody, where he parts with the patronage. And ſo ſee a thing cannot paſs from the king by general words, and by reaſon of another thing, without expreſs mention. And other things are at common law, as (Brook ſays) it ſeems here, and are not taken by equity of the prerogative, as is manifeſted by the caſe of the corody. Br. Patents, pl. 34. cites 26 Aſſ. 53. ——10 Rep. 64. b. in Whiſtler's caſe, cites S. C. [but miſcites it, as 26 Aſſ. pl. (63.) whereas it ſhould be as in Br. (53.)]

* If the king grants to J. N. *manor or land*, &c. and *does not make mention of* fees of knight and † *advowſons*, there thoſe do not paſs; for they do not paſs without expreſs words. Br. Patents, pl. 5. cites 41 E. 3. 5. ——*But* where the king makes livery to an heir, or makes *reſtitution* or grant *of temporalties* to a biſhop, there thoſe paſs *without expreſs words*. Note the diverſity. Ibid. —— Br. Livery, pl. 20. cites S. C. & 21 E. 3. 40. —— Br. Livery, pl. 45. cites S. C. —— Br. Patents, pl. 75. cites S. C. ——† S. P. Per Weſton, J. Pl. C. 243. cites Treatiſe of Prærogativa Regis, cap. 15.

In quare impedit, the caſe was, that *king* H. *before the ſtatute of prerogative, granted a manor to* J. N. *without expreſſing the advowſon, and without ſaying cum pertinentiis*; and yet by judgment the advowſon paſſes, becauſe it was appendant to the manor; but now by the *ſtatute of prerogative*, advowſon, dower, fees of knight, do not paſs, unleſs expreſsly mentioned; and that if *a common perſon* be ſeiſed of a manor with advowſon appendant, and grants the manor cum pertinentiis, the advowſon paſſes. Br. Patents, pl. 6. cites 43 E. 3. 22. —— Br. Prerogative, pl. 7. cites S. C. —— 10 Rep. 64. in Whiſtler's caſe, cites S. C.

This act is reſtrained only to theſe three caſes of advowſons, knight ſervice, and dower; for *leet* ſhall paſs without expreſs mention, or words equipollent, as is held in 18 H. 6. 12. So of *foreſt appendant to an honour*, as is agreed in 26 Aſſ. 60. So of *corody appendant to a patronage* of a priory, as appears in 26 Aſſ. 63. And the words of the act are *quando dominus rex dat vel concedit*, and therefore in caſe of *reſtitution*, advowſons, &c. ſhall paſs without expreſs mention of them, or words equipollent, as in *livery to the heirs*. 2dly, In reſtitution of *temporalties to the ſucceſſor of the biſhop*, &c. 10 Rep. 64. b. cites 41 E. 3. 5. b. 27 Aſſ. 48. Pl. C. in Lord BARKLEY's caſe, 251, 252. 20 Eliz. D. 306. accordingly. But that Thorp Ch. J. ſaid in the ſame plea, that if a *manor with advowſon appendant* be *in the hands of the king by eſcheat or* by *purchaſe*, if he at this day (ſince the ſtatute of prærogativa regis) *gives it as entirely as J. S. held it before it came into our hands by way of eſcheat*, or *as J. S. held who enfeoffed us*; in ſuch caſe, the advowſon ſhall paſs without ſaying in the charter cum feodis & advocationibus, becauſe the law in ſuch caſe intends, that the king is appriſed of his right. Quod Curia conceſſit.

10. If the king *grants a hundred, which has a leet*, to J. N. and *another man has a manor and a leet in it within the hundred*, if he makes *hue and cry* there, &c. the ſaid J. N. ſhall not have the puniſhment of it, but it ſhall be puniſhed in the eyre. Per Wilby. Br. Grants, pl. 31. cites 21 E. 3. 3, 4.

11. In quare impedit, where the *king makes livery to the heir within age*, there *fees and advowſons do not paſs*. Br. Livery, pl. 20. cites 21 E. 3. 40. & 41 E. 3. 5.

Contra, where he makes livery *at full age upon office upon ſuit*, there they paſs by general words; but in the other caſe, they do not paſs *without ſpecial words* expreſſed. Note a diverſity. Ibid. —— *So* in quare impedit, 41 E. 3. 5. Where the *king renders the temporalties to a biſhop elect before that he be ſworn*, fees and advowſons do not paſs without expreſs mention. Ibid. *Contra*, where he renders them *after the conſecration* of the biſhop. Ibid.

12. If the king grants *returna omnium brevium*, yet the grantee ſhall not have return *of Exchequer ſummons*. Br. Patents, pl. 32. cites 22 Aſſ. 49.

13. King H. was *ſeiſed of the honour* of Pickering, *to which a foreſt was appendant*, and the *king granted the bailiwick* of it to one *in fee, rendering rent*; and after he *gave the honour cum pertinentiis* to E. earl of Lancaſter, and by this the *foreſt paſſed, but not the bailiwick nor the rent* reſerved upon it; for this was ſevered before from the honour, and therefore cannot paſs as appendant; *for it was in groſs before*, and does not paſs unleſs by expreſs words, quod nota. Br. Patents, pl. 35. cites 26 Aſſ. 60.

Jenk. 25. pl. 55. cites 26 Aſſ. 6. S. C. —— but it ſhould be (60.) as in Br. —— Br. Incidents, pl. 11. cites S. C. —— 10 Rep. 64. b. Br. Corody, pl. 2. cites S. C. & 44 E. 3. 24. —— Br. Patents, pl. 8. cites 44 E. 3. 24. & 14 H. 6. 12.

14. The king is founder of a priory, and *confirmed to the prior all his poſſeſſions, tenend. libere & quiete ab omnibus placitis, gildis, tolnetis querelis, actionibus et demandis, et ab omni ſervicio et exactione ſeculari*, &c. And notwithſtanding thoſe words, he was charged of *corody, reaſonable aids, and to repair bridges and cauſeways*; quod nota, that the general words do not bind the king. Br. Patents, pl. 78. cites 50 Aſſ. 6.

15. In treſpaſs, the defendant juſtified by grant of king R. 2. who granted *bona & catalla felonum & fugitivorum, & aliorum qui pro aliquo delicto vitam vel membrum amittere debent ſeu pro aliquo alio delicto, pro quo bona aut catalla perdere debent in his manor of D.* and

and one was outlawed of treſpaſs, and he took his goods; and the beſt opinion was, that he well might, by reaſon of theſe words *(delict' pro quo perdere debet catalla ſua)*. Br. Patents, pl. 86. cites 11 H. 6. 50.

[133] The king had the advowſon of the vicarage of D. and granted *vicariam ſuam de D.* The advowſon of the vicarage did not paſs. D. 350. b. Marg. pl. 21. cites Mich. 31 & 32 El. C. B. Denny v. Aſtill.

16. A rectory, to which an *advowſon of a vicarage* was *appendant*, but the annual revenues and profits of them were *concealed*, *came to the queen by the attainder* of J. S. which being found by office, the *queen*, *for a valuable conſideration*, *ex certa ſcientia*, &c. *granted* the poſſeſſions of the glebe, and tithes of the rectory, by ſpecial names, and generally *omnia hereditamenta*, &c. belonging to the ſame, *not mentioning expreſsly* the rectory or *advowſon* of the vicarage, *adeo plene*, &c. as the ſaid J. S. had it, et prout ad manus ipſius reginæ, devenerunt ſeu devenire debuerunt; with this proviſo, that if the premiſes were not concealed, &c. Adjudged, that by theſe words the advowſon of the vicarage did paſs, and that the queen was not deceived in her grant, for want of knowledge. D. 350. b. pl. 21. Paſch. 18 Eliz. * Anon.

* Bendl. 252. Blagrave v. Pierce and Shaw. S. C. adjudged. ——— S. C. cited per Cur. 10 Rep. 65. b. in Whiſtler's caſe.

17. The queen *ſeiſed of the manor of Gaſcoigne, and of a grange called Gaſcoigne-grange* in D. *granted all her lands, tenements, and hereditaments in D.* Adjudged by the whole Court, that the manor did not paſs. Godb. 136. pl. 159. Paſch. 28 Eliz. C. B. Giles v. Newton.

18. The queen having the *advowſon of the vicarage of D. granted the vicarage to B.* It was held, that the *advowſon did not paſs*; for by her grant nothing paſſes but what ſhe intended to paſs, and the vicarage is a different thing from the advowſon, and every thing muſt paſs by its proper name; nor ſhall it paſs in the caſe of a common perſon. Cro. Eliz. 163. Mich. 31 & 32 Eliz. C. B. Anon.

19. The king granted to A. a *great manor*, called an honour, and paſſed it *by name of an honour*, and well. Jenk. 277. pl. 99. cites Pl. C. 311. The caſe of Mines.

20. Jac. 1. granted to Sir R. M. and his heirs, by letters patents, the territory of Rout, which is parcel of the county of Antrim, and adjoining to the river of the Banne in ea parte, where there is a *piſchary of ſalmons*; and the grant was of *omnia caſtra, meſſuagia, tofta, molendina, columbaria, gardina, hortos, pomaria, terras, prata, paſcua, paſturas, boſcos, ſubboſcos, reddit. reverſiones & ſervitia, piſcarias, piſcationes, aquas, aquarum curſus*, &c. *Ac omnia alia hereditamenta* in vel infra dict. territorium de la Rout in comitatu Antrim exceptis, et ex hac conceſſione nobis heredibus et ſucceſſoribus noſtris, *reſervatis tribus partibus piſcationis fluminis de le Banne*. The chief judges being of privy council, upon view of ſeveral pipe-rolls, in which this matter was found ſeverally in charge as parcel of the antient inheritance of the crown, and upon conſideration had of the ſaid patent, certified their opinion and reſolution, that *no part of this ſaid piſchary paſſed by the letters patents* aforeſaid. It was alſo reſolved,

ſolved, that no part of this royal piſchary of the Banne could paſs by the grant of the *land adjoining*, by general grant of all piſcharies; for *this royal piſchary is not appurtenant to the land, but it* is a piſchary *in groſs*, and parcel of the inheritance of the crown by itſelf. And laſtly, it was agreed, that where the king had granted to Sir R. M. all the territory adjoining to this river, and all piſcharies within this territory, exceptis tribus partibus piſcariæ de le Banne, that the fourth part of this piſchary ſhall not paſs to him; for the *grant of the king ſhall not paſs any thing by implication.* Dav. Rep. 55. a. to 57. b. Mich. 8 Jac. in Ireland. The caſe of the royal piſchary of the Banne. —— alias Sir Randal Mac Donnell's caſe.

21. General words in a grant of the king ſhall not paſs ſuch a *ſpecial royalty as belongs to the crown by prerogative*; as mines royal, amercements royal, eſcheats royal, ſhall not paſs by general words of all mines, amercements, and eſcheats. Dav. Rep. 57. b. in the caſe of the royal piſchary of the Banne.

S. P. Dav. Rep. 17. a. Mich. 5 Jac. B. R. in the caſe of cuſtoms. —— S. P. Jenk. 304. pl. 77.

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22. It was reſolved, that by a general grant *of a manor* (which had been forfeited to the king by attainder of treaſon) cum pertinentiis, *and of all his intereſt, claim, and demand therein*, a writ of *error to reverſe a common recovery* (which had been erroneouſly ſuffered of the manor) did not paſs, notwithſtanding the clauſe *de ſpeciali gratia, &c.* for if the king could grant it, it muſt be by virtue of his prerogative, (for no common perſon could do it,) and then it ought to be by expreſs and preciſe words. 3 Rep. 4. b. Trin. 25 Eliz. The Marquis of Cheſter's caſe.

23. If the king grants *eccleſiam*, the *advowſon paſſes*; for the intent, and not the preciſe words, are to be regarded in the grant of the king. Per Jones J. Lat. 248. Hill. 22 Jac. In the caſe of Evans and Aſcough—cites 7 E. 3.

24. Sir Francis Forteſcue *ſeiſed of a manor granted it to the E. of Denbigh, except ſuch lands as were then held for life by copy.* Afterwards *the inheritance of this copyhold was granted to the ſaid earl;* the copyholder dies, the *earl granted again by copy, and then forfeited all to the king.* The *king granted the manor*, &c. *and every part or parcel, or reputed parcel thereof.* Lord Ch. J. North delivered the opinion of the whole Court, that theſe copyhold lands paſſed by the words (reputed parcel). And that in this caſe, where the jury have found the particular matters, and thoſe particulars are a ſolid ground for a reputation, the Court ſhall adjudge it reputed parcel, and ſo ſhall paſs by thoſe words in the grant of the king; and judgment was given accordingly. Freem. Rep. 207. Paſch. 1676. C. B. Lee v. Browne.

See (I. b) (K. b) (L. b) (Z. b) (A. c) (B. c) (C. c) (E. c)

(D. c) Grant of the King [*by general Words; and what paſſes*].

Br. Forfeiture de Terre, pl. 32. cites S. C.—Br. Patents, pl. 32. cites S. C.—

[1. IF the king grants to another * *bona & catalla tenentium ſuorum fugitivorum & felonum qualiter cunque damnatorum.* And after a tenant of the grantee is *attainted of treaſon* for killing the meſſenger of the king, the grantee ſhall not have his chattels, becauſe he is attainted of treaſon. 22 Aſſ. 49. Adjudged.]

Bona *felonum & qualitercunque damnatorum* does not extend to high treaſon, becauſe felony is named firſt. Hard. 442. cites 11 H. 6. 54. b.

* The king granted to the earl of Arundel and his heirs, ex gratia ſpeciali, certa ſcientia & mero motu *omnia bona & catalla felonum, & felon' de ſe, attinct' de proditione, de felonia, utlagatorum in exigendo poſitorum, hominum ſuorum, integre tenent um & non integre tenentium, reſidentium de & in omnibus maneriis, & hæreditamentis dicti comitis.* The ſaid earl was *ſeiſed in fee of the hundred of Paling* in the county of Suſſex. *B. held a tenancy in fee within the ſaid hundred of the ſaid earl, as of his perſon*; B. was attainted of *treaſon* committed by him in the county of Hereford, and *had a leaſe for years and goods within the ſaid hundred* of Paling, *and elſewhere, where the earl had not any hereditament.* Reſolved by all the judges of England, that the Lord Lumley, who has the eſtate of the earl of Arundel, ſhall, by force of the ſaid patent, have the ſaid tenancy, leaſe, and goods. The word (*de*) ſhall be conſtrued and relate to any tenure of the perſon, or of any manor of the earl; the word (*in*) relates to goods, the word (*de*) to tenances which are held of the earl, be the tenants reſident or non-reſident. This is a good precedent to conſtrue beneficium principis, quod debet eſſe manſurum. The words in a patent ex certa ſcientia, ſpeciali gratia & mero motu, make the caſe of the king like the caſe of the grant of one ſubject to another; if the king be not evidently deceived. Jenk. 255. pl. 45.——— cites 30 Eliz. Lord Lumley's caſe.

Br. Patents, pl. 32. cites S. C.—Br. Forfeiture de Terre, pl. 31. cites S. C.

[2. But upon this grant he ſhall have the chattels of his tenant *who is attainted of petty treaſon for killing of his maſter.* 22 Aſſ. 49.]

For in petty treaſon the king ſhall not have the eſcheat held of another. Contra, in high treaſon.

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Fol. 195.

[3. The king *by general words* may grant *chattels.* 9 H. 6. 28.]

Br. Patents, pl. 4. cites S. C. Per Babington.

[4. If a *man outlawed be poſſeſſed of a term* for years, or of a *ward*, and the king grants to another *all the goods and chattels* of him ſo outlawed, the patentee ſhall have the term and the ward. 9 H. 6. 28.]

See pl. 7. Br. Patents, pl. 27. cites S. C. Per Treſham, who ſays,

[5. If the king grants to another, *that he and his men ſhall be diſcharged of toll*, by this he, *his villeins, and* alſo *homagers*, ſhall be quit of toll; for in doing of homage, he ſays, I become your man. 14 H. 6. 12.]

that if ſuch grant had been *before time of memory*, his villeins, and *not homagers*, ſhould go quit of toll by ſuch general words. *But*, per Cheiny and June, a grant by ſuch words *at this day* will diſcharge villeins and homagers.

In quo warranto, the king granted to W. N. *that he and his men ſhould be quit of pontage*; this extends only to his *villeins*, and not to others. Br. Patents, pl. 103. cites It. Nott. tempore E. 3.

Br. Patents, pl. 36. cites S. C.

[6. If the king grants to another *bona & catalla felonum & fugitivorum de hominibus ſuis.* This extends not to the goods of *homagers*; but only to *villeins*, unleſs it had been anciently uſed to extend to homagers. 40 Aſſ. pl. 21. Adjudged.]

[7. If

[7. If the king grants *conuſance* to another *of actions concerning him & homines ſuos;* this ſhall extend to his *villeins*, and not to his *homagers*. Dub. 12 Aſſ. pl. 35.]

See pl. 5. Br. Conuſance, pl. 34 cites S. C.—But, per Shard, it extends to thoſe who become their men in doing homage; quære, of thoſe who do fealty? But Parning was merely contra; and it was ſaid, that in protection pro ſe & hominibus, neither villeins nor franktenants ſhall be aided; therefore it ſeems there, that it extends only to his *familiar ſervants*. Ibid.

(E. c) Grant of the King by general Words.

See (I. b) (K. b) (L. b) (Z. b) (A. c) (B. c) (C. c) (D. c)

[1. IF the king grants *certain liberties* to J. S. *and* inter alia grants to him *omnia bona & catalla felonum de ſe* within the vill of S. this ſhall *paſs obligations, ſpecialties, and debts due to the felon;* for though if the king grant *in other caſes omnia bona & catalla ſua, where it is not granted as a liberty*, ſpecialties and debts ſhall not paſs without ſpecial words, being choſes en action; yet in caſe of ſuch a grant of a liberty, it ſhall paſs ſuch debts and ſpecialties; becauſe all liberties of ſuch nature have uſed to paſs by ſuch words in all ages before; for *all ancient liberties have been granted by ſuch words, and enjoyed by force of them;* [and therefore] they ſhall paſs by ſuch words at this day by ſuch grant of the king. P. 15 Car. upon a reference out of the Star-chamber between the biſhop of WINTON the almoner of the king, and one WARCUPP the leſſee of the CITY OF LONDON, to whom ſuch grant was made by E. 6. of goods and chattels felonum de ſe in Southwark, to the judges of B. R. all the ſaid judges ſeemed to incline, that it ſhall paſs ſpecialties and choſes en action; but they certified for the generality of the caſe, that it was convenient to be tried at the common law upon a ſuit there.]

The king by letters patents granted to the mayor, &c. of Southampton *omnia bona & catalla ſe onum de ſe*; *J. S.* to whom *money* was *due on a bond*, became felo de ſe; in an action by the mayor upon the bond, it was demurred, for that a (debt) would not paſs by a grant of (omnia bona & catalla felonum de ſe) upon which the plaintiff obtained leave to diſcontinue. Sid. 142. Paſch. 14 Car. 2. Southampton (Mayor) v. Richards.——12 Rep. 1, 2. in caſe of Ford v. Sheldon. S. P.

The Lord N. has a grant of *bona & catalla felorum et fugitivorum within the iſle of Ely, J. S. dwelling within the iſland, was attainted* of felony. *W. R. was indebted to J. S. by obligation* conditioned *to pay money at a manor of the Lord S. who alſo had bona felonum, &c. within his manor.* The queſtion was, which lord ſhould have the money? All the barons of the Exchequer were clear of opinion, that the Lord S. could not have it; for the *place of payment nihil operatur*, but the obligation is the * ſubſtance which came to the Lord N. within the iſle But being inſiſted by Popham, the queen's attorney, that the money belonged to the queen, and that the Lord N. could not have it; for that by the general words of bona & catalla felonum *things in action* do *not paſs, but by expreſs words* they will paſs; otherwiſe, not; and therefore day was given to the Lord N. to ſhew his letters patents. 2 Le. 56. pl. 81. Trin. 29 Eliz. In the Exchequer. Lord of Northampton v. Lord St. John.——S. C. cited Sid. 142.

The queen granted to one catalla utlagatorum & felonum de ſe, within ſuch a precinct; a *debt was due to the queen by a felo de ſe* within the precinct. Reſolved, the queen ſhall have the goods to ſatisfy her debt. 4 Le. 6. 26 Eliz. In Scacc. Anon.

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[2. If the king be *ſeiſed of a ward, and grants the land and body, with all reverſions and remainders* to another, and after *other land deſcends* to the ward within age, the patentee ſhall have this land alſo. 9 H. 6. 27. b. Quære this; for the king continues guardian, and it is to be intended that he was in ward for capite land.]

Br. Patents, pl. 4. cites S. C. per Babington.

[3. If

Br. Patents, pl. 27. cites S. C.

[3. If the king *releaſes to an abbot* or prior *of his foundation all ſervices, and that he ſhall be as free in the church as the king in his crown*; though this was an ancient grant, yet the *corody and penſion due to the king* are not diſcharged by thoſe general words. 14 H. 6. 11. b.

Br. Patents, pl. 27. cites S. C. per Paſton.

[4. If the king grants *land* to another in fee, and grants further, *that he ſhall be as free in this land as the king in his crown*, yet thoſe general words do not diſcharge *fines for alienation*, which are due by prerogative, if he aliens without licence. 14 H. 6. 12. b.]

Br. Garde, pl. 83. cites S. C.—Br. Patents, pl. 39. cites S. C.—Br. Prerogative, pl. 51. cites S. C.

[5. When *king E.* 3. granted to his ſon the *dutchy of Cornwal, cum omnibus ad eam ſpectantibus ſimiliter cum wardis, maritagiis, &c. & ſimiliter alibi extra comitat. prædictum non obſtante prærogativa regis*, and after a man who held of the duke in chief by ſervice of chivalry is dead, and his heir is in ward to the king for cauſe of *ward for other land*; the duke ſhall not have the *wardſhip* of him by thoſe general words; for the *king ſhall not paſs ſuch things as he has in right of the crown without expreſs* * *mention of his right.* 43 *Aſſ.* 15. Adjudged. D. 9, 10. El. 268. 18.]

* Fol. 196.

The king granted to the ducheſs of E. *inſulam de B. & caſtrum cum pertinentiis* habendum, &c. *ſimul cum omnibus exitibus, finibus, amerciamentis, proficuis omnium gentium, tenentium, reſidentium, & non reſidentium, advocationibus, wardis & relieviis, wreckis maris & aliis de & infra inſulam prædictam in quibuſcunque curiis noſtris emergentibus*, and the ſheriff demanded allowance upon his account of certain *iſſues forfeited in Banco at Weſtminſter*, and the beſt opinion there was, that he ſhall not have allowance of them, nor the ducheſs ſhall not have them; for thoſe words, *emergentibus infra inſulam*, ſhall be intended of ſuch *fines*, &c. which are *forfeited in any court in the iſle*, but not of fines and amerciaments forfeited at Weſtminſter or elſewhere extra the iſle; but the caſe is not ruled. Br. Patents, pl. 4. cites 9 H. 6. 27.——S. C. cited Arg. Pl. C. 12. where it is ſaid, that it is held, that the grant was good.

[6. *Exitus, fines and amerciaments of B. vel coram ipſo rege in Cancellaria vel coram Theſaurario & baronibus Scaccarii vel coram juſticiar. ad pacem vel itinerant. vel ad gaolam deliberandam vel juſticiariis foreſtæ vel coram ſeneſchallo & mariſchallo hoſpitii regis vel clerici mercator.* are never allowed to any in the Exchequer upon a grant of the king without ſpecial words, or otherwiſe allowed in a quo warranto. D. 10 El. 269. 18.]

[7. *Exitus tenent. vel fines and amercements of conſtables or other officers of the king* are not allowed in the Exchequer upon a grant of the king without words *licet tenent. vicecom. coronator. ballivi officiarii ſeu miniſtri regis ſunt*, becauſe they are royal. D. 10 El. 269. 18. 2 H. 7. 7.]

[8. If the king *has two titles to a church*, ſcilicet, the one *as patron of the fee*, and the other *by prerogative by lapſe, the church being void*; though the king grants the fee of the advowſon without expreſs grant of *this preſent avoidance* to preſent, the grantee ſhall not have this preſentment. D. 18 El. 348. 12. 10 H. 6. 9 E. 2.]

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Jenk. 244. pl. 28. contra.—Mo. 249. Mich. 29 Eliz. contra, that the queen ſeiſed of a manor, to which an advowſon was appendant, granted the manor una cum advocatione, the church being void, yet the judgment

[9. If the king is *ſeiſed in fee of an advowſon*, and the *church voids*, and afterwards *he grants the advowſon without ſpeaking of the avoidance*, the grantee ſhall have it. D. 9, 10. El. 269. F. N. 33. n. 18 E. 3. 22. 9 E. 3. 26. 3 H. 7. R. 10. cited in D. 10 El. before. Hobart's Reports, 189. Contra D. 13 El. 300. 36. where the grant is *of the manor with the advowſon thereto belonging.*]

judgment was, that the queen ſhould preſent hac vice. Sir Thomas Gorge's caſe.——3 Le. 196. S. C. by name of Sir Thomas Gorge v. Dalton.——S. C. cited accordingly. D. 300. pl. 36. in Marg.

10. *B. G. held* a manor of the king, and *R. W. held another manor of that manor, to which laſt there was an advowſon appendant; both* theſe men *were attainted* of treaſon, and the king ſeiſed both their manors, and afterwards *granted the manor, which B. G. held of him, una cum advocationibus eidem pertinentibus.* Adjudged, that the advowſon did not paſs with that manor, but was ſtill appendant to the other. Nelſ. Abr. 904. pl. 5. cites Mich. 30 H. 8. Dyer, 44.

This is not the principal caſe in Dyer, but is cited there, viz. D. 44. b. pl. 32. That there is a difference where the *king comes to an eſcheat as lord*, and where he comes to it *as king* of England; for where he comes to it as lord he ſhall not be in other courſe than as common lord, but where as king it is otherwiſe, and then cites the principal caſe as the caſe of 6 E. 3. 32. thus, viz. that B. G. *holds a manor of the king to which a royal franchiſe was appendant*, viz. *to have eſcheats of all treaſons of ſuch who hold of this manor*, and that R. W. held another manor of the ſame manor to which the advowſon is appendant, and that R. W. was attainted of treaſon, by which the *king ſeiſed, and* then *granted the manor held of him una cum advocationibus eidem pertin.* and by the opinion there the advowſon paſſed not with this manor, but is appendant as before; but it was held, that the franchiſe royal by the eſcheat was extinct and rejoined to the crown.

11. If the king grants *omnia jura ſua regalia*, or to be *as free as tongue can ſpeak or heart can think*, this ſhall not be taken according to the words, but *according to the ancient allowance*, as to *hold pleas or to have conuſance*, &c. Br. Patents, pl. 110. cites 10 H. 7. 13.

12. A patent in generalibus *without reſtriction*, as if the king grants *omnes terras ſuas*, or *maneria ſua*, or *releaſes all demands*, is a void patent, dolus verſatur in generalibus. Jenk. 304. pl. 77. cites 2 H. 7. 11 H. 7.

13. If the king grants *all his lands and tenements in D.* this is a good grant by thoſe general words. Br. Patents, pl. 95. cites 30 H. 8.

14. King Edw. 6. was *ſeiſed of the manors of Hackney and Stepney, within which was a great marſh* called Stepney Marſh, *parcel of the manor of Stepney*, which he had *in exchange* with the biſhop of London, *and alſo of* 20 *acres of land called Stepney Marſh*, which he had *as parcel of the poſſeſſions of the late priory of Grace*, and *granted* to the lord Wentworth and his heirs *the aforeſaid manors, nec-non mariſcos ſuos de Stepney præd. nec-non omnia terras & tenementa & mariſcos dictis maneriis aut cæteris præmiſſis pertinen.* &c. The queſtion was, if the 20 acres paſs in the general words of the firſt nec-non? Or if the words in the 2d. nec-non (dictis maneriis pertinent.) reſtrains the generality of the firſt words? Gawdy, Clench, and Wray conceived, that the 20 acres did paſs; and Wray ſaid, that againſt expreſs words no favour will be given to the king. And it is ſaid, note, that the marſhes pertaining to the manor are in the third clauſe, ergo the marſh in the ſecond clauſe ſhall be intended a marſh in groſs, or otherwiſe it ſhould be idle. And afterwards judgment was given againſt the queen. Le. 120. pl. 162. Trin. 3 Eliz. B. R. the Queen v. Lewis and Green.

15. A. being *ſeiſed of the manor of Q. and alſo of* the manor of *C.* which was *held of the manor of Q. was attainted of felony. Queen* Mary *gave the manor of Q. to Sir W. M. cum omnibus ſuis juribus & parcellis;* [138]

parcellis; adjudged, that the manor of C. paſſed by this grant, becauſe it was now parcel of the manor of Q. cited by Periam J. 1 Lev. 26. pl. 33. Paſch. 27 Eliz. C. B. in caſe of Marſh and Smith, as Sir Walter Mildway's caſe.

(E. c. 2) Grant. Paſs what. By the Words *Conſtituimus, Conceſſimus, &c.*

Br. Grants, pl. 62. cites S. C.

1. IN aſſiſe, upon a grant of the *office of clerk of the crown in Chancery*, it need not be ſhewn if there was ſuch office at the time of the grant or not. For per Cateſby, the king by this word *conceſſimus* may grant an office which had eſſe before, but by theſe words *conſtituimus & ordinavimus* he may make an office and officer which had not eſſe before, and *the office of one of the clerks of the crown* in Chancery was *granted to two*, where, per Cateſby, two cannot have the office of one clerk; *contra* of grant *of the office of clerk of the crown to two*, and yet non allocatur, but the grant is good. Br. Patents, pl. 21. cites 9 E. 4. 11.

2. The king having granted to Hugh Moyle *the office of broker of London*, by the word *conceſſimus to the H. M. office of brocar.* &c. And by all the ſerjeants the patent is void, becauſe it wants *conſtituimus*; becauſe the king *never had granted ſuch office there before.* And per Brian the patent is void; for this office does not belong to the king. By which he granted another patent, which had *conſtituimus & ordinamus*, &c. and yet held void, becauſe there was never ſuch an office, &c. but the mayor admitted him. Br. Patents, pl. 73. cites 21 E. 4. 76.

(E. c. 3) By the Words * *Ex Certa Scientia*, † Mero Motu, *&c.*

1. IF the king grants by theſe words, *ex certa ſcientia & mero motu*, ſuch patents ſhall be taken more ſtrong againſt the king. By ſome. Br. Patents, pl. 80. cites 9 H. 7. 2.

2. *But* where the king *recites a former grant, and confirms it ex certa* ſcientia & mero motu, he ſhall be *eſtopped to deny the recital*; per Huſſey; but Brooke ſays quære. Ibid.

* *Ex certa ſcientia imports*, that the king has knowledge of the thing which he grants; and therefore ſuch charter is called aſſertive and not ſuggeſtive, as is ſaid in 2 E. 3. 7. but this is to be intended of verity, which is the proper object of ſcience, and not of falſity, which is a non ens, and thereof the king cannot have knowledge; but in ſuch caſe notwithſtanding thoſe words the king is utterly deceived in his grant, and therefore they ſhall not give the patentee any advantage. 10 Rep. 112. b. Reſolved Mich. 10 Jac. C. B. Legat's caſe.——S. P. Arg. 3 Le. 249, in the caſe of Harris v. Wing.——S. P. Pl. C. 502. b. Mich. 18 & 19 Eliz. in the caſe of Grendon v. the Biſhop of Lincoln.

† *Ex mero motu* properly *imports* the honour and bounty of the king, who rewards the patentee for the merit of his ſervice of the mere motion of the king himſelf, without any ſuit of the party; and it was ſaid, that thoſe words were *added after the ſtatute of 4 H. 4. cap. 4. by which the king declared, that he would abſtain from granting any part of his revenues, lands, or wardſhips, but to ſuch as deſerve them, and thoſe who ſue for any ſuch thing ſhall be puniſhed, and ſhall not have the thing for which the ſuit was made*; after which act, to the end that it ſhould not appear, that any ſuit was made, thoſe words were added, viz. ex mero motu. 10 Rep. 112. b. 113. a. in Legat's caſe.——S. P. Arg. 3 Le. 249. in the caſe of Harris v. Wing.

3. If

3. If the king has a mine royal in the land of J. S. and he ex gratia ſpeciali, certa ſcientia & mero motu ſuis, grants to a ſtranger *all mines*, which he has *in the land of J. S.* by this grant the mine royal ſhall paſs; for otherwiſe the words ſhall be void; for he cannot have baſe mines in another's ſoil, and therefore when he ſays *ex certa ſcientia*, and recites, that it is in the ſoil of another, he cannot be taken miſconuſant of the thing, and therefore it ſhall paſs. Per Dyer Ch. J. of C. B. Pl. C. 337. Hill. 9 Eliz. in the caſe of mines. [139]

4. The words *ad humilem petitionem* diminiſh the force of the words de gratia ſpeciali, ac ex certa ſcientia et mero motu; for the charter ſhall not be taken to proceed from the grace of the king merely, and ſo to be taken more ſtrong againſt the king, and in favour of the patentee, unleſs it is merely of the motion of the king, and without ſuit of the party. Per Catlin Ch. J. Pl. C. 337. in the caſe of mines.

5. *Queen* Mary being ſeiſed in fee, in the right of her crown, of a manor, to which an advowſon was appendant; and *the church being then void*, ſhe, in the time of the vacancy, ex certa ſcientia, *granted the manor & omnes advocationes eidem* manerio *pertinent.* five incurrent. in tam amplis modo & forma prout, &c. *but no mention* was made *of the preſent avoidance*, which was at that very time when the grant was made; it was adjudged that the next preſentation did not paſs by ſuch a grant. Dyer, 300. pl. 36. Paſch. 13 Eliz. the caſe of the manor of Bedminſter.

Ibid. Marg. ſays, it ſeems by this caſe, that the grantee ſhall not have the preſent avoidance, contra to F. N. B. 33. & 18 E. 3. 22. 9 E. 3. 22. Dyer, 269. And this judgment is good law, per Cur. Mich. 29 & 30 Eliz. C. B. & Dyer, fol. 348. [and where] A. had a manor to which advowſon is appendant, which is void, he grants the manor una cum advocatione to B. In this caſe B. ſhall not preſent hac vice. Paſch. 28 Eliz. SIR THOMAS GORGE'S CASE, in a caſe of the king, and Trin. 15 Jac. MINCHCOMB'S CASE being the caſe of common perſon.

6. Grant *to J. H. ſon of T. H.* ex certa ſcientia, et mero motu. J. H. *was a baſtard.* The *grant ſhall not be* taken in ſuch plight as the grant of a common perſon, *void for uncertainty*, becauſe the king takes notice of the perſon of what degree he is; and in the king's caſe where he takes knowledge by the words ex certa ſcientia, there all matter of * *uncertainty ſhall be avoided*, and made good; *but not matter which is not true;* and where a thing may be *taken two ways*, there without the words ex certa ſcientia, &c. the beſt ſhall be taken for the king, and the ſtrongeſt againſt the patentee; per Manwood; but per Dyer, by the words ex certa ſcientia, the uncertainty is ſaved, and ſhall be taken ſtrong for the patentee; and if it can be any ways taken for him, the patent ſhall not be void; and here the word (ſon) may be taken either for a baſe, or a true ſon. But where the king in his grant † recites a thing which is falſe, that ſhall not make the patent good, although the words be ex certa ſcientia & mero motu. 3 Le. 49. pl. 69. Mich. 15 Eliz. in C. B. Anon.

* S. P. per Manwood Ch. B. As the uncertainty of the vill, or when the patent has different meanings, and is executory. Sav. 5. pl. 14. The words (ex mero motu, et certa ſcientia) by which the king ſays, (I grant it without the ſuit of or information of any perſon, but of my own knowledge,) aid all uncertainties; as if he *grants lands which belonged to the late diſſolved monaſtery of Chriſt-church*, when in fact there were *ſeveral monaſteries of Chriſt-church*, this is helped; but ſuch patent ſhall never aid a falſity; as if the king *grants lands which came* to him *by the diſſolution* of a monaſtery,

monaſtery, *when* in fact *they came* to him *by the attainder* of Cardinal Wolſey. Per Cur. Sav. 37, 38. pl. 36. Mich. 24 & 25 Eliz. in Scacc. Attorney-General v. May.

† S. P. per Holt Ch. J. 2 Salk. 561. Hill. 9 W. 3. in the caſe of the King v. the Biſhop of Cheſter.

S. C. cited Hob. 243. in the caſe of Lord Stanhope v. Biſhop of Lincoln.

7. By *attainder of one diſſeiſed*, a right to certain land became forfeited to the *queen*, who, *after the death of the diſſeiſee*, by letters patents de ſpeciali gratia, ex certa ſcientia, & mero motu, *granted all the lands*, tenements, rights, *and hereditaments*, *which ſhe had by attainder* of the diſſeiſee; but it was adjudged, that ſuch a *naked right* ſhall not paſs by ſuch general words of the king; for that (if it can be granted at all) it muſt be with a ſpecial recital by expreſs and ſpecial words. 3 Rep. 4. b. cited, and affirmed by the Court to be good law, by the name of Cromer's caſe.

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S. P. Arg. 3. Le. 249. in the caſe of Harris v. Wing.

8. *Ex gratia ſua ſpeciali*, is in reſpect of the grace and favour which the king has conceived in reſpect of the patentee.—10 Rep. 113. a. in Legat's caſe.

(F. c) Grants of the King. In what Caſes they ſhall be *void for Uncertainty*.

Cro. J. 421. S. C. by the name of Lightfoot v. Lenet. Adjudged, that the grant is uncertain and void; and the averring payment at Borrowbrigg, without averring payment at Willowbrigg, is therefore ill; and for that reaſon it was awarded that he ſhould anſwer.

[1. IF there are two brigs in Yorkſhire, ſcilicet, Willowbrig and Borrowbrig, and the king grants to a man, *that he ſhall take ſo much for every beaſt which ſhall go over Willowbrig for toll, as has uſually been taken for every beaſt which ſhould go there et alibi infra regnum Angliæ*; though he avers, that ſo much in certain has been paid at Borrowbrig aforeſaid, and ſo much he claims to have, yet this grant is void for the uncertainty of the words (*et alibi infra regnum Angliæ*), for this has not any certainty; for one place may be 2*d*. and at another place more or leſs. P. 15 Ja. B. R. LIGHTFOOT *and* LOVETT. Adjudged.]

2. If the king *grants* to me *that I ſhall not be ſheriff*, this is not good for the uncertainty, becauſe he *does not ſay of what county*; but contra, if he ſays that I ſhall not be ſheriff *of any county in England*. Note the diverſity. Br. Patents, pl. 92. cites 2 R. 3. 7. per Huſſey.

So if the king has 100 *acres of land in D.* and he *grants* to J. S. 20 *acres of the lands* in D. *without any deſcribing them by the rent, occupation or name*, &c. This grant is void, and the patentee ſhall not have his election in the king's caſe. 12 Rep. 86. in Stockdale's caſe.

3. The queen *ſeiſed of a great waſte*, called Ruddleſdown, in the pariſh of Chipnam, *granted a moiety of a yard land in the ſaid waſte* to the mayor and burgeſſes of Chipnam, *without any certainty*, *name*, *or deſcription*, and after granted the waſte to H. Adjudged, that the grant was void for the uncertainty of the thing granted, it being in the caſe of the king, though otherwiſe it would be in the caſe of a common perſon, where the grantee might by election, reduce it to a certainty; and the Court held farther, that the grant was void, not only againſt the queen herſelf, but alſo againſt H. her patentee. Le. 30. pl. 36. Trin. 27 Eliz. B. R. Sir Walter Hungerford's caſe.

4. If

4. If the king grants a rent or land *without limitation of any eſtate*, the grant *is merely void* for the uncertainty, *and the grantee ſhall not be tenant at will* to the king, as it is ruled in ALTON WOOD's caſe. And the reaſon is, becauſe the grant of the king ſhall be taken moſt ſtrong for his benefit and advantage. Reſolved. Dav. Rep. 45. a. Paſch. 5 Jac. B. R. in Ireland, in the caſe of the Dean and Chapter of Fernes.

5. If the *thing granted* be *of ſuch a nature that divers eſtates may be limited thereof*; as of land, ſeignory, rent, &c. if the king, in his grant of ſuch a thing, does not limit any certain eſtate to the grantee, nothing ſhall paſs by this grant, but it ſhall be adjudged merely void for the uncertainty. Reſolved. Dav. Rep. 45. a. in caſe of the Dean and Chapter of Fernes.

But if the thing granted be ſuch of which divers eſtates cannot be limited, but *one eſtate only is incident thereto*, which the law limits without any limitation made by the grantor, of ſuch thing the grant of the king cannot be doubtful or uncertain, nor can the king be deceived, nor can he err; for error eſt in bivio, and no error can be where there is only one way to be taken. Reſolved. Dav. Rep. 45. a. in the caſe of the Dean and Chapter of Fernes.

6. *Certainty* is requiſite in the grants of the king. Per Fleming Ch. J. Bulſt. 10. Hill. 7 Jac. in the caſe of the Earl of Shrewſbury v. Earl of Rutland. [141]

7. King James granted to W. S. *ſo many debts, duties*, arrearages and ſums of money, *being on record in any of his courts from the laſt year of H. 8. to the 14th of queen Eliz. as ſhall amount to 1000l.* It was reſolved, that this grant was void; for there is no certainty what debt ſhould paſs. And that the word (arrearages) being coupled with the words (debts, duties, and ſums of money) ſhould *not paſs arrearages of rents, or things real*, but muſt be intended of things perſonal; but there being a proviſo that the grantee ſhould take no benefit of any arrearages of rents, reliefs, tenths, or annual payments whatſoever, till J. S. ſhould be ſatisfied the ſum of 10000l. this explains what arrearages were intended, viz. of rents, &c. and ſo one part of the patent muſt be conſtrued by the other; but clearly meſne rates are not within the ſaid words; for they are the profits of demeſne lands. 12 Rep. 86. Trin. 9 Jac. in the Court of Wards. Stockdale's caſe.

8. In ejectment, the caſe upon the evidence in a trial at bar was, that *Eleanor queen dowager* of H. 3. in the year 1273, *founded St. Katharine's Hoſpital, reſerving to herſelf during her life, & reginis Angliæ nobis ſuccidentibus the nomination* of the maſter of the hoſpital, which was incorporated, and the grants confirmed by letters patents. And the *queſtion was, whether* by thoſe words (reginis Angliæ) the *queen dowager or* queen *conſort was intended?* And it was held, that the queen dowager had the right to nominate; for queen Eleanor, at the time of foundation, was only dowager, and therefore could never be intended to exclude ſuch queens as ſhould ſucceed her in that capacity. And the words will include a queen dowager; for ſhe is queen of England, and as ſuch may ſue in the Exchequer. 1 Vent. 149. Mich. 23 Car. 2. the caſe of St. Katharine's Hoſpital.

2 Jo. 176. S. C. by name of Leſſee of Lord Brunker v. Sir R. Atkins. —— Skin. 2. 14. S. C.

(F. c. 2) Grants. *Enure. How.*

1. THE *aſſiſe had uſually been held in York-caſtle*, and Queen Eliz. *granted the cuſtody of the caſtle* to J. S. *with all the herbage* in the caſtle. Upon demanding the opinion of the Maſter of the Rolls, the Ch. J. of B. R. and the Lord Ch. Baron, they held that the aſſiſes might be held there, whether the patentee would aſſent to it or not; for if he might prevent it, ſo might every one, and ſo the buſineſs for the public good would be unexecuted, which would be very inconvenient, and would be in effect the barring the queen herſelf from coming into the caſtle, it being her ſervice which is there to be executed, and the ſeat of juſtice her ſeat, for which the common law with their commiſſion gives authority to the juſtices to appoint the place of their ſeſſions. 1 And. 345. pl. 320.

Cited per Holt Ch. J. Skin. 661. in caſe of the King v. Biſhop of Cheſter (alias Sir W. Theekſton's caſe).

2. Where the words *damus & concedimus* in the king's grant cannot enure by way of *grant*, but may by way of *confirmation*, there they ſhall enure by way of confirmation; ſo that a forfeiture, before office found of the forfeiture, is diſcharged by thoſe words; and though they are void as to amounting to any grant, yet they confirm the eſtate of the patentee. Mich. 7 Jac. 8 Rep. 167. in the Earl of Cumberland's caſe.

3. Holt Ch. J. cites it as ſaid by his brother Turton, that the *king's intention* is a qualified intention, viz. according to the letters
[142] patents; but Holt ſaid, that a *legal intention is not neceſſary* in the king, *but only a moral intent*. Skin. 661. Mich. 8 W. 3. B. R. in caſe of King v. Biſhop of Cheſter. (Sir William Theekſtone's caſe.)

See (O. c).

(G. c) In what Caſes it ſhall *enure to a double Intent.*

Br. Patents, pl. 9. cites S. C. that he may make ſuch officers after; and ſo well.

[1. IF the king grants to another *to hold pleas before his bailiffs, ſtewards*, or juſtices, if he *had no ſuch officers* before the grant, he cannot make them by it. 7 H. 4. 5. b.]

——— If the king grants *conuſance of pleas* to one N. *and does not ſay before whom it ſhall be held*, the grant is void; for the grantee cannot make a judge; *but if he had court before*, there the grant is good. Br. Patents, pl. 44. cites 2 H. 7. 13.

[2. If the king grants to a ſpiritual corporation *to hold ſuch church in proper uſe* for ever, where the *king himſelf is ſeiſed of the advowſon* of the ſaid church at the time; this ſhall not enure firſt to a grant of the church, and then to an appropriation: but the king is deceived, and therefore the grant void. 17 E. 3. 39.]

Sty. 266. to 273. S. C. and the Judges concurred in opinion that the copyhold

[3. If the king be ſeiſed of a manor, whereof a copyhold tenement in fee is parcel, and the *king grants the copyhold tenement to J. S. for his life, by his letters patents*, though this be a good grant, becauſe the king is not bound to recite ſuch copyhold eſtates, they not being of record, yet after the death of J. S. the king may grant

it by copy * again; for this doth *not extinguiſh* the copyhold, becauſe the grant of the king ſhall not enure to a double intent, eſpecially to ſuch *collateral intent*; and it would be of dangerous conſequence to the conveyance made by the king to the ſubject, if the king once make a leaſe for life or years of a copyhold, that this ſhould deſtroy the copyhold for ever. If a *biſhop tenant in tail, for life or years, leaſe a copyhold*, yet this ſhall *not bind the ſucceſſor iſſue in tail, or him in reverſion*, to grant it by copy, nor ſhall bind *an infant* lord of a manor; and the eſtate and poſſeſſions of the king are in like manner under the protection of the law, in reſpect of the great affairs of the king; and peradventure it may be a prejudice to the king to extinguiſh the copyhold by an act in law, by way of conſequence, without open intent of the king; for perhaps a common appendant or appurtenant to the copyhold will be loſt, if the copyhold be extinguiſhed. P. 1651. between CREMER AND BURNET adjudged upon a demurrer; per totam Curiam, after divers arguments at bar. Intratur, P. 1650. R. 414.]

is not deſtroyed.

* Fol. 197.

Mar. 206. Paſch. 18 Car. B. R. FULHAM v. FULHAM, the Ch. J. Bramſtone, and all the Court ſaid, it never was recited in any of the king's grants what is copyhold; and they were clear of opinion that the grant was not void; but whether it deſtroyed the copyhold, ſo as the king could not afterwards grant the ſame by copy again,

[4. *In the caſe aforeſaid*, if the king after the death of the tenant for life *grants over the manor* to J. D. *in fee*, the *grantee may grant it by copy*, as well as the king might, if he had not granted it over; for by the death of the tenant for life, it is reduced to the ſame condition as it was before the making of the leaſe for life. In the ſaid caſe of CREMER AND BURNET adjudged per totam Curiam; for the grantee of the manor doth not communicate of the prerogative of the king, but has the manor in the ſame manner as it was in the king at the time of the grant made to him.]

they agreed might be a queſtion. ——— But Jo. 449. LEE v. BOOTHBY, which ſeems to be the S. C. with this of CREMER v. BURNET, reports that it was agreed by Barkley, Crooke and Jones, that this grant (which was of a copyhold eſcheated to the king) is an extinguiſhment of the copyhold; ſo that it is not again grantable by copy, either by the king or his grantee of the manor after this eſtate for life ſhall be determined; and that Bramſtone was of the ſame opinion. ——— Roll. Copyhold (B) pl. 1. accordingly. Mich. 15 Car. B. R. DOWNCLIFFE v. MINORS, reſolved per Cur. † upon evidence at the bar. ——— Sid. 17. 35. 81. 137. S. C. by the name of FIELD v. BOOTHBY; and there it was held by Glyn Ch. J. and Warberton J. againſt Newdigate J. that the power of granting again by copy was not deſtroyed. ——— Keb. 720. Paſch. 16 Car. 2. B. R. LEE v. BOOTHBY, ſays, that a grant for life by the king, is only a ſeverance of the copyhold pro tempore.

†[143]

5. Letters patents of the king ſhall not enure to two intents; as where *land or office is granted to an alien born*, this does not make him a denizen. Br. Patents, pl. 62. cites 7 E. 4. 30. per Cur.

S. C. cited as BAGGOT's caſe. 3 Le. 243. Mich. 32 El. in caſe of

Harris v. Wing. ——— S. P. 5 Rep. 56. a. in Knight's caſe, cites 17 E. 3. 39. ——— S. C. cited Roll R. 466. Mich. 4 Jac. in caſe of Colt v. Glover. ——— S. P. By Dyer, Pl. C. 501. Mich. 18 & 19 Eliz. in caſe of Grendon v. the Biſhop of Lincoln, cites 9 E. 4. 6. 11. ——— *Nor* where the king gives *land to a felon*, this ſhall not pardon him of the felony; for it ought to have ſpecial words in the one caſe and the other. Br. Patents, pl. 62. cites 7 E. 4. 30. per Cur. ——— S. C. cited Roll R. 466. Mich. 14 Jac. in caſe of Colt v. Glover. ——— So if the king grants lands *to* J. S. and his heirs, and in truth J. S. is *the king's villein*, this does not infranchiſe the villein by implication. 5 Rep. 56. a. Mich. 30 & 31 Eliz. C. B. in Knight's caſe.

6. If the king *grants the office of ſteward* or conſtable of the caſtle of D. *where there is no ſuch office before*, the grant is void; and therefore the beſt ſhall be taken for the king; and if the king will make ſuch office, it ought to have this word *conſtituimus*, &c. Br. Patents, pl. 63. cites 8 E. 4. 6. Per Choke.

Br. Office and Officers, pl. 28. cites S. C.

7. The *king granted the office of one of the chamberlains of the Exchequer to H. C. and the heirs male of his body, to be exerciſed by him or his ſufficient deputy;* and after the *patentee granted it to J. L. for his life;* and after the *king confirmed it, and granted* thereby *the ſame office to J. L. for his life;* and after *H. C. had iſſue, and died,* and *the iſſue died without iſſue;* and the king granted the office to another, and J. L. made debate; and it was held clearly, that of ſuch offices as are granted by the king to one upon truſt and confidence, as an eſquire for his body, the grantee cannot make an aſſignment, if there be no aſſignment in the grant, as here, *to him and his aſſigns,* but of the office of parker he may make an aſſignment; and if the patent had not been by him and his deputy, &c. he could not have made a deputy. And it was moved, that though the *grant to J. L.* is *void againſt the iſſue in tail, yet it is good againſt the king,* by reaſon of the confirmation of the king. Contrary per Billing; for by him, if the *king does not recite the firſt grant,* and grants the office to J. L. *habendum after the death of the firſt grantee* for life of the ſecond grantee, it is not good; for the king has not the office to grant during the life of the firſt grantee. Br. Grants, pl. 99. cites 49 H. 6. 14. and 11 E. 4. 1.

Brooke ſays, *But ſee that ſeveral ſuch grants are,* that is to ſay, where the king *makes J. N. a duke, and grants* to him *land by the ſame patent, and by the ſame name.*

8. The king granted to W. N. by his letters patents, *that he may give 10l. rent to a chaplain to celebrate divine ſervice in B. pro bono ſtat. A. & animabus,* &c. *juxta ordinationem ipſius W. N. fiend.* Rede ſaid this is a good grant, notwithſtanding that the chaplain be not named, as where the king grants to them of N. ſuch liberties as thoſe of London have, this is a good grant. But Fineux and Keeble held the principal grant void; for grant of the king cannot enure to *two intents;* that is to ſay, *to grant licence, and* to *make a corporation.* Br. Patents, pl. 44. cites 2 H. 7. 13.

Ibid. ——*So* to *make a mayor and commonalty, and to give land to them by the ſame patent,* or licence to purchaſe, which is common, &c. Ibid. —— *But* if the king *grants to J. N. to amortiſe certain lands,* yet if he gives *land held of the king in capite* in mortmain, the land ſhall be ſeiſed for fine for the alienation, and therefore *it is uſed to put in* ſuch patents now, *though it be held of us in capite.* Per Keeble. Ibid.

9. It was held by the juſtices, that if the king *grants land to a corporation by another name* than that by which they were named before, yet *the land ſhall paſs, and* the letters patents *ſhall be* to them *as a new incorporation,* &c. 3 Le. 190. Mich. 26 Eliz. C. B. Dean and Chapter of Chriſt-church v. Parot.

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S. P. per Dyer and Brown. Ibid. 247. in S. C. who ſaid, that the rule is true where both intents enure and work againſt the king. But where one intent ſerves for, and works for the benefit of the king, it is otherwiſe.

10. The king's grant cannot enure to two intents, viz. *to make a leaſe, and to accept a ſurrender;* per Popham, and many other grave and learned men upon a conference. 3 Le. 243. Mich. 32 Eliz. in caſe of Harris v. Wing.

The king's grant ſhall not enure (to his ſpecial prejudice) to two intents, viz. to a *demiſe* of the *land, and alſo to a ſuſpenſion of his condition* by which he may defeat the eſtate for life, and other eſtates, as it ſhould be in the caſe of a common perſon; or to a demiſe in reſpect of his preſent eſtate pur auter vie, and

and alſo to a confirmation of his condition by which otherwiſe he might defeat all, as it ſhould be alſo in the caſe of a common perſon; for the grant of the king ſhall be taken according to his expreſs intention comprehended in his grant, and ſhall not extend to any other thing by conſtruction or implication which does not appear by his grant, and therefore in ſuch caſes the king ought to be truly informed, and he ought to make ſpecial and particular grant, which by expreſs words may enure to all ſuch ſeveral intents as are deſired. 7 Rep. 14. a. Mich. 33 & 34 Eliz. in Englefield's caſe.

11. If the king's grant may be taken to a double intent, it ſhall be adjudged *void for the doubleneſs thereof.* Reſolved. Dav. Rep. 45. a. Paſch. 5 Jac. B. R. in Ireland, in the Dean and Chapter of Fernes' caſe. S.P. per Ld. Dyer, Pl. C. 502. b. Mich. 18 & 19 Eliz. in caſe of Grendon v. the Biſhop of Lincoln. ——S. P. per Williams J. Buſſ. 4. Hill. 7 Jac. in caſe of the Earl of Shrewſbury v. the Earl of Rutland.

12. When the king *has two rights* in him, he cannot exclude himſelf of both without ſpecial words; as advowſon held of the king is aliened to an abbot, now the king has title to the advowſon by the mortmain, and after the king by his letters patents grants to the abbot that he may hold the advowſon to his own uſe, yet the king ſhall not loſe advantage of the mortmain. 7 Rep. 14. b. Trin. 6 Jac. in Calvin's caſe.

(H. c) *How* it may be *without Grantee.* [Or where it muſt be *by way of Ordinance.*]

See (Y. a. 2) pl. 18.

[1. THE king may *grant generally without mention of any to whom* he makes grant, that the men of ſuch a vill ſhall be a corporation, as he may ſay *conſtituimus the men of ſuch a vill to be a corporation, ſcilicet, mayor and commonalty, or ſuch like;* for he cannot grant the corporation to the men in their natural capacity, and they are not a politic capacity before the grant, and ſo the grant to them would be to no purpoſe *, and therefore it is good here as there for neceſſity.] If the king grants land in fee farm *probis hominibus de Dale,* it was held to be a good corporation. And ſo where it is given *burgenſibus civibus & communitati,* and they by ſuch names of corporations may have actions of things touching their farm, &c. and the writ ſhall be ad reſpondend. hominibus villæ de Dale, vel civibus, &c. 7 E. 4. 14. a. pl. 7.——* Orig. is (et pur ceo icy eſt bon come la pur neceſſity).

[2. The king may grant to J. S. *that his tenants ſhall be a corporation, naming the corporation in certain;* for this is an erecting of a corporation as well as in the other caſe. 20 E. 3. Conuſance de Pleas, 46. Admitted.]

[3. The king by his letters patents may ordain, *that from a vill which is not incorporated ſhall come burgeſſes to the parliament to be elected by the inhabitants of the vill;* for this is the caſe of ſeveral vills and boroughs in England who have burgeſſes by preſcription that never were incorporate, and there this liberty could not commence by grant to any but by way of *ordinance.* Hobart's Reports, 22. Caſe of Burgeſſes of Parliament.] [145]

[4. The king may erect *a fair, market, warren, park, foreſt, chaſe, piſcary,* or ſuch like, *by way of ordinance,* without grant of it to any. Hobart's Reports, 22.]

S. C. cited Comb. 216. Hill. 6 W. 3. B. R. in case of the King v. Larwood.

* Fol. 198.

[5. If letters patents are made in this manner, *statuimus, ordinamus & declaramus per præsentes, that the vill of B. shall be perpetually a free borough*, and that within the said borough shall be *a body incorporate by the name of* provost, free burgesses of the borough, and commonalty of B. and by this name may sue and be sued, purchase and alien, &c. and then follows this clause, *et quod ipsi præfati præpositi & liberi burgenses* * *prædicti & successores sui in perpetuum habeant plenam potestat, & authoritatem eligendi, mittendi & returnandi duos discretos & idoneos viros ad serviendum & attendendum in quo libet parliamento in regno Hiberniæ in posterum tenendo.* Though this liberty is not granted to any, yet it is good *by way of ordinance*, and this liberty is good by way of interest in all the corporation, though the execution of it be committed to the provost and burgesses only. Hob. R. Case of Parliament, 22.]

† This plea in Roll is marked (7), but it should have been (6).

[† (7) 6. So the king may grant *a privilege* to a corporation by way of interest, *and commit the execution* of it *to any persons* who are *not members of the corporation*. Hobart's Reports, 22.]

7. Vaughan held, that the king may *dispense with a corporation*; and he said, it was very usual to *licence them to purchase in mortmain*, to *make parks*, to convert *arable into pasture*, or *wood into arable*, to erect a *fair*, to *appropriate a rectory*, &c. Freem. Rep. 139. Hill. 1673. in case of Thomas v. Sorrel.

(I. c) At what *Time* he may Grant.

[1. THAT which is an *inheritance in the king at the time of the grant*, will well pass by the grant.]

[2. *As* if the king grants *to the tenant, that when he dies his heir shall enter without suing of livery*, this is good. 19 H. 6. 62.]

[3. The king may grant to another *all recognizances which shall be made in the Chancery hereafter*; because this is the profit of the Court. 19 H. 6. 64.]

[4. The king may grant *wards and marriages to such a value which shall happen till such a day, paying*, &c. 34 E. 1. Rot. Fin. Memb. 15.]

See (I. c. 2) pl. 1.

[5. The king may grant *the ward of*, &c. *quando acciderit*. 29 E. 1. Rot. Fin. Memb. 14.]

S. P. Br. Patents, pl. 53. cites 6 H. 7. 4.

[6. The king may *discharge such thing as shall be, which is not in him at the time* of the discharge.]

S. P. Br. Patents, pl. 53. cites 6 H. 7. 4.

[7. *As* he may grant *to a spiritual man, that he shall be discharged of tenths when they shall be granted by the clergy*. 9 H. 6. 62.]

For this sounds in covenant, and against the king no writ of covenant lies; and therefore the grant is good.

‡ Orig. is (Si).

[8. ‡ So the king [may] grant to another, *that he shall not be impeached of a recognizance, if he enters into it afterwards*. 19 H. 6. 64.]

But in case of a common person, it is not a good grant; for of

9. The king by patent, reciting that H. B. held of him in chief, granted to T. T. *that if H. died his heir within age, that he shall have the ward of his heir and heirs*, &c. which was argued in the Exchequer-chamber. Choke said, the grant is good; for the king has

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an intereſt in the ward, though he has not poſſeſſion. But Halſton ſaid, if the grant ſhall be good, it ſhall be by reaſon that the *king has tenure in him*; but if the king after the grant grants the ſervices to a ſtranger before the ward falls, T. ſhall not have the ward; quære inde; for the ſeigniory was charged by the firſt grant to T. But the Juſtices held the grant void by the ſtatute * 18 *H.* 6. that grants made before the king be entitled by office ſhall be void; but this is only of land, which ſee in the ſtatute, and *this grant ſhall enure in lieu of covenant*. And there ſome argued that the ſtatute does not extend to this caſe; for it was for the king's advantage; therefore it ſeems that there is no difference. Br. Patents, pl. 74. cites 30 H. 6. and Fitzh. Grant, 91.

this he may have *writ of covenant*, and by conſequence againſt the king, by way of anſwer; but grant of the king, that where A. is indicted of felony, if he be after outlawed of it, the grantee ſhall have

all the forfeiture, &c. † [is good.] Ibid. —— *So* the king may grant the *temporalties of a biſhop before they fall*; per Laicon. But it was ſaid that there is but a little diverſity between this and the principal caſe. Ibid. —— *So of fines and amerciaments*, and *chattels of felons and fugitives*, the king is ſeiſed in law; and therefore his grant thereof is good; but contra here; per Vampage. Ibid. —— *For* if the king grants *the eſcheat of his tenant when it ſhall fall*; *or* the *land which his villein ſhall purchaſe*; this is not good. Ibid. —† Fitzh. Grant, pl. 91. —* See (H. b)

The king's grant of the *temporalties* of a biſhop *in the life-time of the biſhop*, *or* of the *wardſhip* of an heir *in the life-time of his anceſtor*, who is the king's tenant, *or of fifteenths* or tenths, *before they are given* by parliament to the king, are good; for the law underſtands there to be *near poſſibilities*. The parliament is ſuppoſed to be held every year, and the king in parliament generally has aid of his ſubjects; and ſtatuum eſt omnibus ſemel mori; and therefore the grant of the wardſhip, temporalties, and fifteenths, as aforeſaid, is good: *but* the grant of an *eſcheat*, *or* of a *purchaſe made by villein*, *or* of the *forfeiture of the land of an offender before his attainder*, are all void; for they are *remote poſſibilities*, and out of the expectation of the law. Jenk. 210. pl. 44.

10. Note, per Choke and Cateſby, where the king writes to have *B. admitted to a corody for his life*, in the abby of B. who is admitted, the *king cannot write in the life of B. to have N. admitted to ſuch a corody in the life of B. after the death of B.* for the king has only a preſentation, and he cannot preſent in the life of B. who is only an incumbent in effect in this caſe. Br. Patents, pl. 30. cites ‡ 39 H. 6. 48.

‡ Orig. is (36) but miſprinted.

11. Contra per Laicon, that the king may grant office for term of life; and by another patent he may *recite the firſt grant, and grant it to another after the death of the firſt*; and well; *but* it ſeems that he *cannot* grant it *by name of a reverſion*; for there is no reverſion of an office; for it is determined after the death of the grantee; *but* he may grant it *by name of office habend' after the death of the firſt patentee*. Ibid.

12. In eſcape out of the priſon of the biſhop of S. by negligence, the biſhop ſhewed *ancient grant allowed in quo warranto*, where the king had granted to his predeceſſors *that he ſhould be quit of eſcapes of thieves and felons*, and of eſcape of priſoners *out of his priſon*. And all the juſtices held it good, becauſe it was allowed in eyre; for this is *judgment final* in this point. Br. Patents, pl. 51. cites 3 H. 7. 15.

And it was held that the grant is good *before the act done*, becauſe it is a thing which *turns in pœnam pecuniariam*. Ibid. ——

But voluntary eſcape cannot be pardoned before the act done; note the diverſity. And the reaſon is, becauſe *negligent eſcape* is only money to the king, which he may pardon before the act done. Ibid —— But ſuch grant cannot be intended of *voluntary* eſcapes. F. N. B. (229) (B) a. 524. in notis.

13. Note where the ſtatute of 31 *H.* 8. *gives to the king the poſſeſſions of abbeys, and all rights, entries, actions, conditions, &c. which*

S. C. cited 11 Rep. 12. in caſe of

Priddle v. Napper; and ſays that this queſtion is here well explained and reſolved.

which the abbots might have had; and that he ſhall be in poſſeſſion without office; and that he ſhall be adjudged in actual and real poſſeſſion of thoſe in ſuch plight and ſort as they were at the time of the making of that ſtatute, yet if an *abbot was diſſeiſed of* four acres of *land*, the *king cannot grant it over before entry* made by him into it, becauſe it is a *choſe in action real*, and not like to a choſe in action perſonal, or mixt, as debt, ward, &c. by ſome; and by ſome contra, by reaſon of thoſe words, that the king ſhall be in poſſeſſion; but this ſeems to be that he ſhall be in ſuch poſſeſſion as the abbot was, viz. of the thing whereof the abbot had poſſeſſion, the king
[147] has by this actual poſſeſſion; and of ſuch whereof the abbot had only cauſe of entry, or right in action, of thoſe the king ſhall be veſted of a title of entry, or title of action; but the thing to which he has ſuch cauſe of entry or action, is not by this in him in poſſeſſion; and therefore *cannot paſs* from the king *by general words*. Quære if the king *recites the diſſeiſin*, and how the right and action is * given thereof to him by the ſtatute, and *grants it ſpecially*, it ſeems that this is good. Br. Choſe in Action, pl. 14. cites 33 H. 8.

* Orig. in all the editions is (bon) but ſhould be (done).

14. If a *man* be accuſed or *indicted of treaſon* or felony, his lands and *goods cannot be granted* to any, no, not ſo much as by promiſe, nor any of his lands or goods ſeiſed into the king's hands *before attainder*; for when a ſubject obtains a promiſe of the forfeiture, many times undue means and more violent proſecution is uſed than the quiet and juſt proceeding of the law would permit, and the party ought to live upon his own until attainder. 2 Inſt. 48.

2 Salk. 465. S. C. 4 Mod. 276. S. C.—Carth. 350. S. C.—Comb. 334. S. C.

15. The king granted the *office of ſearcher* in the port of P. to J. M. (without granting it to him for life; ſo that he had only an eſtate at will;) and afterwards reciting this grant, granted to Kemp for his life the ſame office, *from and after the death, ſurrender or forfeiture of* M. This was adjudged a good grant. 12 Mod. 77. Trin. 7 W. & M. the King v. Kemp.

(I. c. 2) Grant of the King *in futuro*. Good, and *when* it ſhall *take Effect*.

1. GRANT *of the next ward*, &c. is good; for it ſounds in covenant, &c. Br. Patents, pl. 53. cites 6 H. 7. 4.

2. Grant *of* an *office*, reciting the firſt grant, and to *take effect after the firſt grant determined*, is a good grant; for though the king has no reverſion, yet he is ſeiſed of the office in law, and inheritor of this grant after. Br. Patents, pl. 57. cites 8 H. 7. 12.

1 Bulſt. 4. Earl of Shrewſbury v. Earl of Rutland.—S. C.—2 Brownl. 299. S. C. Jenk. 283. S. C.

3. Queen Elizabeth *granted the herbage* and pawnage of Clipſon-park *to J. S. for life*; and afterwards *king James* by letters patents, *reciting the former eſtate* for life, *granted* the herbage and pawnage *to the earl of Rutland for life, not mentioning* in this ſecond grant, *when the eſtate* in the herbage and pawnage *ſhould begin*, yet the grant was held good; for the firſt grant being truly recited in the laſt, the king could not be miſtaken, or intend to paſs a greater eſtate

eſtate than he had to grant; and therefore the eſtate in the herbage and pawnage *ſhall commence* to the earl, *as by law it may*, viz. after the death, &c. of the firſt tenant for life; nor was there any uncertainty when it ſhould commence; for though the grant to J. S. might be determined ſeveral ways, either by his death, forfeiture, or ſurrender, yet it can determine but once, and which ever firſt happens, the other grant ſhall then commence.—8 Rep. 55. Mich. 6 Jac. C. B. Earl of Rutland's caſe.

4. Queen Mary granted Eſtwood-park *to the lord Stafford and his wife, and* to *the heirs of the body of the ſaid lord*; afterwards queen Elizabeth, anno 7. of her reign, *reciting the former eſtate, and that ſhe had the reverſion expectant*, ſhe for the ſum of 53l. 18s. *granted the reverſion to J. S. and to the heirs of his body; and* ſhe did further *will and declare*, that *if the ſaid J. S. did pay the further ſum of* 20s. *&c. then he ſhould have prædictam reverſionem to him and his heirs* for ever. And it was adjudged that the words (will and declare) are ſufficient to amount to a grant; and ſuch words are always uſed in patents of liberties and franchiſes, being things contingent, and de futuro; and that ſuch grant, with a condition precedent, might be annexed to things lying in grant, as a reverſion, as well as to things lying in livery; or to an eſtate tail, as well as an eſtate for life, or years. And laſtly, that the words *(reverſionem prædict.)* muſt be intended of ſuch a reverſion as the queen had and could grant, viz. the reverſion of the fee, and do not mean the reverſion in tail which ſhe had before granted to him, and therefore could not grant to him again. And that ſuch words, in the king's grant, ought not to receive too nice a conſtruction. 8 Rep. 73. b. Trin. 7 Jac. Lord Stafford's caſe.

2 Brownl. 248. Malin v. Tully. S. C.

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5. Grant of an office of ſearcher, &c. *for life, after the death, ſurrender, or forfeiture of the former grant* of the ſame office, which was granted *at will*, is good. And if the king ſhould *determine his will in the life of grantee at will, without any ſurrender or forfeiture*, in ſuch caſe the ſecond grant ſhall not commence during the life of grantee at will; but in the mean time the king may grant it to whom he pleaſes. Per Holt Ch. J. 12 Mod. 80. Trin. 7 W. & M. The King v. Kemp.

And Holt Ch. J. held, that if the king grant an *office to commence* in futuro, when there is *no other eſtate in being, to continue till the office ſhall take effect*, that it is good; ſo if he grant an office to commence *on a contingency a year hence*, or the like; for though a freehold cannot commence in futuro, that is to be *underſtood* where it is *derived out of an inheritance*. If there be an *office in fee*, and the king has the inheritance, there a freehold can no more commence in futuro by letters patents than by livery of ſeiſin; ſo is 5 Co. Berwick's caſe. 12 Mod. 80. King v. Kemp.——*But* if it be a *new thing* created by the king, he may conſtitute it in what manner he pleaſes; as a *rent de novo* may be granted or created to commence in futuro, or on a contingency, as in the caſe of Ed. 2. quoted in CORBET's caſe, in 1 Co. 87. For it is a creature of his own, and he may diſpoſe of it as he pleaſes. 12 Mod. 80. King v. Kemp.——And *to riſe and fall*, and to be *in eſſe and not in eſſe*, as well as a rent. Per Holt Ch. J. Skin. 581. S. C.

(I. c. 3) Grant *determined by Death* of the King, or Patentee.

1. WHERE the king *grants to his tenant, that his heir after his death ſhall not be in ward, or* grants *to an abbot that the covent ſhall make an abbot without licence of election*, if the tenant dies his heir ſhall be in ward, or if the abbot dies, the covent ſhall not make an abbot without licence; for in the one caſe the *grant expired by the death* of the tenant, *becauſe* it was *not granted to him and his heirs;* and in the other caſe, becauſe it was not granted to the abbot and his *ſucceſſors;* for when the grantee is dead, none is alive who can enjoy or plead the grant; but where it is granted to the tenant and his heirs, &c. the heir ſhall not be in ward; nor where ſuch grant as above is granted to the abbot and his ſucceſſors; [and there] the grant is good clearly; per Laicon; & nemo contradixit. Br. Patents, pl. 30. cites * 36 H. 6. 48.

* It ſeems that it ſhould be (39) H. 6. 48.

2. If a *king grants conuſance of pleas to J. N. and dies*, the grant is not good againſt the other king, inaſmuch as it was not granted for the king and his heirs; for it is de jure corone, and yet confirmation of the new king ſhall make it good. Brooke ſays, it ſeems, that the firſt caſe is not law. Br. Confirmation, pl. 28. cites 2 H. 7. 10.

Where the king *grants office or annuity for life*, the juſtices.

3. *Contra of annuity which charges the perſon.* Ibid. cites S. C. and ſays, ſee M. 2 E. 4. 23, 24.

&c. which *is not a judicial office*, and dies, there *needs no confirmation of the new king*; by all Br. Patents, pl. 89. cites 1 R. 3. 4. ——*So of franchiſe, contra of judicial offices.* Ibid.

Br. Confirmation, pl. 29. cites S. C.

4. If the *king for him and his heirs grants catalla felonum & fugitivorum*, &c. which lie in grant, *and he dies*, the *grantee needs no confirmation of the new king;* but if the *thing be abuſed or miſuſed*, as fair, market, or ſuch like may be, or if it be a *thing judicial*, or *power granted, as to be juſtice of peace, eſcheator*, or ſuch like, there he ought to have confirmation of the new king. *But* it ſeems, *that the grant of a thing which lies in grant is good* clearly *without thoſe words (for him and his heirs), but of warranty, covenant, annuity*, or ſuch like, there *he ought to make it for him and his heirs.* Br. Confirmation, pl. 19. cites 33 H. 8.

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S. C. cited Pl. C. 457. b. Trin. 15 Eliz. in Sir Thomas Wroth's caſe, where it is ſaid, that it ſeems to be good reaſon, though the grant was not made for the king and his heirs, inaſmuch as it was granted in the body politic of the king. —— Br. Prerogative, pl. 106. adds, that *contra* it is ſaid elſewhere of grant made *to the tenant to alien*, this ſhall not ſerve againſt the next king. —— Co. Litt. 52. b. ſays, that it was reſolved, Mich. 3 Jac. in C. B. that the licence may be executed after.

5. A *licence* granted by the king *to alien in mortmain* ſhall ſerve againſt the next king, if the grantor dies. Br. Prerogative, pl. 106. cites F. N. B. 223.

6. King Edw. 6. *granted to foreign merchants to export merchandizes, paying the like cuſtoms as any Engliſh merchants* paid; now though the grant did *not expreſs pro ſe & hæredibus*, yet becauſe the king

king had an inheritance in the cuſtoms as a prerogative annexed to the crown, it ſeemed to all that the grant was good for the cuſtom. D. 92. a. pl. 17. Mich. 1 Mar. Anon.

7. If the king grants to a man *to export* 1000 *tun of beer*, aliquo ſtatuto non obſtante, and *ſays not, for himſelf, his heirs, and ſucceſſors*, the queſtion is, if in ſuch caſe the grant determines not by his death, it being only a licence diſpenſative and revocable before execution of it? D. 92. a. pl. 17. in an anonymous caſe there, but no opinion given.

8. The king grants *annuity for term of life percipiendo ad receptum Scaccarii noſtri*, and does *not ſay* in his grant, *pro ſe & hæredibus & ſucceſſoribus ſuis*; whether the heir or ſucceſſor ſhall be charged with this? And the habendum was, percipiendum ad receptum Scaccarii noſtri *per manus Theſaurarii-camerariorum noſtrorum ibidem pro tempore exiſtent.* And this grant was pro ſervitio tam regi H. 8. quam dicto regi E. 6. impenſ. It was debated in Serjeant's Inn; and by the opinion of Cordel, Solicitor; Griffith, Attorney; Dyer, one of the queen's Serjeants; Whiddon, Brooke Ch. Baron; Morgan and Bromley, Ch. J. the annuity is determined by death of the king; but Stamford, Saunders, Brown, and Portman held the contrary. Ideo quære. And it was ſtrongly held, that the grant was void to charge the perſon of the king; and without ſhewing certainly by whoſe hand it ſhall be rendered, the grant is void; and this by the opinion of Fitzh. in N. B. laſt caſe in writ of annuity; and then for this reaſon there is no need of ſaying pro hæredibus & ſucceſſoribus regis; but by reaſon of the laſt words, viz. *Scaccarii noſtri per manus Theſaur. & noſtrorum*, this *refers only to king E. 6.* and therefore the eſtate in the annuity was limited, and by the king's death determined. D. 92. a. b. pl. 19.

Ibid. 92. b. pl. 20. cites Pl. C. 449. at the end of WROTH's caſe, that by Saunders Ch. Baron, the reſolution of the juſtices above was, that if the annuity was granted *pro executione alicujus officii vel ſervitii*, the patents ſtand not in need of the word hæredibus.

9. Queen Mary, ex ſpecialia gratia, &c. made a grant to A. B. *to keep a tavern and ſell wines by retail non obſtante the ſtatute* 7 *Ed.* 6. in which ſhe *commanded her officers to permit the patentee to keep a tavern and ſell*, &c. for life; Catlin held the diſpenſation perpetual during the life of A. B. and that he is, as it were, exempted out of the ſtatute utterly, or otherwiſe the licence being once put in ure is immediately determined, &c. But Dyer and Saunders contra, and that there *ought to be a certain time and limitation of the prince's pleaſure*, how long the diſpenſation and licence ſhould continue, and that by the death of the prince this commandment ſhall utterly ceaſe. Ideo quære legem. D. 270. pl. 22. Hill. 10 Eliz. Anon.

Coke affirmed in C. B. Paſch. 8 July, and that he denied the opinion of Choke 5 E. 4. 8.

Ibid. Marg. cites 17 E. 1. Adjudged, that if the king *grants land* to one by letters patents, *and ſays not for how long*, he ſhall be leſſee at will, and not for term of life, which caſe 21 E. 4. 46.

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10. *Wine licence* was granted by the king pro ſe & hæredibus to A. and B. and their aſſigns, to ſell wine in ſuch a vill. Adjudged, that this continues notwithſtanding the demiſe of the king. Sid. 67. Mich. 12 Car. 2. C. B. Young v. Wright.

S. C. cited Lev. 220. Trin. 19 Car. 2. B. R. in caſe of Thomas v. Sorrel ſays, that an intereſt paſſed

11. *And* per Bridgman Ch. J. this caſe *differs* from caſes of a *naked authority*, inaſmuch as the king who makes the grant has an intereſt of *inheritance in the thing* which he grants; and he likened it to the caſe where the king granted 10*l. out of tonnage and poundage*;

by way of reſtitution to what was their right before the ſtatute was made.

age; this is good, though tonnage, &c. then ceaſed by the parliament's not granting it. Sid. 7. in caſe of Young v. Wright.

12. *So* if the king grant the *tenths* or fifteenths of D. to J. S. *though the clergy at the time have not granted it to the king*, yet the grant is good; becauſe the inheritance is in the king, though *not then in prender*, and ſo a fortiori the grant ſhall be good in the principal caſe of the wine licence. Sid. 7. in caſe of Young v. Wright.

13. Scire facias to repeal a patent; the caſe was, that *king Ch.* 1. *granted to one P.* the *office* of under-ſearcher, &c. *durante beneplacito noſtro*, and after *king Ch.* 2. was reſtored, he *ſent his privy ſignet* to the lord treaſurer *to confirm P. in his place.* F. obtained a patent from king Ch. 2. of this place without taking notice of the former patent to P. And the queſtion was, whether this ſecond patent was void by the ſtat. 6 H. 8. cap. 15. It was agreed on all hands, that the king's privy ſignet did but intimate the king's mind, but could transfer no intereſt. But the Lord Chancellor, Windham, and Rainsford inclined, that the patent was void, and the ſcire facias to be quaſhed without better cauſe ſhewn. Freem. Rep. 71. Hill. 1672. the King v. Foſter.

See (R) &c. —(Y. b)— (A. c) pl. 1. Ancient Demeſne (B), and other proper titles.

(K. c) Grant of the King. Prerogative. What *Immunities* the King may grant.

[1. THE king may grant, that the citizens of a vill ſhall be quit of *toll in every city and vill in England* of all their merchandizes. 49 E. 3. 6.]

[2. 3 E. 1. Rot. clauſo Memb. 8 H. 3. grant that for ſuch time J. S. ſhall be free *de ſummonitionibus coram juſticiariis itinerantibus.* 8 E. 1. Rot. Pat. Memb. 4. *hac vice* de omnibus ſummonitionibus [coram] juſtic. itinerant. *tam ad communia placita quam ad placita de foreſta.*]

So a grant of diſcharge from payment of *priſage*, which is *made civibus de London.* See the caſe of Walker v. Hanger. 3 Bulſt. 1, &c. And ſee S. C. (R. 2) ſupra.

[3. 2 & 3 E. 1. Charter-rolls, Memb. 3. quietation from *toll per totum regnum*, pro civibus et hominibus Bathonum et epiſcopi. Per E. 1.]

[4. H. 6. by his letters patents, 20 H. 6. granted to Corpus Chriſti college in Oxford, that they and their ſucceſſors and their tenants ſhould be diſcharged of payment of *toll for pontage and paſſage in every place in England*; which is admitted good. Tr. 43 El. B. R. between Wood and Hawkswell.]

[5. 18 E. 1. lib. Parl. 1 R. 1. grant to the biſhop of Coventry and Litchfield, that all his lands and men liberi ſint & quieti *de murdro et latrocinio & ſhire & hundred, et de ſectis ſhire & hundred, et* * *auxiliis vicecom. de foreſta et placitis foreſtæ, et de vaſtis et aſſartis*

* Fol. 199.

eſſartis regardis foreſtæ, et omnibus aliis operibus tam caſtellor. quam vivar. et ſtagnor. &c.]

[6. 23 E. 1. Rot. Pat. M. 9. the king ad petitionem, &c. and by the aſſent of the city of London, granted, that J. citizen of London, ſhould for his life be free in the city, *de omnibus tallagiis, auxiliis, vigiliis et contributionibus, ratione terræ et merchandiſarum ſuarum.* Item, *quod non ponatur in aſſiſis ibidem nec fiat major, vicecomes, eſcheator, coronatur, præpoſitus, aldermannus, &c.* 1 E. 2. Part 1. M. 15.]

7. Glanvil, of Lincoln's-inn, in his reading in Lent 1629, ſaid, that he had ſeen a patent granted to one, that he ſhould not be compelled to be *ſerjeant*, or *judge*, or *knight*. D. 52. a. Marg. pl. 1.

(L. c) Prerogative. Immunities.

[1. 18 E. 1. Rot. Chartar. Memb. 20. in Dorſo. R. 1. granted great privileges *to hoſpitallers*, &c. where are ſuch words, ſcilicet, *omnem poteſtatem, omnes libertates et liberas conſuetudines, quas regia poteſtas conferre poteſt, &c.* Conceſſit *omne jus, omne dominium, quod ad nos pertinet, &c.*]

[2. 24 E. 1. Rot. Chartar. Memb. 1. diſcharge of *cuſtoms and tallages* pro priore & fratribus de Whittenham, ordinis Carthuſienſis.]

3. H. 7. granted *to the corporation* of Waterford, *quod omnes et ſinguli cives et inhabitantes* dictæ civitatis *et omnes et ſinguli mercatores, tam indigenæ quam alienegenæ de nova cuſtuma vocat le pondage*, viz. *de præſtatione* 12 denariorum de libra *imperpetuum ſint quieti et exonerati, &c.* Dav. Rep. 14. a. Mich. 5 Jac. B. R. in Ireland, in the caſe of cuſtoms.

(M. c) Patents. *Conſideration.*

See (Q. b.)

[1. IF the king be *deceived in the conſideration* which he intended to have, the grant is void; otherwiſe if not, (Co. 10. 67.) admitted. M. 5 Ja. Scacc. 6 Ja. Sir ROBERT JOHNSON's caſe.]

False conſideration in letters patents does not avoid them; *as where the king, for* 10*l. to him paid, gives ſuch land*, and *the* 10*l. is not paid*, the patent is not void. *Contra*, of patent granted *upon falſe ſurmiſe, as that the land came to the king by attainder of J. S.* which is not true, or the like; quære diverſitatem. Br. Patents, pl. 100. cites 37 H. 8. ——— Br. N. C. 37 H. 8. pl. 310.

In all caſes where the conſiderations are real, and favour of the land, or *extend* to ſuch a *real thing*, if it be *falſe* it deſtroys the patent. *But* where the conſideration is *perſonal*; as in conſideration of * money paid, or for ſervice done; although it be falſe, yet the patent may be good. Per Popham, Attorney-General, Arg. 3 Le. 248. Mich. 32 Eliz. B. R. in caſe of Harris v. Wing.

* S. P. Hob. 222. in caſe of Needler v. the Biſhop of Wincheſter.

[2. *Surrender of letters patents in Chancery to be cancelled* being the conſideration is good; for the Lord Chancellor or his officers ought to cancel [them]. Co. 10. 67. b. contra, P. 11 Ja. Scacc. St. SAVIOUR's caſe. M. 5 Ja. Scacc. M. 6 Ja. Sir ROBERT JOHNSON's caſe.]

[3. If

Hob. 203. Trin. 14 Jac. Swain v. Holman.—Hutt. 7. S. C.

[3. If A. seised of land for life, takes *new estate* of the king, by letters patents in which the said estate is *recited*, and in consideration of this estate, the king grants it to A. for a certain estate, this is a good grant, though there was *not any actual surrender*, * *but only a surrender in law by the acceptance of this new patent.* Hob. R. 275.]

*[152] Hob. 203. S. C.—S. C. cited Hob. 226. Trin. 16 Jac. in case of Needler v. the Bishop of Winchester.—Hutt. 7. S. C.

[4. *But if baron and feme are seised in right of the feme for life of the feme, and the king grants it to the feme for life of the feme, with remainders over*, by new letters patents, in consideration of the *surrender of the first estate*. This is a void grant, because this surrender *is not absolute*, inasmuch as the feme after the death of the baron, may claim her ancient estate. Hob. R. 275. between SWAIN and HOLMAN.]

So a patent upon a consideration *executory*, and *not performed*, is void. Jenk. 304. pl. 77. cites 5 Rep. 93. b. Berwick's case.

[5. If the king makes a lease *for divers considerations executed*, and it appears to the Court, that *some of them are not performed in truth*, the lease shall be adjudged void. P. 11 Ja. Scacc. St. SAVIOUR's case. Resolved.]

† Fol. 200.

[6. If the king *recites, that where B. had surrendered* to him an estate for life, he, in consideration of this surrender, grants it by letters patents to B. &c. If this *surrender* was not absolute, but *upon* † *condition revocable*, this is a void grant, because the king is deceived. Hob. R. 276.]

Lane, 108. S. C.

[7. If the king lease land to B. in consideration *tam de* 20*l. paid, quam pro eo quod the said B. super se assumpsit to repair* the thing leased at his own costs, (being then greatly in decay,) and to maintain and leave it well repaired; and after the *lessee doth not repair* it; yet this shall not avoid the lease; because the king may have action of *covenant* upon the patent against the lessee upon the said promise. M. 8 Ja. Scacc. between SAWYER and EAST. Dub.]

It is a maxim, that if the consideration, which is for the benefit of the king, be executed or executory, or be it of record, or not of record, be *not true, or not duly performed, or if prejudice may arise* to the king, *by reason of the non-performance* thereof, the letters patents are void. 5 Rep. 94. a. Trin. 39 Eliz. in the Exchequer. Barwick's case.

[8. Considerations *past*, and *affirmed to be so in the patent, need not be found, or averred to be true.* Co. 10. 67. b.]

[9. But *otherwise* it is if the consideration be *future.*]

5 Rep. 93. Trin. 30 El. Barwick's case.

10. The queen *granted a manor for* 21 *years.* The *grantee granted a cottage parcel* of the said manor, and afterwards surrendered the manor to the *queen*, who, *in consideration of the surrender, granted him a new lease* of the said manor. The barons, viz. Periam, Clarke, and Evans, agreed, that the second lease made in consideration of the surrender, whereas all the first lease was not surrendered, was void; because the queen was deceived in the consideration. Mo. 393. pl. 509. Hill. 37 Eliz. Berwick's case.

11. The Lord Chancellor said, that the *service done to the realm* was as valuable as if 500*l.* had been given for the land. Cary's Rep. 45. cites 23 Jan. 1 Jac.

12. If

12. If the king, in conſideration of *land conveyed* by J. S. to the lord treaſurer for the king's uſe, grants to J. S. and the land conveyed by J. S. *is gotten by diſſeiſin*, and the *diſſeiſee enters* upon the lord treaſurer, yet the king's grant ſhall ſtand good; for the conſideration was true, and you muſt not ſtrain it beyond the words by any imaginary intent. Per Hobart Ch. J. Hob. 221. Hill. 12 Jac. in the caſe of Needler v. the Biſhop of Wincheſter.

13. When the king makes a grant by the words *ex mero motu*, and *yet expreſſes a real conſideration* moving his grant *which is falſe*; now (ſince theſe are contrarieties, and cannot ſtand together) *the law ſhall judge upon the conſideration*, and ſhall not regard the clauſe [153] of the form *ex mero motu*, which is *clauſula clericorum*, but ſhall reject that as the Court does the opinion of the jury when they find the fact, and conclude upon it contrary to law. Per Hobart Ch. J. Hob. 222. Hill. 12. Jac. in the caſe of Needler v. the Biſhop of Wincheſter.

14. *Void letters patents ſurrendered* are yet a good conſideration, becauſe of the intention; ſo that *every deceit*, or miſtake in patents, *do not vitiate* them. Per Holt Ch. J. Skin. 663. Mich. 8 W. 3. B. R. the King v. Biſhop of Cheſter.——Cites 1 Rep. Alton Wood's caſe.—6 Rep. 55.—1 Roll's 32.—2 Roll's 60. [118.] Dickſon's caſe.

(N. c) Patents of the King; how they ſhall enure. *To how many Intents.*

See (G. c.)

[1. THE patent of the king may enure *to three intents expreſſed in the patent*. Co. 10. 28.]

As to make an incorporation, to make ſucceſſion, and to grant a rent. 10 Rep. 28. a. Mich. 10 Jac. B. R. in Sutton hoſpital's caſe.

(O. c) How they ſhall be *expounded*.

[1. IF *two conſtructions may be made* of the grant of the king, *and by one the grant ſhall be void, and by the other good*; then for the honour of the king and the benefit of the ſubject ſuch conſtruction ſhall be made that the grant ſhall be good. Co. 6. MOLIN. 6. Co. 10. 67.]

The king's grants ſhall be taken *beneficially for the honour of the king, and* for the *relief of the ſubject*, and not to make any ſtrict or literal conſtruction in ſubverſion thereof. 6 Rep. 6. a. Hill. 9 Eliz. in Scacc. in Sir John Molyn's caſe.

When a charter of the king may be taken *to two intents*, and both intents are *of effect and good*, in many caſes it *ſhall be taken to ſuch* intent *as is moſt beneficial for the king*; *but if* it may be taken *to one* intent of effect and *good*, *and to another* intent *void*, and of no effect, *it ſhall be taken* and *conſtrued* according *to ſuch* intent, *that the grant ſhall take effect*, and this in judgment of the law ſtands with the intent of the king; for it was not the intent of the king to make a void grant. 8 Rep. 167. a. Mich. 7 Jac. The Earl of Cumberland's caſe.——5 Mod. 301. Mich. 8 W. 3. S. C. cited Arg. and ſays, that it is a good rule.——S. P. 8 Rep. 56. Mich. 6 Jac. in the Earl of Rutland's caſe.——S. P. 10 Rep. 67. b. Trin. 11 Jac. in the church-wardens of St. Saviour's caſe.——S. P. 11 Rep. 11. b. Mich. 10 Jac. in the caſe of Priddle v. Napper.

Br. Charters de Pardon, pl. 24. cites S. C.

2. Patent *ex mero motu* ſhall be taken ſtrongeſt for the party, and againſt the king; contra of patent granted upon *ſurmiſe*, or at the ſuit of the party. Br. Patents, pl. 24. cites 37 H. 6. 21.

3. *Ancient charters*, whether they were before time of memory or after, ought to be conſtrued as the law was taken when the charter was made, and according to ancient allowance; and when any claimed before the juſtices in eyre any franchiſes by an ancient charter, though it had expreſs words for the franchiſes claimed; or if the words were general, and a continual poſſeſſion pleaded of the franchiſes claimed; or if the claim was by *old and obſcure words*, and the party in pleading expounding them to the Court, and *averring continual poſſeſſion* according to that expoſition, the entry always was *inquiratur ſuper poſſeſſionem et uſum.* 2 Inſt. 282.

4. 2 Inſt. 496, 497. Upon the ſtatute of quo warranto, 18 *E.* 1. ſays, the rule laid down is an excellent one *for conſtruction of the*
[154] *king's letters patents*, not only of liberties, but of lands, tenements, and other things which he may lawfully grant, that they have no ſtrict or narrow interpretation for the overthrowing them, but *ſecundum earundem plenitudinem judicentur*, viz. to have a liberal and favourable conſtruction for the making them available in law uſque ad plenitudinem, for the honour of the king; and that it is alſo hereby implied, that they are to be conſtrued ſecundum earum plenitudinem, viz. *as fully and beneficially as the law was taken at that time when they were made*; and Lord Coke adds, that certainly theſe ancient laws were directions to the ſages of the law for the conſtruction of the king's charters and letters patents, as appears in our books.

5. 43 *Eliz.* 1. enacts, that *the letters patents of all grants made by the queen ſhall be expounded moſt beneficially to the patentees, any miſnaming, miſ-recital, non-recital, &c. notwithſtanding.*

6. Every gift or grant of the king *has* this *condition either expreſſed or implied annexed* to it; ſc. *ita quod patria per donationem illam magis ſolito non oneretur ſeu gravetur.* 11 Rep. 86. b. Trin. 44 Eliz. in the caſe of monopolies.

7. King James, ex certa ſcientia, &c. granted to Jehu Webb the *office of the maſter of tennis-play, as well within the palace of Weſtminſter, as of the ſaid king elſewhere*, during his life; it was adjudged, that this grant ſhould have a reaſonable conſtruction, and *extend* not only to when the king himſelf plays in perſon, but likewiſe *to tennis plays of the king's houſhold.* 8 Rep. 45. Mich. 6 Jac. C. B. Jehu Webb's caſe.

8. When the king's grant cannot be conſtrued to a double intent, the ſame is then to be conſtrued *according to the intent and meaning of the king.* Per Williams J. Bulſt. 6 Hill. 7 Jac. in caſe of the Earl of Shrewſbury v. the Earl of Rutland.

Cro. J. 521. pl. 7. Hill. 16 Jac. B. R. Sir John Brett v. Cumberland.

9. The *king leaſed* for 21 years, and the *leſſee*, his executors and aſſigns, were *thereby tied to repair.* And it was moved, that this being the king's patent, wherein the leſſee takes only, and not made by him, whether that clauſe for the repairing ſhould be taken and *interpreted as a covenant on the leſſee's part*, to bind him and his aſſigns. And reſolved, that it ſhould. Cro. J. 240. Paſch. 8 Jac. B. R. Lord Ewre v. Strickland.

10. In ſeveral caſes though the grant of the king *extends to a future time*, yet it *ſhall be intended of things preſent* and in eſſe at the time of the grant. Dav. Rep. 15. a. Mich. 15 Jac. B. R. in Ireland. In the caſe of cuſtoms.

As if the king grants to me *liberties in all my lands*, I ſhall have the liberties in the lands which I had at the time of the grant, and *not in the land which I purchaſe after*. Dav. Rep. 15. a. in the caſe of cuſtoms, cites 38 H. 6. 10. a.——*So* if the king grants liberties *in all my demeſnes*, and after a tenancy eſcheats, I ſhall *not* have the liberties *in the lands newly eſcheated*. Dav. Rep. 15. a. in the caſe of cuſtoms.——*So* if the king grants *catalla felonum quorumcunque*, and after by parliament *an act is made felony which was not felony before*, the grantee ſhall not have the goods of a perſon attainted of ſuch felony. Dav. Rep. 15. a. in the caſe of cuſtoms.——*So* where the biſhop of London has *jura regalia, and eſcheats of treaſon* within his county palatine, he ſhall not have the *lands of tenant in tail*, attainted of treaſon. Dav. Rep. 15. a. in the caſe of cuſtoms.

11. When there are *words* in a grant of the king, *which under a general name comprehend things royal and things baſe*, it ſhall be taken in favour of the king; and the baſe things ſhall paſs, and the royal ſhall remain in the crown. Dav. Rep. 17. a. in the caſe of cuſtoms, cites Pl. C. 333. [in the caſe of mines.]

12. A. was attaint of treaſon. It is found by office, that A. was ſeiſed of the manor of D. the day of the treaſon committed (where *in truth C. was in poſſeſſion, and it was his inheritance.)* The king grants this to B. in fee. B. reconveys this land to the king. The attainder of A. is annulled by act of parliament. The *king* by patent *reciting C.'s right, grants the land to C.* by patent. In this caſe C. is *remitted* to his ancient right in the manor. By all the judges of England. Jenk. 196. pl. 4.

Without this recital C. had not been remitted, but *eſtopped by acceptance* of the ſaid patent, to claim any other right than by the patent. Ibid. cites 33 H. 8. Br. Caſes, 206.——The recital and grant amounts to a reſtitution upon petition of right. Jenk. 196. pl. 4. (bis) cites Kelw. 158. 2 H. 7. 17.

* [155]

13. The conſtruction made on grants of the crown is, that where the *intention is plain* the words are taken moſt favourably for the ſubject. Per Raymond Ch. J. Gibb. 308. Trin. 5 Geo. 2. Dr. Bentley v. Ely (Biſhop).

14. It was objected by Turton J. that the *general words* ſhould be conſtrued *with relation to the recitals*, which Holt Ch. J. ſaid was ſo ſometimes; as when the king deſigns a profit to himſelf; as in a grant of *concealed lands*, and not to diminiſh his revenue. But if there are *words to ſhew his intent, non obſtante* that they are not concealed, there the patent ſhall be good. Skin. 663. Mich. 8 W. 3. B. R. in the caſe of the King v. the Biſhop of Cheſter.—Cites Hard. 231.

(O. c. 2) *Difference between* the *Grants of the King and a common Perſon*, as to the Effect thereof.

1. IF the king grants lands by letters patents, and *ſays not for what time*, it is but a leaſe at will. D. 270. pl. 22. Marg. cites it as adjudged 17 E. 3. and affirmed by Coke in C. B Paſch. ---- Jac. And he denied the opinion of Choke 5 E. 4. 8. 21 E. 4. 46. Cro. 76. 5 H. 5. 3. Co. Litt. 21. b.

2. *Leaſe* of dutchy lands was made by the king *in his minority*, yet good. D. 209. b. 22. Mich. 3 & 4 Eliz. Anon.

3. By the common law the grant of every common perſon is taken more ſtrong againſt himſelf, and *more favourable* againſt a ſtranger; but grant of the king is taken more ſtrong againſt a ſtranger, and more favourable as to the king; though the thing which he grants came to the king by purchaſe or deſcent. Per Weſton J. Pl. C. 243. Trin. 4 Eliz. in caſe of Willion v. Lord Barkley.

4. If the king grants a manor, except all *courts and perquiſites*, it is good; but in the caſe of a ſubject, it is void. D. 288. b. 54. Paſch. 12 Eliz.

S. C. cited 2 L. P. R. 140. tit. King.

5. The deed of a ſubject has *relation* only to the time of the delivery, and not to the time of the date; but the charter of the king has relation to the time of the date, and not to the time of the delivery; inaſmuch as matters of record, by preſumption of law, import truth in them. Per all the juſtices. Pl. C. 491. Mich. 18 & 19 Eliz. in the caſe of Ludford v. Gretton.

So if the king had *granted land to* J. S. and his heirs, and in truth J. S. was *his villein, this ſhould not infranchiſe him* by implication. Ibid. ——And if *two are indebted* to the king, and the *king releaſes to the one*, yet this ſhall not diſcharge the other. Ibid. cites 2 R. 3. 4. 21 E. 4. 46. and 34 H. 6. ——And if the king *releaſes all demands*, this ſhall not releaſe a *right of inheritance*. Ibid. cites 6 H. 7. 15. and 11 H. 7. 10.

6. The grants of the king are favourably interpreted, ſo as *no prejudice ſhall accrue to the king by conſtruction or implication* upon his grant, any more than he truly intended by it. 5 Rep. 56. Mich. 30 & 31 Eliz. in Knight's caſe.

7. If the king has *two manors* A. and B. and grants *totum illud manerium de A. & B.* cum pertinentiis in the county of C. the grant is void as to the king. In the caſe of a common perſon both manors would paſs. 1 Rep. 46. a. Trin. 42 Eliz. in Altonwood's caſe.

8. By the words (omnes *terras dominicales* manerii de W.) —— In the king's caſe, cuſtomary lands held by copy, parcel of the ſame manor, ſhall not paſs; but otherwiſe it is in caſe of a common perſon. 1 Rep. 46. b. Trin. 42 Eliz. in Altonwood's caſe.

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See Preſcription (M) pl. 7, 8, 9.

(P. c) Patents *Allowance.* What Patents need Allowance.

1. THE *charter of the king granted before time of memory* is not of any value now. 8 H. 6. 4. b.

See Conuſance (D.) * Br. Patents, pl. 27. cites S. C.

[2. *Conuſance of pleas granted before time of memory* is not of any value now, if it has not been allowed ſince time of memory. 8 H. 6. 4. b. * 14 H. 6. 12. b.]

[3. A grant *de catallis of* ſuch men as ſhall be outlawed in a perſonal action *before time of memory*, is not of value without confirmation. 11 H. 6. 50. b.]

Br. Patents, pl. 27. cites S. C.

[4. A *releaſe of a corody* by the king to an abbot before time of memory is not any diſcharge now, if it has not been allowed ſince time

time of memory, *though the king never was ſeiſed of the corody after the releaſe*; for it is *due of common right*, if there be no diſcharge. 14 H. 6. 12.]

[5. If the king had granted to one before time of memory, *that he and his heirs ſhould not be impanelled in any jury*, yet this ſhall not be any diſcharge without allowance, though he had never been impanelled afterwards, yet he had not * any means to compel the ſheriff to impanel him. 14 H. 6. 12. b.] Br. Patents, pl. 27. cites S. C. * Fol. 201.

[6. If the king before time of memory granted to another, *that he and his heirs ſhould be diſcharged of toll*, this is not any diſcharge without allowance. 14 H. 6. 12.] Br. Patents, pl. 27. cites S. C.

[7. If a man pleads the charter of the king, dated before time, &c. *of goods and chattels of felons*, then he may preſcribe to have it with a confirmation after time, &c. Kel. 8 H. 8. 190.] 9 Rep. 29. a. Per the reporter.

[8. If a man ſhews the commencement of *a ſanctuary*, ſcilicet, if he ſhews the letters patents of the king, and the *bulls of the pope*, dated before time, &c. then he may preſcribe with confirmation after time, &c. but otherwiſe not. 8 H. 8. 190.]

9. If *charter* * *of exemption of jury*, or the like, be *ſhewn in the time of the ſame king who granted it*, there needs no writ of allowance. Per opinionem; but Brooke makes a quære. Br. Patents, pl. 84. cites 39 E. 3. 25. * Orig. is (d'execution.)

10. King H. 2. founded the abbey of St. Bartholomew in London, and granted that they *ſhould be as free in the church as the king was in his crown*. It was ſaid by ſome, that the *king was not barred of corody and penſion* by ſuch general words, becauſe they are *incident to him as founder*. Hody, Treſham, and Portington held the grant good; and Portington held it good without allowance. But Paſton, June, and Vamp held it not good without allowance. Br. Patents, pl. 27. cites 14 H. 6. 12.

11. What *cannot paſs without charter*, is not good without allowance in eyre; but otherwiſe it is of a thing lying in preſcription without charter; for uſage makes it as leets, waifes, ſtrays, Per Coke Ch. J. Roll. R. 194. in caſe of the King v. Wray.

12. Grants of *franchiſes and liberties* muſt be allowed in eyre; and ſo my lord Rolls muſt be underſtood in his Abridgment. 2 Mod. 322. Trin. 34 Car. 2. B. R. in caſe of James v. Trollop.

(Q. c) Patents Allowance. What Allowance will be *peremptory to the King.*

[1. IF allowance has been *of conuſance in eyre*, this is peremptory to the king. 44 E. 3. 18.]

[2. *But if* conuſance *has been allowed in B. againſt the law*, yet if afterwards it appears to the Court that it was not well granted before, they ought not to grant it again. 44 E. 3. 18.] [157]

See (I. b) (K. b)(L. b) (Z. b)(A. c) to (E. c)

(R. c) Patents. Grants. [What] ſhall paſs by general Words, with Reference to other Perſon or Thing.

[1. WHEN the charter of the king in general terms *refers to a certainty*, it contains as expreſs mention as if the certainty had been expreſſed in the charter, though the certainty to which the reference is, be *not of record*, but lies in *averment* by matter en pais, or in fact. Co. 10. * WHISTLER, 64. Reſolved Co. 9. count. SALOP, 46. b.]

* See (L. b) pl. 1.

See (F. f)

(S. c) *Exemptions.*

No exemption from ordinary juſtice may be pleaded, but the party *ought to ſhew a juriſdiction within the place exempted, in what manner juſtice may be done*; for the king cannot grant an exemption without ſuch a proviſion, for a total exemption from juſtice cannot be. Per Holt Ch. J. Skin. 685. Brown v. Borlace.

[1. IF the king grants to another to be exempt *of admiral juriſdiction of things within a certain liberty*, this is not good without giving power to have admiral juriſdiction there; for if it ſhould be good, there would be *a failure of juſtice*. Trin. 15 Car. B. R. between and STIDSON. Per curiam. Prohibition denied in this caſe to the court of admiralty upon this reaſon, and the court ſaid that this was ſo reſolved in the caſe of COLEHERBERT.]

But Brooke ſays, ſee that the king is inheritable to hold his parliament, and when this is granted, it is inheritance to the king, as it ſeems; and by the beſt opinion the grant is good, and that the *rector may plead by rebutter, and ſhall not be compelled to ſue by petition* of it, nor to have writ of covenant againſt a common perſon upon ſuch a grant by him, as to hold without impeachment of waſte, &c. Ibid.

2. King H. 4. had granted to the rector of Edington, his confreres and ſucceſſors, *that when any tax or tallage by the commonalty, or tenth by the clergy, ſhall be granted to him*, that *the rector and his ſucceſſors, their goods, chattels, lands and poſſeſſion ſhall be diſcharged of it*; and that a tenth was granted to the king by his clergy, and the collectors upon their payment prayed to be diſcharged of 10 l. to be levied upon the rector, which they could not levy by reaſon of the grant aforeſaid; and the rector came and put in a plea, containing this matter, and prayed to be diſmiſſed; and the king's attorney demurred. And per Forteſcue, the grant is void; for it *was not in the king at the time of the grant*. And per Newton, the grant here is not good; for *tenths and fifteenths are at the will of the people*; and therefore the king is not inheritable to it. Br. Patents, pl. 16. cites 19 H. 6. 62.

For more of this matter ſee Trial (A. c. 2) &c.

3. In attaint, a man ſhewed forth charter of the king, *that he ſhould not be ſworn in aſſize juries nor attaints*, and prayed allowance thereof. Quære; for a juror upon attaint ſhall expend 20 l. and if hereby there ſhall be any default, then it ſeems that the charter, by this, ſhall be void; and it is ſaid that Sir Richard Newton diſallowed ſuch charter for this cauſe, and ſo he may well by the words of the ſtatute of Marlebridge, 14. Br. Exemption, pl. 10. cites 34 H. 6. 23.

4. The

4. The king granted to the *burgeſſes of C.* that they *ſhould not be impleaded extra their walls but before the bailiffs of T. of things done in T.* And by ſome the grant is void; for the king cannot compel a man to ſue extra Bancum unleſs he will; but the beſt opinion was contra; and that *it ſtands with juſtice* that the king may grant conuſance of pleas, and ſo of grant of things done in D. to be tried in B. Br. Patents, pl. 67. cites 12 E. 4. 67. [158]

6. The king cannot grant a charter of exemption to any man to be freed *from election of knight, citizen, or burgeſs of the parliament* (as he may do of ſome inferior office or places) becauſe the elections of them ought to be free, and his attendance is for the ſervice of the whole realm, and for the benefit of the king and his people, and *the whole commonwealth hath an intereſt therein;* and therefore a charter of exemption that king H. 6. had made to the citizens of York, of exemption in that caſe, was by act of parliament enacted, and declared to be void. And though we find ſome precedents, that *lords of parliament* have ſued out charters of exemption *from their ſervice in parliament*, yet thoſe charters are holden to be void; for though they be not eligible, as is aforeſaid, yet their ſervice in parliament is for the whole realm, and for the benefit of the king and his people, of which ſervice he cannot be exempted by any letters patents. And if he hath *læſam phantaſiam*, or be extremely ſick, or the like, theſe be good cauſes of his excuſe in not coming, but no cauſe of exemption; for he may recover his memory and health, &c. So as the ſaid precedents were grants de facto, not de jure; for if the king cannot grant a charter of exemption from being of the grand aſſiſe in a writ of right, or of a jury in an attaint, for the miſchief that may follow in thoſe private actions; a fortiori, he cannot grant any exemption to a lord of parliament; for his ſervice in parliament is public for the whole realm. But if any lord of parliament be ſo aged, impotent, or ſick, as he cannot conveniently, without great danger, travel to the high court of parliament, he may have licenſe of the king under the great ſeal to be abſent from the ſame, during the continuance or prorogation thereof; but if the rehearſal be not true, or if he recover his health, ſo as he become able to travel, he muſt attend in parliament; or without any ſuch licenſe obtained, if he be ſo aged, impotent, or ſick, as is aforeſaid, and yet is amerced for his abſence, he may reaſonably and honeſtly excuſe himſelf by the ſtatute of 5 R. 2. 4 Inſt. 49. cap. 1.

D. 52. Marg. pl. 1. ſays, that Glanvil, in his reading Lent 1629, ſaid, he had ſeen a patent granted to one that he ſhould not be compelled *to be ſerjeant*, or *judge, or knight*; and he took this difference, ſuch things as are in the king to make, as to be a judge or knight, the king may diſpenſe with; but of ſuch *things as are in the election of the people*, though the king ſends the writ to the ſheriff or coroner to elect *knight of the ſhire or burgeſs*, he cannot diſpenſe.

7. The king granted to the city of Canterbury, a privilege to be exempted *from ſerving on juries out of their city*, excepting only in caſes of treaſon; and in expreſs words that they ſhould not ſerve *coram ipſo rege;* and it was agreed by all, that without ſuch expreſs clauſe, the grant would not exempt them from ſerving on juries in the court of B. R. Sid. 243. Paſch. 17 Car. 2. B. R. The King v. Percival & al.

Lev. 159. S. C. by the name of the King v. the city of Canterbury.—Raym. 113. S. C.—Hard. 389. S. C.

8. It was agreed per omnes, that though the *privileges of London* are confirmed by parliament, the *king may* by his charter *grant exemptions* from them. Sid. 288. Trin. 18 Car. 2. B. R. in the caſe of Swallow v. the City of London.

2 Keb. 50. pl. 4. & 54. pl. 14. S. C. by name of the City of London v. Swallow.

9. In replevin, the defendant avowed the taking as a diſtreſs towards the *repairing the highways*. The plaintiff replied and ſet forth a grant from the king for exempting the lands, where, &c. from that duty. It was argued, that ſuch grant was not ſufficient, becauſe it was prior to the making this ſtatute, and ſo before any cauſe of action, and judgment accordingly was given for the avowant. 3 Mod. 96. Hill. 1 Jac. 2. Brett. v. Whitchot.

10. Exempt juriſdiction *is* this, and was granted to cities and towns corporate for benefit of trade; it was *a grant to the freemen* [159] *of ſuch a city* or town, *that they ſhould not be impleaded out of their city* or town; and this grant was good, if there were a court in the city or town, to hold plea of the matter. Per Holt Ch. J. 12 Mod. 644. in the caſe of Croſſe v. Smith.

S. P. per Holt Ch. J. 12 Mod. 644. in caſe of Croſſe v. Smith.

11. As to an *exempt juriſdiction*, that *always is for the benefit* and caſe *of the reſiants* within ſuch a vill, borough, &c. not to be ſued out of their vill, &c. And then ſure they may *wave* that benefit, and remove their cauſes to the ſuperior courts; and if one, who is within an exempt juriſdiction, be *impleaded out of it*, *his way is to plead it*, and the lord has nothing to do with it. 12 Mod. 666. in the caſe of Taylor v. Reignolds.

12. Lord lieutenant of Middleſex is empowered by the 14 *Car.* 2. to inflict a penalty of 20l. upon perſons ſo and ſo qualified for not finding a horſe, &c. to ſerve in the militia. King Cha. 2. in the 15th year of his reign, granted to the college of phyſicians a charter of exemption *from bearing or providing arms to ſerve in the militia*, by which charter another is recited, which was granted to the ſaid college by H. 8. and another by Ja. 1. exempting them from ſeveral ſervices. It was ſtrongly argued pro & con. whether the king could grant charters of exemption from *penalties, &c. impoſed by act of parliament*. The Court, upon the firſt argument, declared it a caſe of great difficulty and conſequence, as to the prerogative of the king, and the general right of the ſubject, and therefore ought not to be determined on a caſe ſtated. But upon this firſt argument, the Ch. J. was of opinion, that the king by his prerogative could not diſpenſe with an act of parliament which was made for the public good of the whole nation; but the queſtion in this caſe was, whether this ſtatute had diveſted the king of any part of his prerogative, or whether it was made to eaſe him of the care of arraying militia, and intruſting the lieutenants and other officers therewith; for if it was, then it did not diveſt him of any authority he had before the act. Now he was of opinion, that this charter did not exempt the phyſicians from being contributory to the finding men to ſerve in the militia, though probably it might exempt them from perſonal duties; yet it cannot be inferred from thence, that he might exempt them from being contributory to others to perform thoſe duties which are required by an act of parliament, eſpecially where the *ſubject hath an intereſt* that ſuch duties ſhould be performed, or a loſs if they ſhould not, and the better opinion ſeemed to be, that the king could not exempt in ſuch caſes. That in the principal caſe, the contribution to be made to the finding a man with arms to ſerve in the militia, is a *charge upon the lands, as well*

well as on the perſons of the owners; and if this charter of exemption ſhould be good, it would increaſe the charge on all the lands of perſons not exempted, which would be a very great damage to ſuch perſons, becauſe the phyſicians who are exempted are a conſiderable body of men in every county; for which reaſon it would be very hard if the king had power to leſſen the tax impoſed upon one man, and charge it upon another; beſides, the *king cannot exempt in any caſe where the ſubject hath an intereſt, as where particular perſons are bound by preſcription or tenure to* * *repair bridges*, the king cannot exempt them from repairing; becauſe all the ſubjects have a common benefit to paſs and repaſs over public bridges; but it was adjourned for a farther argument. 8 Mod. 18, 19. Mich. 7 Geo. 1721. the caſe of Sir Hans Sloane, preſident of the college of phyſicians.

* S. P. or to make a bridge; but of contribution to a bridge, he may diſcharge as it ſeems; quære. F. N. B. [230.] 524. in notis cites Fitzh. Aſſiſe 445. 3 E. 3.

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Fol. 202.

(T. c) Exemption. To what Thing it ſhall *extend*.

[1. IF the king grants to a biſhop, *quod omnia maneria, et* omnes terræ & omnia feoda, *of the ſaid biſhop and his ſucceſſors inde in perpetuum libera ſint et quieta of ſuch foreſt* of the king, &c. The biſhop alia maneria ſua terras & homines ſuos clamare non poteſt eſſe quieta de foreſta, quam *illa quæ tempore confectionis illius chartæ fuerunt in ſeiſina of the ſaid biſhop.* 18 E. 1. lib. Parl. 1. Biſhop of Coventry and Litchfield's caſe.]

[2. If the king grants to an abbot, that he *et homines ſui ſint quieti ab omni theolonio in omni foro et in omnibus nundinis, et in omni tranſitu portuum viarum et marium* per totum regnum noſtrum *et omnia mercata ſua et hominum ſuorum, &c.* The abbot and his men ſhall be only quit ex præſtatione theolonii in venditionibus & emptionibus per ipſos *factis de neceſſariis ſuis, ut in victu, veſtitu*, & ſimilibus & hoc *ad opus proprium* ipſorum abbatis, & hominum ſuorum, ſed ſi prædictus abbas aut homines ſui emptiones, ſed venditiones fecerint *ut mercatores communes*, & de communibus merchandiſis & ratione merchandiſarum faciend. debent theolonium, ſicut, & cæteri mercatores communes, non obſtante charta prædicta.]

3. No franchiſe, nor charter of exemption, ſhall be *allowed againſt the king*, nor array ſhall not be challenged againſt the king. Br. Prerogative, pl. 87. cites 38 Aſſ. 19.

4. Grant was made by the king to the abbot of C. that he *ſhould not be collector of the tenths granted per clerum Angliæ*, and *tenths were granted by the province of Canterbury*, and the abbot was appointed to be collector of it by the archbiſhop of C. and pleaded his patent in the Exchequer to be diſcharged, inaſmuch as this tenth was not granted per totum clerum Angliæ; for the province of York granted nothing. And alſo the convocation granted that no perſon privileged ſhould be diſcharged, &c. but this is not to the purpoſe; for this cannot toll the power of the grant of the king; and yet per Cur. the grant is good, though it be not by all the clergy; for the province of Canterbury and York do not intermeddle; and alſo the one and the other is clerum Angliæ; for if one be bound to pay 20l.

Br. Patents, pl. 71. cites S. C. —— Jenk. 138. pl. 83. cites 21 E. 4. 48. The *Abbot of Waltham's* caſe. S. C. And Judge Jenkins ſays this is a good precedent. Nice conſtructions of the king's patents are a

dishonour to him. —— S. P. Br. Exemption, pl. 14. cites 2 R. 3. 4. And that the king may exempt clerks from the collection of tenths, though the bishop be inheritable to name collectors; and that upon such discharge the bishop ought to name and certify to the Exchequer another collector. And if *he who is so exempted takes upon him the collection in one county*, yet he *may plead his patent as to another county*, if he be assigned collector there. Br. Patents, pl. 90. cites S. C.

20l. if men of L. come to B. there if two men of L. come to B. the obligor shall pay the 20l. though all the men of L. do not come to B. and also the *patent is ex certa scientia et mero motu*, which is taken most strongly against the king; contra of patent upon suggestion; and the not shewing of the patent in the convocation house is no estoppel against the abbot; for they can neither allow nor disallow it there, and it is no matter though the abbot was one of them in the convocation who granted the tenths; for this is diversis respectibus, and therefore the patent and grant is good. Per Cur. Br. Exemption, pl. 9. cites 21 E. 4. 44.

5. If the king grants to one a franchise royal, scilicet, that he and his heirs shall be *quit of toll*, &c. If he dies without heir of the part of the father, the heir of the part of the mother shall have advantage of this discharge. Pl. C. 445. b. Pasch. 15 Eliz. in the case of Clere v. Broke alias Cobham.—Cites 49 E. 3.

[161] 6. The queen granted by letters patents to Pelham, *that he should not be bailiff*, constable, *or other officer* or minister, *licet eligatur*. Adjudged that this grant shall not discharge him, if the queen make him *sheriff of a county*; for the word officer in the patent, shall not extend to royal officers; and also the making of a sheriff is not by election, but by denomination only of the queen; so that if he have not these words *(licet eligatur per nos)* he shall be sheriff. Held before the Treasurer and the Barons in the Exchequer-chamber, and they said it was the opinion also of Lord Chancellor Bromley. Godb. 21. pl. 28. Pasch. 25 Eliz. Pelham's case.

(U. c) * *Liberties.*

* Liberties in this place signify the franchises and privileges which the subjects have of the gift of a king, as the goods and chattles of felons, outlaws, and the like, or which the subject claims by prescription, as wreck, waif, stray, &c. 2 Inst. 47.

[1. AMONG the petitions of the parliament, 18 E. 1. fol. 3. there is such petition, prioriſſa de auribium petit allocationem chartarum suarum, *fines, amerciamenta hominum suorum, estoveria sua, visum forestarum et plurimas alias libertates in Nova Foresta et pro tenentibus in Woodrowe; quæ omnia rex concessit juxta formam chartarum suarum et præcepit chancellar. &c.*]

[2. And among the said petitions, fol. 2. Radulphus Pipard petit quod *uti possit regalibus libertatibus in manerio suo de H. sicut Johannes Gifford coram rege recognovit, &c. concessum est per conciliam quod sic fiat et baronibus de Scaccario mandatur in forma prædicta.*]

[3. 12 E. 1. Rot. Walliæ. Memb. 1. the king granted *returnum brevium* to the Bishop of Bangor, &c. 35 E. 1. Rot. Chartar. Memb. 16. such grant.]

[4. King H. 3. granted to the vill of Shrewsbury authority *to take*

take toll in their market, ſcilicet, *a halfpenny of every*, &c. Tr. 43 El. B. R.]

[5. Rot. Parl. 43 E. 3. n. The city of London, and all other cities and boroughs of England, pray, that where it is contained in the great charter, that they ought to have their franchiſes which were confirmed by divers progenitors of the king to ſuſtain their charges, and among others they have uſed *that none ſhould ſell merchandizes nor victuals at retail, if they were not infranchiſed within the cities and burghs*, the which uſage they have had in the time of all his progenitors, and in his time till the ninth year of his reign, * which was then taken away, to the undoing of his ſaid cities and burghs; they pray, that it pleaſe the king in this parliament to confirm their franchiſes granted to them, notwithſtanding the ſtatutes and ordinances made to the contrary, and that none ſell at retail within the ſaid cities and burghs, † if he be not a man infranchiſed among them, and *that no merchant alien buy of other merchant alien any merchandizes nor* ‡ *wares within the cities and burghs to ſell again*. Anſwered, it is aſſented, that thoſe of London and no other ſell at retail victual only, and this of the *eſpecial grace of the king*, till the next parliament, that it be well ruled and governed in the mean time to the common profit; and it is the intention of the king, that no prejudice be done to the aliens who have franchiſes by charters of kings.]

* Orig. is (que lour fait tolne en anientice-ment de ſes dits cites &c.)—

† Fol. 203.

—‡ Orig. is (d'aires).

[6. 7 E. 1. Rot. Pat. Memb. 5. in Dorſo. Commiſſion ad inquirendum ſi Warrinus filius & hæres Th. M. habere debeat *furcas ad manerium ſuum de W. et judicium de malefactoribus ibidem captis pro feloniis et aliis tranſgreſſionibus factis* eo quod Abbas de Glaſtenbury ipſius hujuſmodi furcas nuper vento proſtratas iterum levare non permittit.] [162]

[7. 8 E. 1. Rot. Pat. Memb. 1. cum Hen. quondam rex Angliæ primus per chartam conceſſit Radulpho de Monte Caniſio, *quod terræ ejus et homines ſui ſint quieti de ſhiris et hundred. Et omnibus querelis quæ pertinent ad ſhiras et hundred. Excepto murdro et theſauro, et Willielmus de Monte Caniſio et omnes anteceſſores ſui virtute conceſſionis prædictæ habuerunt viſum franci plegii et turnum vic. in omnibus terris et feodis ſuis donec nos viſum et turnum prædictum de hominibus et tenentibus ſuis in curia noſtra coram juſticiariis noſtris ultimo itinerantibus in comitatu Cant. per conſiderat. ejuſd. cur. verſus præfat. Willielmum diſrationaſſemus occaſione abuſus earundem libertat. Nos nunc viſum et turnum prædictum in terris et feodis ſuis illi reſtituimus*, &c.]

[8. Rot. Parl. 21 E. 3. N. 17. The commons pray, for that the franchiſes have been ſo largely granted in times paſſed by our ſaid lord the king, that all this land is ‖ almoſt all infranchiſed, to the great § areriſement and eſtenyſment of the common law, and in great oppreſſion of the people. Pleaſe our lord the king to reſtrain ſuch grants for the time to come. Anſwer, the king will order, that the franchiſes which ſhall be granted ſhall be made by good adviſement.]

Prynne's Cott. Rec. Abr. 54. 21. E. 3. No. 17.

—‖ Orig. is (apoye).

—§ Quære the Engliſh of thoſe words.

9. The king made a corporation, and granted to the bailiffs and citizens their heirs and ſucceſſors, *that the bailiff and recorder* of the ſaid city *for the time being, or two of them, of whom the recorder to be*

be one, una cum hujuſmodi aliis perſonis per nos, &c. *ad hoc aſſignatis, ſhall be juſtices of gaol-delivery for the ſaid city, and that no ſheriff,* or juſtice of peace, or other miniſter or commiſſioner of the king, his heirs or ſucceſſors, &c. *ſhall* in the ſaid city, in any thing therein to be done *intermeddle* under the penalty of 100l. &c. The queſtion was, whether the juſtices of the general gaol-delivery of the county might try felonies committed in the city; and it was held per Popham, Anderſon, and Periam, that they might, becauſe this patent, as to holding a gaol-delivery by the bailiffs and recorder, is void; for they have no authority but jointly with ſuch as the king ſhall appoint; and that appointment the king is not obliged to make; but if he does make it, it muſt be by patent, and not otherwiſe; and therefore they cannot have a joint authority with the bailiffs, whoſe authority (if they have any) muſt ariſe from their patent; and ſo at ſeveral times; ſo that the king is deceived in his grant, in miſtaking the law; and therefore the grant is not good. 1 And. 296. Anon.

See (I. b) pl. 1, 2, 3.

(X. c) In what Caſes they ſhall be *extinct by coming to the Crown.*

[1. IF the king grants certain *manors which are within his foreſt of D.* to a biſhop and his ſucceſſors, *and* grants further, *that they ſhall have the ſaid manors free and acquitted of the ſaid foreſt and pleas of the foreſt, &c.* And after the ſaid manors come into the hands of the king, and he reſtores them to the biſhop, yet the [163] biſhop ſhall not be exempt from the foreſt for thoſe manors. 18 E. 1. lib. Parl. 2. the biſhop of Coventry and Litchfield's caſe.]

So a liberty to have view, waif, infangthief, &c. as appendant to his manor, ſhall be extinct by eſcheat to the king. See Keilw. 147. a. b. Itin. temps E. 3.

2. A liberty to have *wreck as appendant to his manor* ſhall be extinct by *eſcheat* to the king. Keilw. 137. b. Itin. temps E. 3.

S. C. cited per Hale Ch. B. Vent. 407.—S.C. cited per Turner J. Vent. 402. who ſays it is only a miniſterial thing.

3. It was adjudged in B. R. that where a man *has returna brevium* which *comes to the king by unity of poſſeſſion or* otherwiſe, the king ſhall uſe it as well as his tenant, or him by whom the king claims, and ſo this unity of poſſeſſion in the king does not extinguiſh the liberty; quod nota, &c. Keilw. 72. a.

Br. Incidents, pl. 12. cites S. C.—— *Contra, if he gives* the manor *cum liber tate ad illud ſpectant, tempore quo manerium fuit in manibus of the feoffor*; for they were extinct before as it ſeems, and by him, by thoſe words they paſs as appendants. Ibid.——Br. Incidents, pl. 12. cites S. C.

4. If the *king purchaſes a manor to which franchiſes royal are regardant, and* after *gives the manor ſimul cum libertat. ad illum ſpectant.* no liberties paſs; for by the purchaſe, the franchiſes of common right were annexed to the crown. Br. Extinguiſhment, pl. 32. cites 43 Aſſ. 10. per Thorp.

5. Unity

5. *Unity of poſſeſſion* of liberties in the king is an extinguiſhment. Br. Quo Warranto, pl. 11. cites 15 E. 4. 7.

When a franchiſe is ſeiſed into the hands of the king it is extinct; for it *ſhall not be ſaid franchiſe in his hands.* Br. Quo Warranto, pl. 9. cites 15 E. 4. 10. ——— *For if I have fair or market* of the grant of the king, *and I grant it to the king*, he takes it of me by way of extinguiſhment. Ibid.

Liberties which the king would have himſelf throughout England if not granted to or preſcribed for by a common perſon are *merged* in the crown, if a common perſon that had them by grant or preſcription commits a *forfeiture* of them, or they come otherways to the king, and the king has them by his prerogative; and they cannot afterwards be granted but by a new creation, as *waif, ſtray, wreck, &c.* But ſuch liberties as a common perſon has by grant or preſcription which the kings (if ſuch grant or preſcription had not been) could not have by his prerogative, as *warren, park, fair, market with toll, &c.* if theſe come to the crown, &c they remain in eſſe, and are not extinct; for if the king ſhould not have them, by this means they would be loſt. Cro. E. 591. Mich. 39 & 40 Eliz. B. R. Heddy v. Wheelhouſe.

6. A *manor, to which wreck belonged by preſcription*, came to the king's hands, who granted to A. the office of admiral, with all wrecks at ſea, and all profits to the ſaid office belonging; this does not paſs the wreck appurtenant to the manor. 12 Mod. 259. Hill. 11 W. 3. B. R. Wiggan v. Branthwaite.

Fol. 204.

(Y. c) * Liberties. *Seiſure.*

See Franchiſe (F).

* Liberties are of three kinds; 1ſt. thoſe which are *ancient flowers of the crown*, as felon's goods, &c.

[1. AMONG the petitions of parliament, 18 E. 1. there is ſuch a petition, *Cives London petunt, quod rex velit eis concedere priſtinum ſtatum*, ſcilicet, *majorem et antiquas libertates rex non habet inde conſilium quia ſunt in bono ſtatu ut ſibi videatur, et hac vice ſtatum non mutabit, ex quo omnia bene fuerint ut omnia ſint in pace, et nullum commod. apparet.*]

the which if they are forfeited judgment may be of ouſter or ſeiſure; for the king may have them again. 2dly, A *thing newly created*, the *which the king cannot have*, as a corporation, the which, if it commits a forfeiture and judgment of ouſter be given, in ſuch caſe there *needs no ſeiſure*; for to what purpoſe ſhall there be a ſeiſure by the king, when he may not have it? The ſame law of a *judgment of ſeiſure, as forfeited*; for this amounts to a judgment of ouſter. Otherwiſe of a *ſeiſure quouſque*. 3. There are things *newly created*, as *markets*, &c. the which may *ſubſiſt after ſeiſure* † by the king; and in ſuch caſe, though judgment of ouſter be given, there ſhall be a ſeiſure for the king. Skin. 311. Hill. 3 W. & M. B. R. The King v. the City of London. ——— 12 Mod. 18. S. C.

† [164]

[2. Among the ſaid petitions of the parliament of 18 E. 1. fol. 5. there is ſuch petition, *Libertates de Norwich captæ fuerunt in manus domini regis quas petunt homines ejuſdem ſibi reſtitui; faciant finem pro tranſgreſſione et ſimiliter tenetur debitum integraliter quod allocationem qua et fiat eis ad Scaccarium juſtitia.*
Quia homines de Southampton verberaverunt et vulneraverunt uſque ad Mortem Gilb. Canon qui exequebatur præceptum regis in dicta villa, pro tranſgreſſione villæ capta fuit villa iſta in manum regis, & finem fecerunt. Et firmam ſuam exaltaverunt ad 20l. per ann.]

[3. 13 E. 1. Rot. Fin. Memb. 10. *Pro civibus de Norwico, reſtitution after taken into the hands of the king pro combuſtione eccleſiæ, &c.*]

4. If one who has a franchiſe *does not come at the firſt day of the eyre*, then his franchiſe ſhall be ſeiſed into the hands of the king, and he ſhall make a fine, and ſhall have his franchiſe by replevin. Keilw. 152. b. 6 E. 1.

If the *defendant makes default* in quo warranto, the *franchiſe ſhall be ſeiſed into the hands of the king, and the king ſhall be anſwered of the profits*, and if he *does not replevy*

replevy them within the eyre, he ſhall loſe the franchiſe for ever. Br. Quo Warranto, pl. 7. cites It. Canc. 6 E. 2. 7.

5. Aſſiſe of *bread and ale, pillory and tumbrel*, are appendant *to view of frankpledge*, where a man has it by grant of the king; and if he *does not uſe pillory and tumbrel*, he ſhall loſe his franchiſe. Br. Quo Warranto, pl. 8. cites It. Canc. 6 E. 2.

6. If one *vouches record* of a franchiſe, and at another day ſhews the charter; quære if he ſhall forfeit his franchiſe by failure of the record. Keilw. 138. a. Itin. Temps E. 3.

7. Liberties *claimed* by one *as appendant* to the manor of B. were ſeiſed into the hands of the king, becauſe the *franktenement* of the ſaid manor *was not in him who claimed them*. Keilw. 139. b. pl. 7. Itin. Temps E. 3.

8. In quo warranto, if *one claims warren as appendant* to his manor, and *another claims it as appendant* to his manor, *and makes default*, judgment ſhall be that the franchiſe be ſeiſed, but *ceſſet executio* till the inqueſt be paſſed. Keilw. 148. b. Itin. Temps E. 3.

So the biſhop of Durham pretending to have ſuch privileges, that the king's writ ought not to run there, *impriſoned one becauſe he brought the king's writ thither*;

9. A *prohibition* was awarded out of C. B. *to the biſhop of Norwich, and he excommunicated the perſon who ſerved him with the writ*; and thereupon the party brought his action, and declared upon all this matter, and the biſhop being found guilty, it was adjudged that his temporalties ſhould be ſeiſed until he abſolved the plaintiff, and ſatisfied the king for the contempt of his writ; and damages to the party of 10,000l. and this judgment was affirmed in error brought in B. R. Cro. C. 253. ſays ſuch precedent was ſhewn of Trin. 21 E. 3. Rot. 46. or 460.

and therefore an information being exhibited againſt him, and this offence proved, it was adjudged that he ſhould pay a fine to the king, et quod capiatur, and ſhould loſe his liberties for his time; and the entry upon the roll is, that he ſhall loſe his liberties, becauſe juſtum eſt quod punietur in eo quo peccat. Cro. C. 253. in Tyndall's caſe. cites 33 E. 1. Rot. 101.

S. P. 2 Inſt. 282.—— S. P. Keilw. 139. a. pl. 5. Itin. Temps E. 3.—— S. P. and not that it ſhall be forfeited;

10. In quo warranto the *writ was returned ſerved*, and the *defendant did not come*, and *venire facias iſſued returnable in another term, which was returned ſerved*, and *he did not come*, and therefore the *franchiſes were ſeiſed*; and for the default of the defendant judgment was, that it be **ſeiſed* into the hands of the king. Br. Quo Warranto, pl. 9. cites 15 E. 4. 10.

for it does not appear whether there be cauſe of forfeiture. And no man ſhall finally loſe his land or his franchiſe upon any default, if he has never appeared. By the judges of † both benches. Jenk. 141. pl. 91. cites 15 E. 4. 7.—— *But* it was ſaid, that if a man *has uſed franchiſe without title*, judgment ſhall be that he be *cuſted*. Br. Quo Warranto, pl. 9. cites 15 E. 4. 10.—— *But* if he *miſuſes a franchiſe which he has by title*, that judgment ſhall be that the franchiſe *be ſeiſed* into the hands of the king. Ibid.—— * Britton, cap. 19. page 30. (55.) (57.)

Quo warranto was brought *for uſing* certain liberties, viz. *fairs, markets, and courts*; *at the day of return of the writ defendants did not appear*. It was agreed by the whole court, that if they *do not ſhew good cauſe in excuſe of their default*, their liberties ſhall be ſeiſed into the king's hands, according to the book in 15 E. 4. 2 Roll. Rep. 92. Trin. 17 Jac. B. R. the King v. the Mayor, &c. of Wygorne in Lancaſter.

†[165]

Br. Franchiſes, pl. 26. cites S. C.

11. Writ of *error to remove a record out of B.* and the *bailiffs did not ſend it, nor come till the pluries*, which is a proceſs of contempt, *and took day to bring it in*, and *failed at the day*; and by ſeveral their franchiſe

franchiſe ſhall be reſeiſed, viz. their conuſance of pleas; quære. Br. Reſeiſer, pl. 29. cites 20 E. 4. 5.

12. The abbot of C. had a *gaol*, wherein diverſe men were impriſoned, and becauſe he *detained ſome, that were acquitted* of felony, *after their fees paid*, the king ſeiſed the gaol for ever. 2 Inſt. 43. S. C. cited in 9 Rep. 96. b. Hill. 9 Jac. in Sir George Reynell's caſe, as 20 E. 4. 5. b. the Abbot of Crowland's caſe.

13. If *ſteward of a liberty arraigns a man by colour of infangthief*, and *adjudges him to death*, the liberty ſhall be ſeiſed by this, but the ſteward ſhall ſuffer no pain; for he did it colore libertatis, and therefore no felony; quod nota. Br. Corone, pl. 173. cites 2 R. 3. 9, 10.

14. If a *vill be incorporated* by letters patents before time of memory, and thoſe *franchiſes never uſed ſince time of memory*, they have loſt their franchiſes. Br. Franchiſe, pl. 10. cites 14 H. 7. 1. Per Vaviſour. Non-uſer of a *liberty* doth not *determine it*, nor any preſcription which goes with it. Arg. Godb. 238. Mich. 11 Jac. C. B. in caſe of Cowper v. Andrews.

15. If a lord does *not make hue and cry* within his franchiſe, lord Coke ſays, it ſeems that he ſhall loſe his franchiſe for ever; for the words of the ſtatute are, that the king ſhall take to himſelf the franchiſe (viz. as forfeited). 2 Inſt. 173.

16. The non-uſer of a *fair*, or *market*, or *courts*, or ſuch like liberties, wherein the ſubjects may have intereſt for the common profit or common juſtice, is *cauſe of ſeiſure* of them; but the non uſer of *parks* or *warrens*, or ſuch like, which are *to the profit or pleaſure of the owner only*, is not any cauſe of their loſs or *forfeiture*. Per Coke Ch. J. ſaid to have been ſo adjudged. Cro. J. 155. Paſch. 5 Jac. B. R. Leiceſter-foreſt's caſe. —— Affirmed by Popham; but he ſaid, it had been about the ſame time adjudged otherwiſe in the Exchequer. Ibid.

17. In caſe of preſcription for *warren within foreſts*, although it had *not* been *uſed for divers years*, if he that had it, had it by grant, or can prove it by preſcription, a non-uſer is no cauſe of forfeiture thereof. Reſolved. Cro. J. 155. in the caſe of Leiceſter-foreſt.

18. There is a *diverſity* where the *liberties are ſubordinate and dependent* the one upon the other; there the miſuſing and *abuſing* of a liberty *is forfeiture of all the liberties; but* otherwiſe it is where the liberties *are ſeveral*. Arg. And Montague Ch. J. held it clearly ſo. And Doderidge J. accordingly; but if one miſuſe and *abuſe the fair*, he *forfeits the court of pie-powders*, becauſe it is incident to the fair. 2 Roll. 1 Rep. 156. Hill. 17 Jac. B. R. in the caſe of the King v. the Warden of Maidenhead.

19. The franchiſe, &c. of a body politick *may be ſeiſed* or ſurrendered, &c. and the *body itſelf remain untouched*, as appears in the Bishop of Norwich's caſe, and more clearly in the ſame caſe after in Jones, Fulchard and Haywood's caſe; for *franchiſes*, &c. are *not eſſential* to a corporation, but a privilege pertaining to it. Skin. 311. Hill. 3 W. & M. in B. R. The King v. the City of London.

(Y. c. 2) *Pleadings* or Letters Patents, Exemptions, &c.

1. HE, who would *make title to a franchiſe by grant* of the king *inrolled in Chancery*, without ſhewing the charter, ought to have the record ready. Keilw. 140. a. Itin. temps E. 3.

2. In quare impedit, where a *man would intitle himſelf to an advowſon becauſe the king was ſeiſed, and granted it to J. and E. for life by patent, and after granted the reverſion to three in fee*; there, *if he will plead the firſt patent or grant for life*, he ought to *ſhew certainly the date and the year, day, and place*; for if the other will ſay, *nul tiel record*, it cannot be certified, * [nor] exemplified, if he does not plead it certain. Per Priſt. But, per Danby, it ſuffices to ſay and plead the patent of the grant of the reverſion in this form, ſc. that the *king, by his letters patents, bearing date*, &c. *reciting, that where he had granted the advowſon to J. and E. for term of life*, he *granted the reverſion to three in fee, who granted it to the defendant*, &c. and then well; but, per Priſot, if he will plead the firſt patent, he ſhall plead it certain. Br. Pleadings, pl. 58. cites 38 H. 6. 35.

* In the ſmaller editions of Brook the word (ne) is inſerted, but in the larger edition it is omitted.

3. In aſſiſe upon grant of the *office of clerk of the crown in Chancery*, he need not ſhew if there was ſuch an office at the time of the grant, or not; for, per Cateſby, the king by this word *(conceſſimus)* may grant an office which had eſſe before; but by thoſe words *(conſtituimus & ordinavimus)* he may make an office and officer which had not eſſe before. Br. Patents, pl. 21. cites 9 E. 4. 11.

4. A patent, or record, *ſhall not be pleaded by rehearſal, but by matter in fact*. Br. Pleadings, pl. 110. cites 21 E. 4. 44.

3 Le. 193. pl. 240. cites S. C. by name of Barn's caſe.

5. In *treſpaſs* the defendant *juſtified* the taking *as his proper goods*, and pleads a ſpecial juſtification; the plaintiff *replied, and made title* to the goods *by a ſeizure*; for that the king by letters patents dedit & conceſſit to the town of L. *liberty of a market*, &c. and ſhewed a ſpecial cauſe of ſeiſure, as an officer there; and upon demurrer the plaintiff had judgment. Error was brought, and it was aſſigned for error, becauſe the plaintiff had *made a title by letters patents*, but did *not ſay, ſub magno ſigillo* Angliæ confectas; and this was held clearly an error; for if the grant was not under the great ſeal, it was not good; and though he ſaith, that it was inrolled in Chancery, yet this is not good; for any patent may be inrolled there, and therefore the judgment was reverſed. Cro. E. 117. Mich. 30 & 31 Eliz. B. R. Kingdon v. Barne.

6. King James by letters patents inrolled in B. R. *granted* to the earl of Southampton *all deodands* within the manor of Titchfield; an inquiſition was certified in B. R. that a deodand was forfeited within the manor, and proceſs went out, &c. Upon a motion in behalf of the coheireſſes of the earl, for the direction of the Court, whether they ſhould be obliged to ſet forth their title in pleading, which

which would be inconvenient, and the charge exceed the value of the deodand, the Court ſaid, that if they could *ſatisfy the office of their title without pleading it*, that ſhould be ſufficient, *in regard the letters patents were inrolled in this ſame court.* 1 Vent. 142. Trin. 23 Car. 2. B. R. Earl of Northampton's Heir's caſe.

(Y. c. 3) Pleadings of Letters Patents of Grants, Exemptions, &c. And in what Caſes there muſt be Profert or *Monſtrance* of them. [167]

1. IF a *gift in tail* be by the king *by his letters patents*, which is *executed*, yet the heir ſhall not have formedon againſt the letters patents. Per Martin, clearly. Br. Monſtrans, pl. 2. cites 2 H. 6. 14. The king *gave* to the earl of Rutland *in tail, and after intended to give it to him in fee-ſimple, and to extinguiſh the tail*; and it was doubted, that the ſurrender of the letters patents of the tail, and the cancelling thereof, and of the inrolment, and bill aſſigned would not extinguiſh the tail; for the *tail executed may be averred* without ſhewing the patent, and formedon lies after the tail executed, without ſhewing the patent. Br. Patents, pl. 97. cites 32 H. 8.

2. Where a man brings *debt againſt the cuſtomer*, or debt is aſſigned to him to be paid by the king and *tally of Exchequer*, he need not ſhew this tally to the Court upon his declaration, as in debt upon obligation; for the debt does not ariſe only by the tally, but by the aſſignment by the record, and the tally is only to deliver to the cuſtomer to take allowance of it upon his account. Nota, Br. Monſtrans, pl. 8. cites 27 H. 6. 9.

3. A man cannot *juſtify as ſervant* of the king without ſhewing patent. Br. Aid del Roy, pl. 12. cites 33 H. 6. 29.

4. If a man pleads *letters patents in the Court where they are inrolled*, the party may plead them * without ſhewing deed, and it is ſufficient, *notwithſtanding that they were never pleaded before*; quod nota; per the Juſtices. Br. Monſtrans, pl. 124. cites 21 E. 4. 48, 49. * S. P. Br. Pleadings, pl. 110. cites 21 E. 4. 44. S. P. But if *recorded in any other Court*, he muſt plead them with a profert in curia, or the exemplification of them under the great ſeal. Per Holt. 2 Salk. 497. Roberts v. Arthur.

5. Note, if a man pleads *letters patents* made to the abbot of St. Alban's, *that he ſhall make juſtices of the peace within his liberty, and that no other juſtices ſhould intermeddle there*; and that he was *indicted there before the juſtices of the peace of the county*, who ſat within the liberty, and therefore a void indictment; per Fineux, Chief Juſt. he ſhall not ſhew the patent. Br. Monſtrans, pl. 172. cites 13 H. 7. 14. & 20 H. 7. 6.

6. Where a man is a *ſtranger* to the patent, and *does not claim any thing within it, nor does any act in right of the grant*, he ſhall plead the patent without ſhewing it; per Pollard. Br. Monſtrans, pl. 172. cites 13 H. 7. 14. and 20 H. 7. 6. *Contra*, where he *claims any thing* by it, *or juſtifies* by the grant. Ib.

7. Formedon of a gift of land by the king by letters patents. Fiſher ſaid, if a man *loſes his letters patents*, he may have new letters patents out of the Chancery, if he ſhews to the chancellor that he has loſt them, quære inde; for it ſeems that he ſhall have only

only a *conſtat*, et non negatur ibidem. But it was admitted upon the argument, if he ſhews the letters patents of the gift of the king or [does] not, but [ſhews] that he has loſt his letters patents and has a new patent, that is intended a *conſtat*, as it ſeems to me, that in this caſe it *ſhall ſerve* him *to ſhew or plead* as well as the firſt patent. Br. Patents, pl. 58. cites 22 H. 7. 12, 13.

S. C. cited 10 Rep. 92. a. Hill. 8 Jac. in Dr. Leyfield's caſe.

8. In *treſpaſs* the *defendant ſaid, that* the place where, &c. was 10 acres of land, of which *the king was ſeiſed in fee* in right of his crown, *and* by his letters patents *granted the land to the lady Carew for* term of *life, who leaſed to the defendant for years, and averred the life of the firſt leſſee*, and ſo juſtified; and it was moved, if the plea be good without ſhewing the letters patents of the king; and it [168] was held clearly by Knightly, Montague, and Fitzherbert, that he ought to ſhew the letters patents. But Browne, Willowby, and Baldwin e contra. And it ſeemed by them, that there is a *diverſity* when the *grantee* of the king *grants over all his intereſt*; for there the patent belongs to the grantee, and therefore he ſhall ſhew them; but when he *grants only parcel*, it is otherwiſe, &c. D. 29. b. pl. 199. Hill. 28 H. 8. Anon.

9. It was enacted anno 4 *H.* 7. *cap.* 9. that *no man ſhould convey wine into the realm out of Gaſcoigne but in Engliſh ſhips*, &c. *and where the maſter and mariners were Engliſh*, &c. upon pain of forfeiture. And *H.* 8. *granted licence to* a man, anno 9, that he, his deputies, factors, or aſſigns, might *convey*, &c. *in any ſhip* whatſoever, *non obſtante the ſaid ſtatute, 600 tun of Gaſcoign wine, without mentioning any thing of the mariners*, &c. And by the ſtatute made anno 32 H. 8. cap. 14. it is enacted, that the ſaid ſtatute ſhall ſtand in full force and virtue, ſo that from henceforth no perſon ſhall attempt to do contrary to the tenor and effect thereof, upon the pain limited in the ſaid ſtatute. And one R. was ſued by information in the Exchequer for 40 tun imported into the realm contra formam, &c. R. *pleaded this licence as aſſignee* for the 40 tuns, *without ſhewing the patent* of the king, *and alſo without ſhewing deed of aſſignment; but* he *averred* by preſcription, that there is *a cuſtom among merchants, that he who has ſuch licence may aſſign it by parol*, &c. *without averring the life of the firſt grantee.* And upon this plea, it was demurred in law. And by the beſt opinion the plea is not good without ſhewing the letters patents. D. 54. a. pl. 17. Mich. 34 H. 8. Richards's caſe.

10. The *patentee* of the queen *made a leaſe* of the lands to another. Per Periam J. the leſſee ought to ſhew the letters patents; for he deriveth his intereſt therefrom; and he ſaid, that if any books were againſt his opinion it was marvellous. Godb. 111. pl. 133. Mich. 28 & 29 Eliz. C. B. Anon.

11. *Though* the patent is *in court*, yet it ought to be pleaded with a hic in curia prolat. 3 Bulſt. 58. Trin. 13 Jac. the King v. Capell.

(Y. c. 4) *Grants to the King. What may be granted or aſſigned* to him.

See (M. 2) pl. 6. ſ. 2.

1. BROOKE makes a quære, if a man's *beaſts* are *diſtrained*, if he may *give them* to the king *before he has replevied them*; and ſays, it ſeems he cannot. Br. Prerogative, pl. 36.

2. If a man gives land in tail, cum omnibus officiis ea tangentibus, or gives to *J. S. an office with all lands to the ſame belonging*, the *remainder to the king* in fee; this is a good remainder (though the king cannot be officer to any man) becauſe he may grant it over. Br. Done, pl. 51. cites 1 H. 7. 31. Per Brian.

Br. Grants, pl. 83. cites 1 H. 8. 29. That Brian held the grant of an office of foreſter in like manner in tail, remainder to the king in fee, is not good, becauſe he can be officer to no man; but that the whole Court held the contrary for the reaſon above, and that the office may be forfeited.—Grant of an *office* is good to the king, *though he cannot be an officer*; for office may be forfeited to him, and he may grant over the office; and ſo of annuity. Br. Prerogative, pl. 125. cites 1 H. 7. 29. Per tot. Cur.

3. The king *cannot receive a ſurrender of letters patents to himſelf, nor recognizance*, but the chancellor or other juſtice ſhall do it. Br. Prerogative, pl. 135.

Br. Recognizance, pl. 19. S. C.

4. P. was *collector* of the ſubſidy granted by parliament, and by reaſon thereof *was indebted to the queen*; and one *B. being indebted to him, P. aſſigned the ſaid debt to the queen for parcel of her debt*; upon which proceſs iſſued out againſt B. And now at the return of the proceſs, it was moved in behalf of B. that the aſſignment [169] was not good, for that *no aſſignment of debt* to the queen *is effectual where the goods and lands of the queen's debtor are ſufficient*; but here conſtat de claro that P. is ſufficient. And per Fenner, there is not any authority in our law for ſuch aſſignments of debts to the queen. 4 Le. 80. pl. 170. 29 Eliz. in the Exchequer. Pigot's caſe.

5. If *A.* be *bound to B.* by obligation with condition *for the performance of covenants*, although the covenants, or ſome of them, be for the payment of money, yet the aſſignment of ſuch bonds to the queen ſhall not be received; and if it be aſſigned, it ſhall be put out of court; for *no bonds ſhall be aſſigned* as above, *but* ſuch as are made *for the payment of money*. 4 Le. 9. Mich. 33 Eliz. in the Exchequer. Sir John Hawkins v. Chapman.

6. *A. and twelve others were poſſeſſed of* divers *trees* by the grant of the owner of the ſoil, and the ſaid *A. for* and in *ſatisfaction of a debt* which he owed *to the queen, aſſigned* to her by deed inrolled *all the trees*; and the queſtion was, if the queen ſhould have by this aſſignment all the trees. Coke, for the defendant, did agree, that where the queen came to an entire thing by act in law, as attainder or other act in law, ſhe by her prerogative ſhall have the whole; but where ſhe comes to have part of the chattel by the grant of a common perſon, he by his grant ſhall not prejudice his companion; and therefore, in that caſe, the queen ſhall not have her prerogative. Quære of this difference. The barons did not

ſpeak to the caſe, but they ſaid it was ſtrong againſt the defendant; and they gave him day to take advice, if he could ſay any other matter. Cro. E. 265. Mich. 33 & 34 Eliz. The Queen v. Fairclough.

7. A *man recovered damages* in an action on the caſe, *and* he *aſſigned parcel of this debt to the queen* before execution, and the queen thereupon brought a ſcire facias. Manwood Ch. B. and all the Court held clearly, that parcel or a moiety of this debt could not be aſſigned over to the queen. Ow. 2. The Queen v. Allen.

P. was bound in a ſtatute of 2000 l. to C. who dying inteſtate, adminiſtration was committed to his wife, who married F. which F. became bound with others to the king in 600 l. and then he and his wife did, by deed inrolled in the court of wards, aſſign this ſtatute to the king for payment of the ſaid debt of 600 l. to the king, which was payable at certain days after the aſſignment. And it was reſolved, that this aſſignment was good, notwithſtanding this ſtatute; for the purpoſe of this law was, that no debtor of the king ſhould procure another man's debt to be aſſigned, which was a common practice; but this was F.'s *own debt, though not to his own uſe*, which he may himſelf releaſe and diſcharge, and by the ſame reaſon may aſſign. Hob. 253. Breadman v. Coales.—— Cro. J. 524. Hill. 16 Jac. S. C. by name of Fawn's caſe.

8. 7 *Jac. cap.* 15. *No debt ſhall be aſſigned to the king by, &c. any debtor or accomptant, other than ſuch* debts *as did before grow* due originally to the king's debtor *or accomptant, bona fide.*

All grants and aſſignments of debts to the king, &c. contrary to the true intent of this act, ſhall be void.

(Y. c. 5) Grants to the King. *Aided or Conſtrued.* How.

1. 34 & 35 H. 8. 21. ENACTS, that *the king ſhall hold and enjoy all honours, lands, and other hereditaments, which he has obtained ſince the 4th of February in the 27th year of his reign, or ſhall hereafter obtain, within 7 years next after the making of this act, by bargain, exchange, or purchaſe, notwithſtanding any miſ-recital, non-recital, or not naming the ſaid honours, &c. or of the place where they lie, or of any part thereof, or any other matter or cauſe whatſoever.*

The right of others is ſaved, ſave only for rents, ſervices, and rent-ſecks.

[170] 2. The words of *gifts of ſubjects* made *to the king by the parliament* ſhall be *taken moſt ſtrong for the king* where they have two intendments; per Saunders one of the king's ſerjeants, who ſaid it was as a rule. Pl. C. 11. a. Paſch. 4 E. 6. in caſe of Reniger v. Fogaſſa.

The prior of M. was ſeiſed of an advowſon and 22 acres of land, and 20 H. 8. the king licenſed him to appropriate.

3. 35 *Eliz.* 3. enacts, that *all abby lands which came to the hands of H. 8. ſhall be adjudged to have been in his actual and lawful poſſeſſion, notwithſtanding any defect, want, or inſufficiency of, or in any ſurrender, grant, or conveyance thereof, or of any part thereof made to the ſaid king, or any other matter or cauſe whatſoever whereby he might be intitled thereunto.*

The 21 H. 8. the biſhop who was the ordinary aſſented, that after the church ſhould become void, the prior might hold it appropriate. The 27 H. 8. the incumbent died; ſo that the appropriation took effect, and was united to the poſſeſſion of the rectory appropriate, and alſo of the land out

out of which tithes were due to the ſaid prior in reſpect of the ſaid rectory. The priory is diſſolved, and the impropriation and lands given to the king by the 31 H. 8. who granted the impropriation to one, and the lands to another. 2 Brownl. 25. Priddle v. Napper. ——— S. C. 11 Rep. 8. b. Mich. 10 Jac. The firſt point was, if the appropriation was good or not? 2dly, If it was not good by the common law, whether the ſtatute of 35 Eliz. cap. 3. has ſupplied the imperfection thereof or not? As to the 2d point, (admitting the ſaid appropriation had been void,) it was objected, that this act of 35 Eliz. had made it good, it being thereby declared, *that all manors, lands, tenements, and hereditaments, which at any time heretofore were the poſſeſſions of an abby, monaſtery, priory, &c. which after the ſaid* 4 *Feb.* 27 *H.* 8. *were granted or conveyed, or mentioned ſo to be in or by any letters patents whatſoever by H.* 8. *to any perſon, &c. were and ſhall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real poſſeſſion of the ſaid late king, and of his heirs and ſucceſſors, at ſuch time as the ſame were granted by him.* And where it was anſwered by the plaintiff's counſel, that this act of 35 Eliz. extends only to letters patents made by H. 8. and that the letters patents in the caſe at bar were made by queen Eliz. and therefore out of the ſtatute of 35 Eliz. it was reſolved, and ſo the truth is, that this ſtatute extends not to this caſe, but not for the reaſon alleged by the plaintiff's counſel; for though it be true, that queen Elizabeth granted the inheritance of the ſaid rectory, yet it appears by the ſpecial verdict, that H. 8. by patent indented had demiſed the ſaid rectory to W. P. for 21 years, and this act of 35 Eliz. provides, that all manors, &c. mentioned to be granted, &c. in or by any letters patents whatſoever made by H. 8. to any perſon or perſons, bodies politic or corporate, ſhall be reputed, taken, and adjudged to have been lawfully and perfectly in the actual and real poſſeſſion of the ſaid king, his heirs and ſucceſſors. In which proviſo four things are obſervable: 1ſt, The favourable penning thereof, viz. *mentioned to be granted*, though in effect nothing paſſed by the grant. 2. The generality of the words, firſt, in reſpect of the quality of the letters patents, viz. *in or by any letters patents whatſoever*, be they under the great ſeal, exchequer ſeal, the court of augmentation ſeal, the dutchy ſeal, &c. Secondly, In reſpect of the eſtate or intereſt mentioned to paſs by the letters patents without reſtriction to any in certain: ſo that if they purport grant for life or years, the ſtatute has as great operation as to the proviſo, as if the patents had purported a tail or fee. Thirdly, The generality of the proviſo; for it extends not only to make the grant good, but alſo to veſt the manors, &c. of the late abbots, &c. in the actual and real poſſeſſion of H. 8. and likewiſe (fourthly) in his heirs and ſucceſſors. And ſo the *proviſo extends to three other caſes.* 1ſt, Where any lands, &c. *came to the hands or poſſeſſion of the ſaid late king H.* 8. 2dly, *Or which were put in charge to or for his highneſs in his court of Exchequer, or any other court of his majeſty's revenue.* 3dly, *Or by any auditor or other officer of the ſaid late king.* And in every one of thoſe caſes, the proviſo has as great operation as in caſes of letters patents, as to the veſting ſuch lands, &c. in the king, his heirs and ſucceſſors; but yet it was reſolved, that this act of 35 Eliz. extends not to this caſe; for the proviſo has a qualification or reſtraint which has not been mentioned before at the bar, viz. that in the ſaid four caſes ſuch lands, &c. ſhall be reputed, taken, &c. in the actual, &c. poſſeſſion of the king, his heirs, &c. at ſuch time as the ſame did ſo come to his hands or poſſeſſion, or were ſo put in charge, or granted, or conveyed by H. 8. as aforeſaid, *notwithſtanding* 1ſt, *any defect, &c. of or in any ſurrender, grant, or conveyance of the ſaid manors, &c. or any part thereof, to the ſaid H.* 8. 2dly, *Or any other matter or cauſe whatſoever by which his highneſs was, or might have been intitled to the ſame.* So that the ſcope of the act was to veſt in H. 8. all the lands, &c. which the abbots, &c. had, notwithſtanding the defects aforeſaid. But if the ſaid appropriation was void, and was not given to the king by the ſtatutes of monaſteries, then the prior had nothing in the ſaid rectory beſides the advowſon and jus præſentandi. Notwithſtanding which this act of 35 Eliz. has great effect; for ſince the 31 H. 8. gives not to the king any monaſteries, &c. but ſuch only as had been ſurrendered, granted, &c, or diſſolved, this of 35 has ſupplied the defect, &c of a ſurrender, as of an inſufficient ſurrender, grant, or conveyance, ſo that be there any ſurrender, &c. or not, or be it, if any, ſufficient or not, the ſaid lands, &c. are actually veſted in the king, his heirs, &c. 2dly, If the abbot, &c. had been *diſſeiſed*, &c. where an office, ſcire facias, ſeiſure, &c. had been requiſite to veſt the poſſeſſion in the king, there the laſt words, viz. *or any other matter or cauſe whatſoever by which his highneſs was or might have been intitled to the ſame*, ſupplies all ſuch means whereby the king might lawfully have been intitled and put in actual poſſeſſion. But though there be a defect in the appropriation, yet if the rectory be *in reputation appropriated, and been uſed as ſuch*, it was given to the king by the ſtatute 27 H. 8. cap. 38. or 31 H. 8. cap. 13. Note, That in the ſtatute of monaſteries there is a ſaving of rights, &c. but the founders, donors, &c. are excepted out of the ſaving; ſo that they are bound by the body of the act. 11 Rep. 8. b. 11. b. Mich. 10 Jac. Priddle v. Napper.

4. 43 *Eliz.* 1. enacts, that *all grants made to the queen ſince the 8th of February in the 27th year of her reign, (except by eccleſiaſtical perſons, or bodies politic, not having power or ability to make ſuch grants,) are confirmed.* [171]

The right of all others is ſaved, except of the parties and privies to ſuch grants.

See (B. d) (Z. c) *Grant to the King.* How the Grant may be. In what Cafes *without Record.*

It was held, that if a man will give *land to the king and to his heirs*, the *which he will veft in his body natural*, and not in his body politic, the *king cannot take it by livery, but* it ought to be *by matter of record.* Pl. C. 213. b. Mich. 4 Eliz. in the cafe of the dutchy of Lancaſter. —— The *prerogative* of the king *requires matter of record to bring lands to* the hands of *the king* as well as to toll or remove it from him; per all the Juſtices. Pl. C. 484. b. Mich. 17 & 18 Eliz. in cafe of Nicholls v. Nicholls.

[1. A Man cannot grant *land in fee* to the king without matter of record. Contra, 50 Aſſ. 1.]

[2. A man cannot grant *the ſervices of his tenant in fee, or for life*, to the king without matter of record. Contra, 50 Aſſ. 1.]

S. P. Br. Prerogative, pl. 93. cites 7 E. 4. 16.

3. The king cannot be infeoffed but by deed inrolled of record; *for no livery can be made to him;* quod nota bene. Br. Prerogative, pl. 66. cites 5 E. 4. 7.

In quare impedit it was agreed, that *feoffment* made *to the uſe of the king of a manor*, veſts nothing in him; for he cannot take unleſs by matter of record; for he cannot have feoffees to his uſe. Br. Prerogative, pl. 41, cites 21 H. 7. 21.

Gift to the king without deed is good, and the ſame of gift by him of *goods* without deed as ſome held, but contra it ſeems of *land* clearly; and gift to the king of chattels is good as it ſeems clearly. Br. Prerogative, pl. 36. cites 37 H. 6. 11. —— Br. Done, pl. 16. cites S. C.

4. No parlance ſhall bind the king, and he *cannot take* any thing *but by matter of record*, as by deed inrolled. Brooke ſays quære; for others are of a contrary opinion. Br. Prerogative, pl. 70. cites 14 E. 4. 2.

5. The king cannot take land *by gift in poſſeſſion or in remainder* unleſs by deed inrolled; and *otherwiſe* it is *by way of concluſion*, as where the tenant in fee ſimple *prays aid* of the king, alleging that he holds for term of his life, remainder to the king. Br. Prerogative, pl. 56. cites 1 H. 7. 28.

Br. Relation, pl. 20. cites S. C.

6. If a man *gives land in tail, the remainder to the king*, this remainder ſhall not paſs to him before the deed be inrolled, and *when it is inrolled it ſhall paſs ab initio;* and ſo ſee that it ſhall not paſs by livery to the tenant in tail, and yet it ſhall paſs by the inrolment after. Br. Prerogative, pl. 57. cites 1 H. 7. 30, 31. per Brian and Collow.

Keeling ſaid, it had been adjudged, that a ſurrender of a copyholder to the king, lord of a manor, was good without matter of record. Keb. 720. Paſch. 16 Car. 2. in cafe of Lee v. Boothby.

7. The king cannot take a *ſurrender* without matter of record; per Whiddon and Portman J. Pl. C. 105. a. Mich. 2 M. 1. in cafe of Fulmerſton v. Steward.

8. If A. makes a *feoffment to the king* of lands, which is *not recorded*, the king takes nothing by this deed. If an *eſcheator finds an office of this* feoffment made as above, and not recorded, and returns the ſame into Chancery; if the land be in the king's hands, the chancellor upon a motion will, by a ſuperſedeas, reſtore A. to the land.

land. If the *king has granted it to another*, a ſcire facias ſhall be awarded againſt the patentee, and the chancellor ſhall reſtore A. For it appears in the Chancery that the ſaid office, patent, and deed are all void. Jenk. 123. pl. 50.

(A. d) *What* ſhall be ſaid a *ſufficient Record.*

[1. IF * *tenant in tail, or any other particular tenant, ſurrenders their letters patents in Chancery to be cancelled*, there needs not any other inrolment of this ſurrender; for *the remembrance made of it* is ſufficient record to paſs it to the king. Mich. 42, 43 El. B. R. per Popham agreed.]

* S. P. Br. Taile & Dones, &c. pl. 38. cites 35 H. 8. that the tail by this is not extinct. S. C. cited D. 355. a. pl. 37. marg. —— Yelv. 30. Hill. 45 El.

[2. *So* if tenant in tail ſurrender his eſtate *per chartam ſuam deliberatam de recordo in the Exchequer*, this is ſufficient without inrolment thereof; for this is a ſufficient matter of record to intitle the king. M. 42, 43 El. B. R. between ABRAHAM AND WILCOKS, per Curiam, præter Popham.]

S. C. adjudged accordingly. For the king takes not by the inrolment, but by the deed, ſo that the deed is the principal, and the inrolment but teſtimony that the deed is of record; and though it is uſually ſaid in the books that the king cannot take but by deed inrolled, this is to be intended only that the deed made to the king be recorded, yet it is not ſufficient to make deed of land to the king, and caſt it into the Exchequer, or other court of record, or after that ſuch deed is made, to leave it in court, but the party ought to deliver it of record in court, and to be *indorſed* by the officer *quod venit ſ. S. tali die, and delivered ſuch deed to the uſe of the king*, and then this countervails inrolment. Per tot. Cur. nullo contradicente.

[3. If a man *makes leaſe for years of land to the king, and after acknowledges it before certain commiſſioners appointed for the ſame purpoſe, and the leſſor prays that it be inrolled, and the commiſſioners return it accordingly*, yet the king ſhall take nothing by this leaſe without inrolment; for this is not ſufficient record to intitle the king. Tr. 8 Ja. B. Scacc. SIR EDWARD DIMOCK's caſe. Adjudged.]

And the prayer of the leſſor to have it inrolled was indorſed, but not inrolled, and yet it was adjudged againſt the king, that the grant was not good. See Lane, 31. 35, & 36. a. the arguments of the counſel and of the Court, 6 Jac. and Trin. 7 Jac. in the Exchequer. S. C.

[4. If *leſſee for the life of the king renders and delivers up his letters patents in the Chancery ad cancellandum*, this without more is not any ſufficient record to intitle the king to it. M. 5 Ja. Scacc. Sir ROBERT JOHNSON's caſe.] Fol. 205.

5. A deed of gift, *bargain and ſale*, was made to E. 6. by the late duke of Somerſet in fee, and was *acknowledged to be inrolled* before a maſter in Chancery, and alſo before the Chancellor of the augmentations, and *delivered into Court, and there put into a cheſt, but not yet inrolled*; the Attorney-general moved it might lawfully be inrolled now, and thereby the lands to veſt in the queen as heir, or purchaſer; and it ſeemed by the opinions of Wray, Dyer, Bell, and Manwood, that it cannot be to veſt any intereſt in the queen, according to 5 & 7 E. 4. & Br. tit. Done, 37 H. 6. D. 355. pl. 37. Hill. 19 Eliz. Anon.

And. 229. pl. 245. Paſch. 32 Eliz. Anon. S. P. But there it was held that the land paſſed without inrolment, and cited the opinion of Belknap, 49 E. 3. 5. 37 H. 6. 11. and alſo this caſe of D. 355. but ſays, that Wray, Dyer, Bell, and Manwood were of this ſame opinion; and it was further moved, if it might be yet inrolled or not, and it was held by the greater part that it might, though divers held the contrary; and their reaſon was, becauſe it was made

made and acknowledged in the time of another king, and he being dead it is not to be inrolled. ——— And D. 355. Marg. pl. 37. ſays, that Sir Tho. Egerton, Maſter of the Rolls, in Mr. Aldſworth's reading in Lincoln's Inn in Lent 38 Eliz. ſaid, that when he was attorney, he had occaſion to demand the opinions of Wray and Manwood Chief J. and Chief Baron, who then denied their opinion ever to have been as Dyer here has reported; and they ſaid, that there *is no foundation that the king cannot take but by matters of record*; for he ſaid, that the king is intitled in many things which are in filaciis in the rolls, and in the memorandums in the Exchequer; and yet theſe are titles ſufficient for the queen.—About the 35th of Eliz. this caſe came in queſtion again between the * DEAN AND † CANONS OF WINDSOR AND MIDDLEMORE, and by the reſolution of all the juſtices of England, it was agreed, that the deed might be inrolled now, and ſo it was, and ſo Middlemore was ouſted of his term; and it was alſo debated in the Parliament Houſe, and there alſo agreed accordingly; and it was alſo reſolved by all the juſtices, that the acknowledgment of the deed before the Maſter in Chancery, and the delivery thereof into the augmentation court, does not make it a ſufficient record before inrolment, to veſt the intereſt in the king; but when it is inrolled now, with another date, it veſts the intereſt in the king with relation; for all perſons are eſtopped to ſay, that it was not inrolled according to the date, as appears in the caſe of LUTFORD v. GRETTON, Pl. C. 419. b. But the contrary is held at this day; for if it be in filaciis, or any where among the memoranda of the Exchequer, it ſuffices for the king. D. 355. Marg. pl. 37. ——— * S. C. cited Mo. 676. pl. 920. by Lord K. Egerton, and ſaid, it was reſolved upon conference, that the king, by the bringing and leaving of the deed in Court, took well enough without inrolment. ——— Hutt. 1. Paſch. 15 Jac. COMBES v. INWOOD, the Court delivered their opinion, that if there was a deed by which the land then in queſtion was conveyed to H. 8. and that was brought into the court of augmentation, although this deed be not found or inrolled, yet it is a ſufficient record to intitle the king, and it *is a record by being brought into court, and there received to be inrolled*; and the report in D. 355. 19 Eliz. was not as it is there reported; for it was for Borme's Inn, and it was adjudged a good conveyance.

A *deed* to the king *of* certain *land acknowledged* before a Judge, or Maſter in Chancery, *and delivered into Court*, but *not recorded by the neglect of the king's officer*, is good to the king. Jenk. 124. in pl. 50.

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See (Z. c). **(B. d) *How* the King may take; where *without Record. Chattels.***

If a man *deviſes to the king by parol*, and *without deed or teſtament*, the *king* upon ſuggeſtion of this *ſhall have action, and it was awarded* by judgment againſt W. C. who was executor of R. C. his father, who had deviſed his goods to the king by parol, *that execution ſhall be made of the goods of the deceaſed, in whoſoever hands they were found*, and againſt the occupiers; for *the occupation of goods of the king ſhall charge him againſt the king*, and the teſtator had deviſed to the king 1000 marks which were in a coffer, the *executor ſaid, that* at the time of the death of the teſtator he was at London, and *never had occupied the goods* of the king; *but his mother had made full adminiſtration, and W. after her death*, &c. *occupied the goods of his mother, abſque hoc, that he occupied the goods of R.* And after he was examined upon oath and confeſſed, &c. that he had occupied two manors, which R. and his father had, and paid before hand, by which it was awarded that the king have execution of the 1000 marks of the goods of the deceaſed, and that firſt execution ſhall be made of the farms which W. had confeſſed, and *the averment that he had held againſt his own conuſance ſhall be held for nul.* Br. Surmiſe, pl. 5. cites 40 Aſſ. 35. ——— Br. Prerogative, pl. 50. S. C. ——— Br. Prerogative, pl. 145. cites S. C.

[1. IF a man *deviſe goods or money to the king by parol*, yet the king ſhall have it. 40 Aſſ. 35. Tr. 8 Ja. Scacc. per Bromley.]

And though it be only a chattel real, yet chattels real participate in divers qualities with inheritances and freeholds; per Bromley Baron. Lane, 60. S. C.

[2. If a man *leaſe land for years to the king by deed*, the king ſhall take nothing by it without inrolment of the deed, becauſe it *is real*. Tr. 8 Ja. Scacc. Sir EDWARD DIMOCK's caſe adjudged.]

S. P. by Altham Baron. Lane, 61. in Sir Edward Dimock's caſe.

[3. *Leſſee for years* cannot *ſurrender to the king in reverſion* without deed inrolled.]

Lane, 31. 35, & 60. argued and adjudged.

[4. If a *biſhop leaſe land for years to the king by deed inrolled, and this is confirmed by the dean and chapter*; this *confirmation is good without inrolment*; becauſe this paſſes no intereſt, but is only an aſſent.

aſſent. Tr. 8 Ja. Scacc. Sir Edward Dimock's caſe. Per Curiam.]

[5. If *leſſee for years of the king ſurrenders* his patent to the king *in the Chancery ad cancellandum, and pays the fees*, yet the eſtate is not ſurrendered before record or vacat made thereof, entered. P. 11 Ja. B. R. St. Saviour's caſe. Hill. 11 Ja. B. Abraham's caſe.]

But 10 Rep. 67. b. Trin. 11 Jac. in the Church-wardens of St. Saviour's caſe. It was reſolved, that the delivery of letters patents into Chancery to be cancelled by the hands of the party, without writing, was ſufficient, and as much as they ought to do, and it belongs to the Lord Chancellor, or his officers, to cancel them, and every one ought to do that which to him belongs.

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6. An *obligation* may be granted to the king by the obligee, though it be a *choſe en action*, and the king may bring an action upon it, though the grant be *by deed without inrolment*. Br. Choſe en Action, pl. 4. cites 21 H. 7. 19.

S. P. Br. Prerogative, pl. 40. cites 31 H. 7. 19. quod fuit conceſſum.

Brooke ſays, and ſo ſee that the king ſhall take a choſe in action by grant of another, and *may ſue in his own name*; contra of a common perſon; and ſo it ſeems that the king may take chattel or choſe in action, which is not frank-tenement, *without deed inrolled*. Br. Prerogative, pl. 40. cites 31 H. 7. 19.

7. *An uſe* cannot veſt in the king by will or otherwiſe, without matter of record, any more than frank-tenement, or inheritance, &c. D. 74. a. pl. 17. Mich. 6 E. 6. in a caſe of exceptions taken to an information.

(B. d. 2) *Entry by the King, congeable* in what Caſes.

1. A. *Tenant for life*, the *remainder to the heir in ward of the king*. If A. had *aliened*, the king might have entered, and if a *condition, which deſcended to ſuch heir, had been broken*, the king might have entered for the heir, quod nota; but Brooke ſays, it ſeems that the matter *ought to be found by office*. Br. Entre Cong. pl. 126. cites 19 E. 3. & Fitzh. Garde, 113, 114.

2. A man *leaſed for life rendering rent with re-entry*. The *tenant committed felony*, and proceſs iſſued to the *exigent*; and *mean between the exigent* awarded, *and the outlawry*, the *leſſor re-entered* for non-payment, and well, becauſe the king had not entered, nor was ſeiſed before it. Br. Entre Cong. pl. 114. cites 27 Aſſ. 50.

3. Where a *common perſon may enter for eſcheat, ward, mortmain*, &c. if *ſuch matter* be *found for the king by his office*, the king may enter. Br. Entre Cong. pl. 93. cites 12 H. 7. 20, 21.

But where a common perſon is put to his action, as for waſt, ceſſavit, debt upon recognizance for a condition broken, &c. there if *ſuch matter* be *found* for the king, he cannot enter, but *is put to his ſcire facias*; quod nota; per Frowike, Mordant, and others. Br. Entre Cong. pl. 93. cites 2 H. 7. 20, 21.——Br. Prerogative, pl. 63. cites 12 H. 7. 19. S. C.

4. By the ſtatute 10 H. 4. the *poſſeſſions of the dutchy* were *ſeparated from the poſſeſſions of the crown*; ſo that in all things *concerning theſe poſſeſſions the king muſt demean* himſelf *as a ſubject*, and not with his prerogatives as king. But a *difference* has been held upon the ſaid ſtatute, that *where* the *king as duke of Lancaſter is to do any action inſeparable*

inſeparable in perſon, there he ſhall enjoy his prerogative to excuſe his perſon; *but* in actions *concerning the poſſeſſions of the dutchy*, he ſhall have ſuch advantage only as the duke of Lancaſter had; therefore upon great debate in the dutchy court, it was adjudged, that where the king *made a leaſe of dutchy lands, reſerving rent with a clauſe of re-entry*, &c. that *he muſt demand the rent* before he can re-enter; becauſe it is a material advantage to the tenant, that the rent ſhould be demanded before he ſhould receive any damage which might happen for non-payment; and that demand is a thing *which may be* made *by an attorney*. Arg. Mo. 161. in the caſe of Saffron-Walden.——Cites it as * Bonny's caſe.

* Mo. 189. S. C. adjudged.

5. Though by the ſtatute 33 *H.* 8. *cap.* 20. the *lands of perſons attainted of treaſon ſhall be in actual poſſeſſion of the king, without office found;* yet if a diſſeiſee is attainted of high treaſon, the king hath only a right by the attainder, and ſhall not have the poſſeſſion without a ſcire facias, or ſeiſure at the leaſt; becauſe when a ſtranger is ſeiſed at the time of the office found, the king ſhall not be in poſſeſſion till ſeiſure, and with this agrees Stamf. Prerog. 54. 17 E. 3. 10. 29 Aſſ. 30. 21 E. 4. 1. Beſides, *all poſſeſſions, &c. are*
[175] *ſaved by the ſaid act*, as if the act had not been made, and therefore the poſſeſſion of the *diſſeiſor* is ſaved thereby, in the ſame manner as if a ſpecial office had been found by the common law. 3 Rep. 11. Trin. 26. Eliz. in the Exchequer, the ſecond reſolution in Dowtie's caſe.

6. The *queen granted* lands *reſerving* a fee-farm *rent, with a condition of re-entry for non-payment*, and afterwards the *queen granted this rent to J. S. in fee;* the rent was behind; and adjudged, that the queen ſhall not re-enter, becauſe by that means ſhe would defeat her own grant, which would be a tort to the grantee of the rent. Cro. Eliz. 69. pl. 23. Mich. 29 & 30 Eliz. Cranmer's caſe.

(B. d. 3) Entry upon the King, or his Patentee. What is to be done.

1. IF the *king ſeiſes* the *ward which belongs to another* perſon, yet he cannot enter at full age, but *ſhall ſue to the king*. Br. Entry Congeable, pl. 62. cites 26 Aſſ. 57. Per Thorp & tot. Cur.

2. If the king be *ſeiſed by reaſon of an ill office*, the *party* who is ouſted *ſhall have aſſiſe;* per Huls clearly. Br. Office devant, &c. pl. 7. cites 7 H. 4. 46.

As where it is found that the tenant of the king died ſeiſed of my land, yet his heir ſhall have livery, and I cannot enter before livery; but after livery I may have aſſiſe, and ſhall be no longer bound by the office; for the *king by his ſeiſure ſhall not have franktenement*, but only chattel, *and ſo the franktenement not out of the party*; and therefore *otherwiſe* it ſeems *where the king by office is intitled to the fee*, and gives it over, there it ſeems that the party cannot enter. Ibid.

3. Where the *eſcheator ſeiſes colore officii*, or by reaſon of an office, *which is inſufficient*, and does not intitle the king, *as by outlawry in an action perſonal*, &c. there the entry of the tenant is ſufficient upon the eſcheator; for the *king ought not to ſeiſe but to take the profits*. Br. Entry Congeable, pl. 1. cites 9 H. 6. 20.

So where it is found that J. N. who is outlawed in treſpaſs, was ſeiſed of my land, and he enters, I may ouſt him. Ibid.——*Contra* where the *eſcheator ſeiſes by writ where the king has no title*, there the party cannot enter; note the diverſity. Ibid.

4. Where

4. Where the *king* is *intitled by double matter of record*, a man *has no remedy unleſs by petition*. Br. Entre Cong. pl. 128. cites 10 H. 6. 15. *As* if a man be *attainted of treaſon or felony*, and it is *found by office that he was ſeiſed at the time*, &c. of ſuch land, &c. and the *king grants it over*, he who right has *cannot enter, nor have action, nor traverſe to the office*, but is put to his petition. Br. Entre Cong. pl. 128. cites 10 H. 6. 15. ——*And* it was agreed, that *if the eſcheator or other enters to the uſe of the king without title*, yet the party cannot enter; for the king is ſeiſed, and yet the king is no diſſeiſor. Br. Entre Cong. pl. 128. cites 35 H. 6. 61.—*But* if the king grants it over, the party *may enter upon the patentee*. Br. Entre Cong. pl. 128. cites 35 H. 6. 61.——*But* where the king is *intitled by office*, and grants it over, *though it be falſe* office, the *party cannot enter upon the patentee*, but is put to his *traverſe* of the office; per Laicon & Needham; & non negatur. Br. Entre Cong. pl. 128. cites 35 H. 6. 61.——S. P. Br. Entre Cong. pl. 5. cites 35 H. 6. 60.——S. P. Br. Entre Cong. pl. 96. cites 4 E. 4. 21, 22. 25.——S. P. Br. Traverſe de Office, pl. 32. cites S. C.——S. P. Br. Traverſe de Office, pl. 52. cites 10 H. 6. 15. And Brooke ſays, note the diverſity thereof; for where he cannot enter upon the king by reaſon of a record for the king, which ſtands in force, there he cannot enter upon the patentee; quod nota bene; for the title remains, and the patentee is in by the king.——S. P. But where the king is intitled to land by office, and *another has rent-charge or common out of it*, and the king after grants the land to J. S. there he who has rent-charge may diſtrain or uſe his common; for the grantee nor the commoner *is not out of poſſeſſion by ſuch office*. Contra, if he has title to the land; note the difference. Ibid.

5. It was *enacted by parliament, that* the Lord Hungerford *ſhould be attainted of treaſon, and forfeit his lands*, with a proviſo, *that of ſuch lands whereof he was ſeiſed to the uſe of others*, that *ceſty que uſe might enter*; yet where the king is ſeiſed, he cannot enter upon him, but *ſhall ſue ouſter le main*. And ſo it ſeems that the king is not bound by any ſtatute, unleſs by expreſs words of the king; as if it had been that he might enter as well upon the poſſeſſion of the king as upon others. Br. Entre Cong. pl. 134. cites 4 E. 4. 21. [176]

6. If a *man diſſeiſes the king's tenant*, and *the diſſeiſee makes continual claim*, and the *diſſeiſor dies ſeiſed*, and *office is found* for the king, by which he ſeiſes, the diſſeiſee cannot enter upon the poſſeſſion of the king by the continual claim. Br. Entre Cong. pl. 97. cites 5 E. 4. 4. So if a *man gives land rendering rent, with* clauſe of *re-entry*, and the *land comes to the king*, and the *rent is arrear*, the donor cannot enter upon the poſſeſſion of the king. Br. Entre Cong. pl. 97. cites 5 E. 4. 4.

7. A man cannot enter *upon the king and another*; and this ſeems to be, where the king and another are *jointly ſeiſed*. Br. Entre Cong. pl. 101. cites 14 E. 4. 2.

8. It was agreed for law, that if *land eſcheats to the king, which is in leaſe for years, or charged with a rent-charge*, and *office is found* for the king of the eſcheat, [but] the *leaſe or grant not found* in the office, the leſſee cannot enter, nor the grantee cannot diſtrain; but if the *king grants the land over*, the leſſee may enter and the grantee may diſtrain. Br. Entre Cong. pl. 125. cites 33 H. 8.

9. *But* a man who *claims franktenement* in the land, cannot enter without *traverſing the office*, as it ſeems. Br. Entre Cong. pl. 125. cites 33 H. 8.

(B. d. 4) *Seiſin of the King.* In what Caſes the King ſhall be ſaid to be ſeiſed or poſſeſſed. And of what Things he may be put out of Poſſeſſion.

Br. Reſeiſer, pl. 10. cites S. C.

1. THE *king ſeiſed the poſſeſſion of a prior alien in time of war;* and therefore the king has poſſeſſion there, and not only the profits. Br. Seiſin, pl. 11. cites 21 E. 3. 44.

2. The king ſhall not be ſaid ſeiſed *by ſeiſin of his ſervant, unleſs it be in his advantage, and by his own agreement.* Br. Error, pl. 130. cites 39 Aſſ. 18.

Br. Seiſin, pl. 37. (bis) cites 5 E. 4. 4.

3. None can *gain franktenement by any entry made upon the poſſeſſion of the king*, or *upon farmer of the king*; for a man by entry may diſſeiſe a common perſon, but not the king. Br. Prerogative, pl. 79. cites 2 H. 4. 7.

But of things local he cannot have action, as *precipe quod reddat, ejectment of ward*, and the like; for of thoſe he cannot be put out of poſſeſſion. Ibid. —— *And* ſo ſee elſewhere, that *of things tranſitory* the king ſhall be adjudged in poſſeſſion without office, as *ward, villein, ſtray, heriot*, &c. and of thoſe he may be put out of poſſeſſion. Ibid. —— *But of things local or permanent*, as of land, &c. it appears there, and 4 H. 7. 1. that the king is not in poſſeſſion till office found; and there, when office is found, he cannot be put out of poſſeſſion; quod nota. Ibid.

4. The king *may be put out of poſſeſſion of things tranſitory*, and ſhall have thereof action, as *raviſhment of ward, quare impedit*, &c. Br. Prerogative, pl. 55. cites 1 H. 7. 19. and 4 H. 7. 1.

And where it is found that his tenant *ceaſed by two years*, he ſhall have ſcire facias, and is not in poſſeſſion of the land. *Contra of office of alienation of mortmain, or of eſcheat*; note the difference. Ibid.

5. Where the king is *intitled to* [*land by reaſon of*] *waſt done by his tenant for life*, he is not in poſſeſſion of the land, but ſhall have ſcire facias. Br. Scire Facias, pl. 122. cites 14 H. 7. 23.

But Brook makes a quære if the *anceſtor of the king tenant in tail had diſcontinued*, if the king being now heir to it might be in poſſeſſion by office found thereof, or ſhall have ſcire facias in nature of formedon, or cui in vita. It ſeems that he ſhall have ſcire facias. Br. Scire Facias, pl. 143. cites 21 H. 7. 18.

6. *Where a common perſon may lawfully enter* by any title, there if *ſuch title be found for the king* by an office, the *king ſhall be adjudged in poſſeſſion without ſcire facias* againſt the tenant; *but where a common perſon* by his title or matter *cannot enter*, but is put to his * action, *as in* caſe of *ceſſavit or waſt*, there if ſuch matter be found for the king by office, he is not in poſſeſſion by the office, but ſhall have ſcire facias againſt the tenant to give him anſwer; note the difference. Br. Scire Facias, pl. 143. cites 21 H. 7. 18.

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Contra if he had been *ſole ſeiſed, and* had been *attainted by the common law*; for there the king has the land as king. Ibid.

7. Where *ceſty que uſe is attainted of treaſon, and* it is *enacted by parliament that he ſhall forfeit his land in poſſeſſion and in uſe*, there the king is only a purchaſer. Br. Livery, pl. 58. cites 29 H. 8.

So it ſeems of lands ſeiſed into the hands of the king *for alienation without licence*, where the lands are *held of the king in capite*. Ibid. —— *So* it ſeems elſewhere

8. By ſeiſure of the land of *tenant in tail, or for life*, who is *attainted of felony*, the king *has the poſſeſſion, and not the profits only*. Br. Reſeiſer, pl. 10. cites Vet. N. B. tit. Eſcheat.

where *of a ward*. Ibid. ——— *And of anno, die et vasto*; but quære of this. Ibid. ——— *But* upon *outlawry in perſonal actions* the king ſhall have only the profits. Ibid. ——— Br. Seiſin, pl. 9. cites S. C.

9. If the king's *tenant for life dies*, the franktenement in law is in the king immediately. Per Brown, Pl. C. 229. b. 3 Eliz. in the caſe of Willion v. Barkley.

So if the *tenant of the king dies without heir*, the poſſeſſion in law is immediately in the king without office; for *office is not requiſite but where the king ſhall take thereby. As* if the king makes *a gift in tail upon condition*, and the *condition is broken*, there it ought to be found by office. Per Brown. Pl. C. 229. b. 3 Eliz. in the caſe of Willion v. Lord Barkley.

(C. d) *Quo Warranto. Of what* * Things it lies.

See Hundred (E.)

* See Britton, cap. 19.

[1. A Quo warranto lies *of the wreck of the ſea*, as appears among the petitions in parliament of 18 E. 1. fo. 6.]

2. The quo warranto *was framed for franchiſes which belong to the crown*; and ſuch as the ſubject has, are derived from the crown, libertates regales ad coronam ſpectantes ex conceſſione regum a corona exierunt. 2 Inſt. 496.

3. Quo warranto lies *not of ſuch liberties as do not lie in claim; as felon's goods, &c.* which lies only in point of charter. Per Shute J. who ſaid it had been ſo holden in a reading upon the ſtatute of quo warranto, ſuppoſed to be Frowick's. 3 Le. 184. pl. 235. Mich. 29 Eliz. B. R. in Sir Gervaſe Clifton's caſe.

4. Quo warranto againſt the lord of a manor to know *by what authority* the defendant *holds a court baron*, it was *objected, that it was incident to the manor, and* is *not any liberty which the king may have diſtinct from the manor, and being a matter of common right* the king *cannot have a quo warranto thereof*. And of that opinion was Fleming Ch. J. Fenner doubted. But Yelverton, Williams, and Croke held, that a quo warranto well lies; for it is a matter of right to hold courts, and to *adminiſter juſtice*, and to *hold plea*, and to *draw aſſemblies of men* together, and to *ſwear officers*; which if any doth without right, he is to render an account thereof; and therefore a quo warranto lies to ſhew by what title he holds it. But if he there intitles himſelf to the manor, he needs not then ſhew that he is to have a court baron, for that is incident thereto. And *here the judgment is not, that the king ſhall ſeize*; becauſe it is not any ſuch franchiſe as the king may have; *but* it is, *that the defendant* ſhall *be ouſted of that liberty*. Cro. J. 259. Mich. 8 Jac. B. R. the King v. Stanton.

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5. A quo warranto was brought *for claiming a foreſt and a court of ſwannimote*. The defendant made his claim by a charter granted by H. 2. but did not ſhew it. But Coke Ch. J. and Doderidge J. that no ſubject can have a foreſt; a ſwannimote-court, Doderidge ſaid, a ſubject may have, but not a foreſt; becauſe none can make a juſtice in eyre but the king. 2 Bulſt. 295. Mich. 12 Jac. the King v. Briggs.

6. If

6. If *markets* were kept *without the king's grant*, a quo warranto lay againſt thoſe who continued them; and the people that frequented ſuch markets were puniſhable by fine. Arg. 3 Mod. 127.

7. 4 & 5 *W. & M. cap.* 18. *ſ.* 3. *The clerk of the crown in the court of King's Bench, ſhall not, without expreſs order given in open court, file any information for any treſpaſs or miſdemeanor before he has taken a recognizance from the perſon procuring ſuch information to be entered into, to the perſon againſt whom it is exhibited in the penalty of* 20*l. that he will effectually proſecute ſuch information, and abide by and obſerve ſuch orders as the Court ſhall direct. And if the perſon againſt whom ſuch information is exhibited ſhall appear and plead to iſſue, and the proſecutor ſhall not at his own coſts, within a year, procure it to be tried, or if a verdict paſs for the defendant, or if the informer procures a noli proſequi, the Court is authorized to award the defendant his coſts, unleſs the judge, before whom ſuch information is tried, ſhall at the trial certify upon record, that there was reaſonable cauſe for ſuch information; and if the informer ſhall not, within three months after the coſts taxed and demand made, pay to the defendant the ſaid coſts, the defendant ſhall have the benefit of the ſaid recognizance.*

Serj. Hawkkins ſays it ſeems clear that this ſtatute extends to all informations whatſoever exhibited by the maſter of the crown-office; and that though it may be objected, that an information in the nature of a quo warranto, being a proper means to try a right, is not within the meaning of the ſtatute, which mentioning *treſpaſſes, batteries*, and *other miſdemeanors*, may be reaſonably conſtrued ſuch other miſdemeanors only as are of an inferior nature, like to thoſe ſpecified, which are generally wrangling and frivolous ones; yet ſeeing this is a *remedial law*, and *therefore ought to be largely conſtrued*, and ſuch informations may be as vexatious as any other, and always ſuppoſe an uſurpation of ſome franchiſe, and every ſuch uſurpation is certainly a miſdemeanor. It hath been ſettled, that this ſtatute doth extend to them. 2 Hawk. Pl. C. 262. cap. 26. ſ. 7.

8. It was moved for leave to file an *information againſt the mayor and common council of* Hertford, in the name of Sir Samuel Aſhtree, to know by what warrant they admitted *foreigners and ſtrangers to the freedom of the town*; alleging that this was no quo warranto in the name or at the proſecution of the king, but only a *method to try a right*, whether the mayor and common-council could, contrary to the expreſs words of the charter, as it appeared, admit thoſe to the freedom of the town who were ſtrangers and not inhabitants therein; and produced 4 or 5 precedents in the time of king Charles I. After ſeveral motions, the Court gave leave to file an information, becauſe the *injured freemen of the town could have no other way to remedy themſelves*, or to try their right. In this caſe, Holt ſaid, that a quo warranto *is in the nature of a writ of right*, to which the defendant can have *no plea but to juſtify or diſclaim*, and *cannot plead not guilty*; and that *judgment* both for and againſt the king is *final*. *But* judgment *in an information in the nature of a quo warranto*, if againſt the defendant, is final, but not if againſt the king; and that in this caſe the right is in the corporation, and the execution only in the mayor and aldermen. 12 Mod. 225. Mich. 10 W. 3. Anon.—Cites 1 Sid. 86.—9 Co. 28. a.—2 Inſt. 282.

(C. d. 2) Quo Warranto. Of what Thing it lies. *By what Words.*

1. QUO warranto; *by this word (toll)* he *claimed tallage of his villeins; and by word* * *(term)* he *claimed their progeny, and by* the word *(ſocke)* he *claimed ſuit of his tenants, and by* the word *(ſake)* he *claimed conuſance of pleas of his tenants, and by* the word *(murder) to have amercements of murderers, and by* the word † *(oredelfe) to have ore found in his ſoil.* Br. Quo Warranto, pl. 2. cites It. Not. 19.

* So it is in all the editions of Brooke, but it ſeems it is miſprinted for (them) or (theam) which in Somn. Gloſſ. ſignifies mancipiorum ſobolem, and in Spelm. Gloſſ. the word is them, team, and theam, accordingly. And ſee Keilw. 145. a. —— † Br. Preſcription, pl. 110. cites S. C. Brooke ſays, this ſeems to commence by grant at firſt, and therefore makes a quære if a man may preſcribe in it.

2. *Turn-toll* is to have toll for beaſts driven to be ſold, though they are not ſold. Br. Quo Warranto, pl. 3. cites It. Not. Fol. 21. & 32 E. 3.

(C. d. 3) *Proceedings, Pleadings, and Judgment* in a Quo Warranto, in general.

1. THE defendant in a quo warranto was admitted to *imparle.* Keilw. 138. b. Itin. temps E. 3.

It was moved for a *ſecond imparlance* in a quo warranto, and it was ſaid that it was granted in the caſe of the City of London; but the Court denied it; for Aſtry ſaid, by the courſe of the Court, they were to have but the common imparlance; and (per Cur.) being ex gratia, we *may grant or deny it* as we ſee cauſe. Comb. 12. Hill. 1 & 2 Jac. 2. B. R. Anon.

2. A quo warranto was *brought* for vexation *upon* 48 *points*; and the *Court* being moved in it, *ordered that the proſecutor ſhould* wave that quo warranto, and ſhould bring a new one, and therein *inſiſt only upon three points*; but that he might proceed to a trial upon his new quo warranto in ſuch time as he might have done upon the old (Hill. 22 Car. B. R.) to the end he might not be delayed in his proceedings by bringing of the new quo warranto. 2 L. P. R. 414. tit. Quo Warranto.

3. There is a *difference* between a *writ* of quo warranto and an *information in nature of* a quo warranto, as to the proceſs upon them; for it ſeems, that the proceſs upon information are *ven. fac.* and *diſtringas.* But upon the writ of quo warranto it is *ſummons*; and for default of appearance, that the liberties ſhall be ſeized. Sid. 86. in the caſe of the King v. Trinity-houſe.——Cites Co. Ent. 527, 528, &c.

4. A *verdict* between private perſons may not be read as any *evidence* againſt the king, in an information on a quo warranto. 2 Show. 48. Paſch. 31 Car. 2. B. R. the King v. Carpenter.

5. A verdict in a quo warranto on the mere right *concludes the king*, but on information it does not. 2 Show. 47. Paſch. 31 Car. 2. B. R. the King v. Carpenter.

(C. d. 4) Proceedings, Pleadings, and Judgment in Quo Warranto, *as to Liberties and Franchiſes.*

1. 18 *E.* 1. ENACTS, that *if any can verify by good inqueſt or otherwiſe, that they, or their anceſtors or predeceſſors, have uſed* * *any liberty whereof they have been impleaded by quo warranto before the death of R.* 1. *and have hitherto* †, *(not having abuſed ſuch liberty,) they ſhall be adjourned to a reaſonable day before the juſtices, within which time they may repair to the king with the record thereof, ſigned by the juſtice's ſeal, which done, the king will confirm their eſtate; and if any judgments have been given upon ſuch writs by the juſtices at Weſtminſter, upon the complaint of the party grieved to the king, he will give them remedy.*

* This extends to all liberties, as well to thoſe that lie in point of charter, as conuſance of pleas, felon goods, and the like, as to thoſe that may be claimed by preſcription, as waif and ſtray, and the like. 2 Inſt 496. —— † This clauſe extends not only to miſuſer, diſ-uſer, and non-uſer of liberties, but to falſe claim of them, and the like. 2 Inſt. 496.

Scrope ſaid that a hundred is out of the caſe of this ſtatute; for this ſtatute is intended of franchiſe, and a hundred cannot be ſaid a franchiſe; for præcipe quod reddat lies of a hundred. But Shard ſaid a hundred is no other than a franchiſe royal, as view, &c. by which he thought that a hundred, which comprehended ſuch franchiſe royal, might properly be claimed as other franchiſes. Keilw. 143. temps E. 3.

All pleas of quo warranto ſhall be from henceforth pleaded and determined in the circuit of the juſtices; and all pleas now depending ſhall be adjourned into their proper counties, until the coming of the juſtices into thoſe parts.

This ſtatute was confirmed by another ſtatute de quo warranto made the ſame year and to the ſame effect.

The coſts, charges, and expences of the ſubjects in theſe caſes were exceſſive, and therefore to meet with this miſchief, and that the ſubject might receive juſtice in his own country, and as it were at his own door, it was the king's ſpecial grace, that pleas of quo warranto ſhould be heard and determined in the eyres of the juſtices. 2 Inſt. 497. —— When juſtices in eyre ceaſed, then this branch for the eaſe of the ſubject, and for ſaving their coſts, charges, and expences, loſt its effect; for with juſtices in eyre this branch lived, and with them it died. Jenk. 498.

2. In quo warranto he claimed franchiſe, &c. and he *made default at the day*, by which it was *awarded that the franchiſe be ſeiſed into the hands of the king; and that the ſheriff anſwer the profits*; and after the *defendant came by attorney, and prayed to replevy the franchiſe*, and *had it ſalvo jure regis*; and *ſaid that he claimed the franchiſe as appendant time out of mind*, and was received. Br. Quo Warranto, pl. 5. cites It. Canc. 6 E. 2. 6.

3. In quo warranto the *defendant claimed aſſiſe of bread and ale*, &c. He ſaid that it was *appendant to the manor time out of mind*, &c. and claimed *by feoffment of the manor cum pertinentiis*. And it was held that *he may vouch*, becauſe the franchiſe paſſed with the manor; *and* it was admitted alſo that he may *preſcribe*. Br. Quo Warranto, pl. 6. cites It. Canc. 6 E. 2. 7.

4. In quo warranto if a man *claims court of his demeſne tenants in his manor*, it ſuffices to *ſhew that he has manor there without more*; and there it was ſaid that he *need not anſwer to it*. Br. Quo Warranto, pl. 4. cites T. 17 E. 2.

5. In quo warranto *he claimed to have franchiſe in his manor of C.* and *ſaid that his father was ſeiſed of the manor in fee, and died ſeiſed, and he entered as heir, and prayed his age,* becauſe he is within age; and the parol demurred. Bro. Quo Warranto, pl. 3. cites It. Not. fol. 21. and 32 E. 3. Keilw. 147. a. S. C.

6. When *franchiſe is allowed in eyre,* the *award is* no other than *that he go ſine die ſalvo jure regis;* and ſo if it be rightly allowed and well * uſed, it ſhall be allowed, but if it be not well allowed, we will not allow it. Keilw. 139. b. 140. a. per Chaunt. Itin. Temps E. 3. Quo warranto is in nature of the king's writ of right for franchiſes and liberties,

wherein *judgment final* ſhall be given either againſt the king for the point adjudged, or for the king; and the *ſalvo jure* for the king *ſerveth for any other title* than that which was adjudged; and therefore William de Penbrugge the King's Attorney, for proſecuting a quo warranto againſt the Abbot of Fiſhamp for franchiſes within the manor of Steynings ſine præcepto, was committed to gaol. 2 Inſt. 282

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7. A *man* at the commencement of the eyre *claimed to have view and waif* in his manor of L. and *in the* writ of *quo warranto waif was omitted,* by which he prayed that he might plead for it upon his claim, et conceſſum fuit ei; quod nota. Keilw. 147. b. Itin. Temps E. 3.

8. In quo warranto againſt Sir J. C. for *claiming wreck,* defendant pleaded *that E. duke of B. was ſeiſed of the manor of D. to which he had wreck appendant, and was de alta proditione debito modo attinctus,* and that found before the eſcheator; and that the manor *deſcended to queen M. who granted the ſame to the earl of W. who granted to the defendant.* Upon which it was demurred, and exception was taken to the plea, that the attainder was not fully and certainly pleaded. But Plowden argued contra, that it was certainly pleaded, viz. debito modo attinctus; and it is *ſhewn that the wreck is appendant to the manor,* and then if he hath the manor he hath the wreck alſo; and *if defendant hath the manor, it is not material, as to the queen, how he hath it; for ſhe does not claim the ſame, but impeaches the defendant for uſing ſuch a liberty there;* but if the heir of the ſaid duke had demanded the manor there againſt him, the attainder ought to have been pleaded certainly. 3 Le. 72. pl. 111. Hill. 20 Eliz. B. R. the Queen v. Sir John Conſtable.

9. Information was, *that where the defendant was ſeiſed of a manor, and of an houſe within it, he claimed to have a court or view of frankpledge infra meſuagium prædict.* and alſo *that ſine aliqua conceſſione ſive authoritate uſurpavit libertates prædictas.* Defendant pleaded, that *non uſurpavit libertates prædict. infra meſuagium prædict. modo & forma.* It was inſiſted that the plea is not good; for the natural anſwer to a quo warranto is either to claim or diſclaim, and defendant does neither of them. Shute J. ſaid a quo warranto contains but two things in it. 1ſt, It demands quo warranto he claims ſuch liberties. 2dly, He charges him with a tortious uſurpation of them; and here the defendant hath anſwered to the uſurpation, but not ſhewn by what title he claims them. And that the like caſe was adjudged in this court, that non uſurpavit modo & forma was no ſufficient anſwer. The caſe was adjourned. Godb. 91. pl. 103. Mich. 28 & 29 Eliz. B. R. Sir Jervis Clifton's caſe. 3 Le. 184. pl. 235. S. C. — 4 Le. 199. pl. 318. S. C.

2 Le. 212. pl. 266. S. C.—— Cro. E. 125. S. C. by name of Partridge's caſe.

10. It was agreed by the whole Court, that in a quo warranto it is *not ſufficient* for the defendant *to ſay that ſuch a ſubject hath lawful intereſt* to hold leets *without making title* to himſelf; for the writ is quo warranto he claims them. 2 Le. 28. pl. 31. Trin. 30 Eliz. B. R. the Queen v. Partridge.

9 Rep. 24. Mich. 33 & 34 Eliz. the Abbot of S rata Marcella's caſe.

11. Quo warranto, &c. the defendant *pleaded that the abbot of B. was ſeiſed* of waifs and ſtrays *by preſcription, and had uſed* and exerciſed *the liberty to have catalla felonum within three months before the ſuppreſſion, without ſhewing by what title, grant, or charter; and that by the ſtatute* 32 *H.* 8. *for reviving the liberties, and by patent of tot, talia, tanta,* conſimilia libertates, &c. as the abbot had, *he concluded eo warranto he uſed and claimed the liberties aforeſaid, as pertaining to the manor.* Two judges were of opinion, that the defendant had ſet forth a ſufficient title by way of uſage in the abbot, *without ſhewing the grant made to the abbot;* as a man may plead a diſcharge of tithes of abbey lands by the ſtatute 31 H. 8. that the abbot held diſcharged at the time of the diſſolution, without ſhewing how he was diſcharged; but Popham Ch. J. e contra, becauſe felons goods could not paſs from the crown without matter of record; now if an uſage ſhould be pleadable in ſuch caſe, and iſſue ſhould be taken upon a traverſe of legitime uſus fuit, this muſt be tried by a jury; and by conſequence they muſt find what the law is upon that record, which is againſt the maxims of the law; but the caſes of tithes are otherwiſe, becauſe they may be diſcharged by unity of poſſeſſion, or by real compoſition, which is matter en pais, or by the pope's bulls, which are not records in our law. But they all agreed that he *ought to ſhew the eſtate of the abbot*, becauſe the ſtatute revives no other eſtate in the liberties in the crown, than ſuch as came to the crown by the diſſolution of the abbey. And as to the concluſion of *eo warranto*, they all agreed that it was good becauſe it *was taken diſtributively*, viz. that he uſed ſuch as appurtenant, which might be appurtenant, and the others by the other title. Mo. 297. pl. 443. Paſch. 32 Eliz. the Queen v. Vaughan.

2 Bulſt. 156. S. C.—— Roll. R. 399. Trin. 14 Jac. S. C.

12. A quo warranto againſt the biſhop of Durham to know why he claimed to have the *goods and chattels of felons and perſons ſtanding mute;* he *pleaded that Durham was a county palatine, and had jura regalia, and by reaſon thereof he claimed that privilege.* Per Coke, and the whole Court agreed thereto, that though a man cannot preſcribe to have felons goods, becauſe ſuch preſcription is only for matters in fact, yet a man may preſcribe to have a county palatine, and by conſequence to have all theſe as incidents to it. 2 Bulſt. 226. Paſch. 12 Jac. Sir Jerom Bows v. Biſhop of Durham.

13. Quo warranto was brought to ſhew why they *claim divers liberties, &c. within the palace of the archbiſhop of Canterbury.* The defendants *as to part in ſuch a place juſtify in the city preterquam in Staple-gate and Weſt-gate, & quoad reſiduum locorum diſclaim.* It was reſolved, that the *diſclaimer extends* to Staple-gate and Weſtgate, notwithſtanding the preterquam; and judgment of this part was given immediately for the king. 2 Roll. Rep. 482. Mich. 22 Jac. B. R. the King v. the Citizens of Canterbury.

14. In

14. In quo warranto for claiming of a *market*. The defendant *claimed the ſame by letters patents* of E. 3. made to the abbot of G. but *did not plead hic in curia prolat'* as he ought to do. The *attorney-general confeſſed this*; whereupon the Court was moved for judgment for defendant. But though the patent was in court, Doderidge J. ſaid, it did not appear ſo to the Court judicially, it not being pleaded with hic in curia prolat'. And this *cannot be amended without the attorney-general's conſent*, and without amendment judgment muſt be for the king; and afterwards a rule was entered by conſent of the Court, it being moved by Coke Ch. J. viz. that the opinion of the Court was, that the plea in bar here is not good, neither in the manner nor matter of it; and this was done, becauſe otherwiſe this matter hereafter might be evidence againſt the king. 3 Bulſ. 58. Trin. 13 Jac. the King v. Capel.

15. A quo warranto was brought for *claiming divers liberties, privileges, &c.* without expreſſing any certainty of what they conſiſted, as waiſe, eſtray, frank-pledge, &c. ſo as defendant might make a particular anſwer to them, and therefore the Court held it naught. But Mr. Waterhouſe the Prothonotary ſaid, that there are precedents accordingly; whereupon a day was given to ſearch the precedents, and proceſs was ordered in the mean time to ceaſe againſt the defendant. Noy, 121. Sir Henry Cheverell's caſe.

16. A quo warranto was brought *for uſurping certain privileges within the manor of Linton*. Iſſue was joined, whether John abbot of P. ever uſed privileges *of court leet and court baron*; and found that he had not uſed them, &c. It was moved in arreſt of judgment; 1. Becauſe *they find that the keeping of the court leet and baron is an uſurpation, whereas they alſo find that ſuch courts are uſed as within the manor (finding the manor)* which is impoſſible; [183] for a court baron is a neceſſary incident to it as it is a manor, and cited 6 E. 3. 11. No judgment was given. 2 Sid. 68. Paſch. 1658. B. R. Wildmore's caſe.

17. In a quo warranto againſt the town of Farnham, for *uſing a fair and market, and taking toll*, &c. *iſſue was taken, whether they had toll by preſcription* or not, and it was found that they had; but it was moved in arreſt of judgment, that here was a *diſcontinuance, becauſe* there was *no iſſue as to the other liberties* claimed by them, *(viz.) a fair and market*; and this action is not helped by the ſtatute of jeofails, quod fuit conceſſum; but the Chief Baron ſaid, that they were too ſoon to urge that, becauſe judgment was not yet given, and *before judgment there can be no diſcontinuance againſt the king*, becauſe the *attorney-general may yet proceed, by the king's prerogative, to take iſſue upon the reſt, or* may *enter a nolle proſequi*; but if he will not proceed, the Court may make a rule on him ad replicandum, and ſo there may be a ſpecial entry made of it, wherefore non allocatur. Hard. 504. Paſch. 21 Car. 2. in the Exchequer. Attorney-general v. Town of Farnham.

18. Upon a quo warranto when the *liberties* are *ſeiſed quouſque*, &c. and they *do not replevy them*, (per Aſtry) the courſe is, that

judgment final ſhall be given niſi they plead within ſuch a day. Comb. 19. Paſch. 2 Jac. B. R. Anon.

19. Wherever any *judgment* is given *for the king* for a liberty uſurped, it *is quod extinguatur, and that the perſon who uſurped* libertates, &c. *nullatenus intromittat*, &c. which is the judgment of ouſter, but the quo warranto muſt be brought againſt particular perſons. *But* where it is *for a liberty claimed by a corporation*, there it muſt be brought againſt the body politic, in which caſe *there may be a ſeiſure of* the liberties, which will not warrant either the ſeiſure or diſſolving of the corporation itſelf. Per Curiam. 4 Mod. 58. Mich. 3 W. & M. B. R. in Sir Ja. Smith's caſe.

20. If *ſeveral privileges* are *granted* in a charter, and there is a forfeiture of the charter for an *abuſe of one of the privileges*, and a quo warranto is brought, and judgment upon it, this is a forfeiture of the whole charter. 2 L. P. R. 414. tit. Quo Warranto.

21. It was moved for an information in nature of a quo warranto *againſt the ſteward of a court-leet, and againſt the bailiff and conſtables, for impannelling a jury not duly ſummoned*, the bailiff being the proper officer to ſummon them, who ſhould be all freeholders, for they only have a right to be jurymen; but there were none ſummoned, and 6 perſons who had no right being preſent in court were ſworn of the jury, and 6 freeholders being likewiſe preſent in court refuſed to be ſworn becauſe not ſummoned, neither would they ſerve with thoſe who had no right to be of the jury, whereupon the ſteward ſwore 6 more; *and the jury thus conſtituted* of 12, not having right to be jurymen, *choſe the bailiff and conſtables*. The ſteward ſhewed for cauſe, that the 6 freeholders who appeared in court were duly ſummoned but refuſed to be ſworn, whereupon he ſwore a jury out of ſuch as were preſent, which he inſiſted was a good election, and that this jury choſe the bailiff and conſtables, and that this was *the conſtant courſe of chuſing ſuch officers;* and that it would be dangerous to make a precedent of trying the right of chuſing ſuch men by a quo warranto. The Court thought there was no room for any complaint againſt the conſtables or bailiff; but if any, it is againſt the ſteward; and ſo a rule was made for him to attend, and ſhew cauſe why an attachment ſhould not go; and the rule for the reſt was in the mean time enlarged. 8 Mod. 130. Trin. 9 Geo. 1724. the King v. Harriſon.

[184] (C. d. 5) Proceedings, Pleadings, and Judgment in Quo Warranto, *as to Corporations.*

1. IN a quo warranto brought *againſt the bailiffs, aldermen, &c.* they *appeared by warrant of attorney*, but *one of the bailiffs* named in the warrant *did not appear nor agree to it.* The appearance by the major or greater part being recorded was held ſufficient. And alſo, that though the warrant of attorney was *under another ſeal* than their common ſeal, yet being under another ſeal and

and recorded it cannot be annulled. Godb. 439. Bailiffs, &c. of Yarmouth's caſe.

2. Information in nature of a quo warranto againſt the defendants, *for taking gravel and ſand in the river Thames for ballaſt;* they *juſtified by* virtue of *a former patent* to them by the king *of the office of laſtage and ballaſtage of all ſhips in the river Thames;* and the opinion of the whole Court was, that the defendants had a good title to take ſand there for ballaſt, without ſaying cum pertinentiis; but upon a defect in pleading, judgment was given againſt them; 1ſt, That they *pleaded their patent as a grant and confirmation*, which made it *double* (it being upon demurrer), and cited D. 115. But the reporter ſays, vide the caſe of the KING v. BRIDGETT in quo warranto, in 17 Jac. where it was held good. 2dly, They did *not allege that it belonged to the ſaid office to take ſand and gravel in that river.* 3dly, They did *not ſay that the office was* an *ancient* office. Sid. 86. Trin. 14 Car. B. R. the King v. Trinity-houſe.

It was ſaid in this caſe, that the ſoil of all navigable rivers in England belongs to the king, and the reporter adds a nota, that if this had been in a quo warranto, the judgment had been final, becauſe that is a writ of right; but it being in an information in nature of a quo warranto, it is not concluſive, and it appears by precedents, that there is a difference in proceedings. *In the quo warranto is a ſummons, and for default of appearance judgment is that the liberties be ſeiſed, but in the information* the proceſs is a *venire facias and diſtringas.* Sid. 86. Trin. 14 Car. 2. B. R. the King v. Trinity-houſe.

3. In a quo warranto *againſt the muſicians company in London* the return was, that they were a corporation, &c.; but the Court took *exceptions to the return:* 1ſt, Becauſe it appears that the *name of their corporation was the maſter and wardens, whereas in their return they made themſelves guild or fraternity;* for they muſt be the one or the other. 2dly, They returned, *that they may elect perſons of the fraternity into the ſaid fraternity*, which is *contradictory;* for they ought to elect into the ſociety ſuch as were not of it before, and not ſuch as were. Sid. 290. pl. 7. Trin. 18 Car. B. R. the King v. Berdwell. 2 Keb. 52. 63. 88.

4. The king brought quo warranto *againſt A., B., C., and D., & alios periclitatores & plantatores pro prima colonia London in Virginia, to know by what warrant they claim divers liberties.* They come and plead inſufficiently, upon which the king demurs. The queſtion is, how judgment ſhall be entered? for the *maſter and chief of the company were left out* in the quo warranto; and the judgment was given againſt A., B., C., and D., & alios periclitatores, &c. But *quære if this binds the Corporation?* 2 Roll. Rep. 455. Trin. 22 Jac. B. R. Virginia Company's caſe.

5. A *corporation aggregate* may be forfeited and ſeiſed into the king's hands *upon a breach of truſt repoſed in them for the good government of the king's people.* And in the principal caſe a ſeiſure is plainly implied in the ſtatute of 28 *E.* 3. *cap.* 10. which enacts, that *on the firſt offence of the city of London, it ſhall forfeit* 1000 *marks, on the ſecond* 2000, *and for the third, the liberty and franchiſe of the city of London ſhall be taken into the king's hands*, which plainly argues that there may be a ſeiſure of the corporation; and as to a forfeiture the act of oblivion proves it, where 12 Car. 2. cap. 11. ſ. 5. is, "That all bodies corporate, cities, boroughs, &c. are [185] "pardoned and acquitted of all forfeitures, &c." And ſhould the law be otherwiſe, it would erect ſo many independent repub-

lics, as there are corporations now in England, which would be of miſchievous conſequence to the king and kingdom. 2dly, The *affirming a power to make by-laws for levying money* as they have done, is a great oppreſſion of the people, and conſequently a breach of that truſt repoſed in them for the welfare of the king's ſubjects, and conſequently a juſt cauſe of forfeiture. 3dly, *A petition* (mentioned in the pleadings) *ſcandalous to the king and his government, and tending to beget in the people an hatred of their ſovereign*, is a juſt cauſe of forfeiture. Reſolved. 2 Show. 278, 279. Hill. 34 & 35 Car. 2. B. R. the King v. the Mayor, &c. of London.

6. If the *corporation* in a quo warranto *appears not thereto*, judgment ſhall be entered for a *ſeiſure quouſque, and if in the mean time they come not and replevy* their corporation and appear, then *judgment final ſhall be given* againſt them in the term after; and it ſhall not be a good appearance, unleſs the *warrant of attorney* be *made under the corporation ſeal.* 2 Show. 365. pl. 356. Trin. 36 Car. 2. B. R. The King v. Cheſter City.

7. 9 *Ann. cap.* 20. *ſ.* 1. *Where any writ of mandamus ſhall iſſue out of the Queen's Bench, the courts of ſeſſions of counties palatine, or the grand ſeſſions in Wales, to admit and reſtore burgeſſes or officers of corporations, ſuch perſons, who by law are required to make return, ſhall make their return to the firſt writ of mandamus.*

S. 2. *As often as in any of the caſes aforeſaid any mandamus ſhall iſſue, and a return ſhall be made, it ſhall be lawful for the perſons, ſuing ſuch mandamus, to plead to or traverſe all or any material facts contained in the return, to which the perſons making return ſhall reply, take iſſue, or demur, and ſuch proceedings ſhall be had therein, as might have been had if the perſons ſuing ſuch writ had brought their action on the caſe for a falſe return, and if iſſue ſhall be joined on ſuch proceedings, the perſons ſuing ſuch writ may try the ſame in ſuch place as an iſſue joined in ſuch action on the caſe might have been tried; and in caſe a verdict be found for the perſons ſuing ſuch writ, or judgment given for them, they ſhall recover their damages and coſts as they might have done in ſuch action on the caſe to be levied by capias ad ſatisfaciendum, fieri facias, or elegit; and a peremptory writ of mandamus ſhall be granted without delay, as if ſuch return had been adjudged inſufficient; and in caſe judgment ſhall be given for the perſons making ſuch return, they ſhall recover coſts.*

S. 3. *If damages be recovered by virtue of this act againſt any ſuch perſons making ſuch return to ſuch writ, they ſhall not be liable to be ſued in any other action for making ſuch return.*

Informations in nature of a quo warranto may be brought *with leave of the Court* at the relation of *any perſon* deſiring to proſecute, and this is by virtue of the ſtatute of

S. 4. *In caſe any perſons ſhall uſurp, intrude into, or unlawfully hold any of the ſaid offices or franchiſes, it ſhall be lawful for the proper officer in each of the ſaid courts, with the leave of the courts, to exhibit informations in the nature of quo warranto, at the relation of any perſons deſiring to proſecute the ſame, and who ſhall be mentioned in ſuch informations to be the relators againſt ſuch perſons ſo uſurping, intruding into, or unlawfully holding the ſaid offices or franchiſes; and if it ſhall appear to the Courts, that the ſeveral rights of divers perſons to the ſaid offices or franchiſes may properly be determined on one information, it ſhall be lawful for the ſaid Courts to give leave to exhibit one ſuch information againſt*

againſt ſeveral perſons, in order to try their reſpective rights; and ſuch perſons ſhall appear and plead as of the ſaid term and ſeſſions in which the informations ſhall be filed, unleſs the Court ſhall give further time, and ſuch perſons who ſhall proſecute ſuch informations ſhall proceed thereupon with the moſt convenient ſpeed. 9 *Annæ*, 20. the end of which ſtatute was to prevent frivolous and vexatious controverſies. Per Cur. 8 Mod. 351. Paſch. 11 Geo. the King v. Butler.

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S. 5. *In caſe any perſons, againſt whom any informations in nature of a quo warranto ſhall in any of the ſaid caſes be exhibited, ſhall be found guilty of an uſurpation, or intruſion, or unlawfully holding any of the ſaid offices or franchiſes, it ſhall be lawful for the ſaid Courts to give judgment that the relators ſhall recover their coſts; and if judgment be given for the defendants, they ſhall recover their coſts againſt ſuch relators.*

S. 6. *It ſhall be lawful for the ſaid Courts to allow to ſuch perſons, to whom any writ of mandamus ſhall be directed, or againſt whom any information in nature of a quo warranto, in any of the caſes aforeſaid, ſhall be proſecuted, or to the perſons, who ſhall proſecute the ſame, ſuch convenient time to make a return, plead, reply, rejoin, or demur, as to the ſaid Courts ſhall ſeem juſt.*

S. 7. *The act* 4 *Ann. cap.* 16. *for amendment of the law and all the ſtatutes of jeofails, ſhall be extended to writs of mandamus and informations in nature of a quo warranto.*

S. 8. *The mayor, bailiff, or other officer, to whom it belongs to preſide at the election, and make return of any member to ſerve in parliament, and who ought to be annually elected, and who has been in ſuch annual office for one year, ſhall not be capable to be choſen into the ſaid office for the year immediately enſuing; and where any ſuch annual officer is to continue for a year, and until ſome other perſon be choſen and ſworn into ſuch office, if any ſuch officer ſhall voluntarily and unlawfully prevent the chuſing another perſon to ſucceed into ſuch office at the time appointed, he ſhall forfeit* 100 *l. to be recovered with coſts of ſuit by ſuch perſon as will ſue for the ſame in her majeſty's courts of record, one moiety thereof to be to her majeſty, and the other moiety to him that will ſue for the ſame.*

8. Information in nature of a quo warranto againſt S. *for uſurping the office of a common burgeſs of the town of the Deviſes in Wiltſhire;* and upon a trial at bar upon this iſſue, *whether Sutton was choſen a capital burgeſs by mayor, recorder, and capital burgeſſes?* the following points aroſe; the *recorder had made a deputy recorder by writing under his hand and ſeal, and afterwards had revoked this deputation by another writing, a copy of which was offered in evidence of the revocation.* But this held not good evidence, becauſe it did not appear but they might have produced the original. Deputation of an officer is in its own nature grantable by parol; and therefore though it ſhould happen to be granted by writing, yet ſince it is in itſelf grantable by parol, it may be revoked by parol. *By the charter* that incorporates the town, *the mayor, recorder, and in his abſence deputy-recorder and capital burgeſſes, vel major pars* eorundem, *are impowered to chuſe* capital burgeſſes: now the queſtion was, *whether* upon theſe words of the charter, *acts done by*

the mayor and majority of the burgeſſes, without the preſence of the *recorder or his deputy, were good?* And the Court ſeemed to incline that they were good, becauſe the word (eorundem) refers not only to the capital burgeſſes, but mayor, recorder, and capital burgeſſes; and yet the reaſon why the *preſence of the mayor is neceſſary to corporate acts*, is not becauſe he is particularly named, but *becauſe he is the head of the corporation*; and if this were not ſo, the addition of theſe words in charters (quorum recorder unus) would be uſeleſs and unneceſſary. 10 Mod. 74, 75. Hill. 10 Ann. B. R. The Queen v. Sutton.

9. Another *queſtion* was, *whether ſuppoſing it not neceſſary by the charter, that the recorder ſhould be preſent, yet the iſſue did not oblige them to prove him preſent* at the election? To this it was ſaid by the council, that the charter did not require the preſence of the recorder, the queſtion was no more than this, whether they ſhould be obliged to prove *an immaterial part of the iſſue?* It was ſaid further, that by a parity of reaſon it might be expected that they ſhould prove the preſence of every one of the common burgeſſes; that *by the iſſue* no more *was meant*, than
[187] *that the election was made by thoſe who had a power to do it*; that ubi major pars, ibi tota, viz. the authority of the whole. And of this opinion was the Court. 10 Mod. 75. The Queen v. Sutton.

10. Another queſtion ſtarted was, *whether in a corporation* that was by charter *to conſiſt of mayor, recorder, common burgeſſes*, &c. *the ſame perſon might not be both mayor and deputy-recorder.* 10 Mod. 75. The Queen v. Sutton.

11. Another point was moved upon the words of the *charter*, which *appoints the ſwearing of a common burgeſs* to be done *before the mayor, recorder, common burgeſſes, or the majority* of them *tunc ibi preſentium*; whether or no a majority of the whole body was by theſe words neceſſary to be preſent at the ſwearing, or *whether a majority of thoſe* that were *preſent was only requiſite, though* they ſhould *not* be *the majority of the whole?* It was ſaid, that upon the reaſon of the thing it was not neceſſary that the ſwearing in ſhould be done with the ſame ſolemnity as the chuſing in; for the choice is a voluntary deliberate act; the ſwearing in on the contrary is what a perſon once choſen may challenge as his right, and may by mandamus compel them to do. And if this conſtruction did not prevail, the words in this clauſe of the charter concerning the ſwearing, tunc ibi præſentium, which are not in the clauſe concerning the election, would ſignify nothing. As for the objection, that it ſeems abſurd to ſay a man muſt be ſworn before a majority of thoſe that are preſent, ſince if they are preſent he muſt unavoidably be ſworn before them all; the anſwer is, that this clauſe *is to be underſtood of being ſworn in by the conſent of a majority of thoſe that were preſent.* 10 Mod. 75, 76. The Queen v. Sutton.

12. Another queſtion was, *whether by a charter that requires acts to be done by a majority* of the corporation, *a perſon might not be removed by a majority of that body, excluding the perſons that are to*

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be removed, and cannot vote in their own cauſe? But the whole Court were of opinion, that a removal being an act of an odious nature, all clauſes concerning it muſt receive a ſtrict interpretation; and that therefore the word *majority ſhould be underſtood* of a majority *of the whole corporation*. 10 Mod. 76. The Queen v. Sutton.

13. Another queſtion raiſed was, *whether not ſummoning* to a meeting, *members de facto diſfranchiſed, though* afterwards upon re-examination it ſhould appear they were *ſtill lawful members, ſhould vacate acts done* in thoſe meetings? Court inclined to think it would not vacate them. 10 Mod. 76, 77. The Queen v. Sutton.

14. Some of the above points were directed to be found ſpecially Ibid.

15. An information in nature of a quo warranto was brought againſt W. for *exerciſing the office of mayor in Portſmouth*. W. pleaded the charter of King Cha. 1. incorporating the town of Portſmouth, &c. and *ſets forth a particular clauſe on the charter, declaring, that if the mayor ſhould die, or* for juſt reaſons *be removed, it ſhould be lawful* for the aldermen *to chuſe another mayor for the remaining part of the year*, until the time to elect came about again; then he ſets forth, that the mayor died, and *that he was choſen by the majority of aldermen, ſecundum formam chartæ prædict.* The Attorney General replied, *non electus modo & forma*, &c. Upon trial at the aſſiſes it was inſiſted, that the defendants to prove the iſſue *muſt firſt prove themſelves qualified by receiving the ſacrament* according to the act of King Cha. 2. which point, inſtead of being found ſpecially, was ſaved by the judge who tried the cauſe. It was afterwards argued for the defendant, but no judgment is mentioned. 10 Mod. 64. Mich. 10 Ann. B. R. Whitehorn the Mayor of Portſmouth's caſe.

Ibid. S. P. againſt others, for *exerciſing the office of alderman.*

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16. An information in nature of a quo warranto was *for exerciſing the office of port-reeve in the borough of Honiton.* The defendant in his bar *ſet forth a right* to that office, and concluded with a traverſe *abſque hoc, that the defendant uſurped the office.* The crown in its *replication*, * *taking no notice of the ſpecial iſſue ſet forth* by the defendant, *joined iſſue upon the traverſe quod uſurpavit, &c.* and upon this *demurrer is joined.* Powis Jun. J. ſaid, he ever took it, that in this caſe the abſque hoc, &c. was but a mere matter of form, and a reſpectful way of concluding the plea. And Parker Ch. J. ſaid, the queſtion turns upon this, whether the traverſe be only matter of form? for if ſo, the crown cannot take iſſue upon it; but if it be a material plea, moſt certainly the crown may do it. 10 Mod. 210. Hill. 12 Ann. B. R. The Queen v. Blagden.

Ibid. 296. Paſch. 1. Geo. 1. S. C. argued for the defendant, and inſiſted (among other things) that the defendant *by ſetting forth his title had anſwered the whole charge of the information*, which was for him to ſhew quo warranto, &c. And the Court were all of opinion, that defendant ſhould have judgment. And Parker Ch. J. ſaid, nobody ever thought non uſurpavit a good plea, becauſe it evidently appears from the nature of the charge, which is to ſhew by what warrant or authority, to which that plea is no anſwer. And if this could not have been pleaded in bar, then that replication, which in effect ſets up that plea again, muſt be naught. And to this Powis and Pratt J. agreed. —— An objection having been made, that *in an information of intruſion the king may take iſſue upon the uſurpation, though the title be ſet forth*; it was anſwered, that an information of intruſion *is of a different nature from that of a quo warranto*, becauſe it does not follow from his having a title, that he is no intruder; but it does that he

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is no uſurper. And the *courſe of precedents* is ſo in intruſion, but otherwiſe in this kind of information, which is a preſumptive argument that there is a difference. And there is *another difference*, that *in an information of intruſion the crown ſets forth its title, and concludes de præmiſſis*, &c. Arg. 10 Mod. 207. & ibid. 209. Parker Ch. J. approved the diſtinction; for though the defendant ſhould have a title, yet it is very poſſible he may be an intruder, but impoſſible that he ſhould be an uſurper.

17. Upon a rule to ſhew cauſe why an information in nature of a quo warranto ſhould not be granted *to ſhew by what authority he claimed to be mayor of Leſtwithiel in the county of Cornwall*, it was ſhewn, that by the charter of incorporation a mayor is always to be elected out of the capital burgeſſes, and *to continue in his office till a new mayor be duly choſen*; that the defendant the preſent mayor never was a capital burgeſs, and conſequently never could be duly choſen mayor out of thoſe burgeſſes; and therefore is no mayor. To this it was anſwered, that he was choſen a capital burgeſs in 1697, and that as many of the inhabitants as are now living ſaw that he was duly elected, except one *Alex.* John, who now complains againſt him; and that having now ſo *long acquieſced under that election, it ſhall not now be brought in queſtion*, it being a ſtanding rule in caſes of this nature, that they ſhall not be examined in ſuch remote degrees. That defendant was choſen mayor in 1706, and that the corporation, for ſome differences among themſelves, did not proceed to any election of capital burgeſſes ſince that time; ſo that the *borough wanted a ſufficient number of ſuch burgeſſes to chuſe a new mayor, and for that reaſon the defendant had continued mayor ever ſince.* The Chief Juſtice was of opinion, that the fact was plain that defendant had been mayor for 16 years together, which is a ſufficient cauſe for an information; ſo that the rule was made abſolute, and the parties were left to try their right upon this information, though one of the judges was of opinion, that a mandamus to elect a capital burgeſs and a mayor had been a good and proper method. 8 Mod. 132. Trin. 9 Geo. 1724. The King v. Alexander John.

The like rule was made on P. to ſhew by what authority he claimed to be *recorder* of the ſame borough; but as to his caſe, he was elected 29 April, 1722; but finding that election not to be good, he *was re-elected* the May following; and *before he was ſworn into the office*, the Court diſcharged the rule made to the like purpoſe as to the recorder, becauſe he did *not rely upon his firſt but upon his ſecond election.* Ibid. Price's caſe.

18. On a rule to ſhew cauſe why an information in nature of a quo warranto ſhould not go for *claiming to be capital burgeſſes of Brecknock*, it was objected that they *never were duly choſen burgeſſes*; and though *one had been burgeſs de facto 12 years, and the other 16 years*; and though it was urged that it would be of fatal conſequence to this borough, after ſo long an acquieſcence, to make all the corporate acts done by them during all that time void, yet it was anſwered that the long acquieſcence could be no colour againſt this rule, which is made on the mere right, and that length of time will never eſtabliſh a right gained by uſurpation; that it is true, in caſes of *not taking the ſacrament, or the oaths of allegiance and ſupremacy*, the Court after a long acquieſcence will intend that they were duly taken; but a right ſhall never be intended when the merits of it are controverted (as in the principal caſe) * and no collateral point diſputed. And the Court being of that opinion, the rule was made abſolute. 8 Mod. 165. Trin. 9 Geo. 1724. The King v. Powell & al.

19. *Stat.* 9 *Ann.* 20. is not exclusive of a quo warranto in all cases not recited in the preamble of the act; and in the principal case, which was for exercising the *office of bailiff of the town of D.* which was averred to be an office for the administration of justice, and therefore of a public nature, judgment was given pro rege. Gibb. 82. Trin. 2 & 3 Geo. 2. The King v. Boyle.

20. If the party on whom a rule is made for an information in nature of a quo warranto, can *shew to the Court, that his right to the franchise in question has already been determined on a mandamus; or* that it hath *been acquiesced in many years without any dispute; or* that it *depends on the right of those who voted for him, which hath not yet been tried; or* that the franchise *no ways concerns the publick,* (as all those which relate to the government of a corporation, or the election of members of parliament, and fairs and markets, &c. are wont to do,) but is wholly of a private nature, *as a coney-warren, &c. or that the election by which he claims is agreeable to charter; or that he has never acted under it,* the Court will not grant the information unless there are some particular and extraordinary circumstances in the case, the determination whereof being left wholly to the discretion of the Court, cannot well come under any stated certain rules. 2 Hawk. Pl. C. 262, 263. cap. 26. s. 9.

(D. d) *Fifteenths* [and Tenths]. *What.*

[1. FIFTEENTHS and tenths *are a certain tax anciently by parliament impositа singulis civitatibus, burgis & oppidis,* but *not upon every particular man, but generally according to the rate of the 15th part of the goods and possessions, as it seems, of the place.* Camden Liber Annalium, 80. *A* fifteenth *was granted to E.* 1. as appears by 7 E. 1. Rot. Clauso Memb. 5. 8 E. 1. Memb. 3. 5. 6. 3 E. 1. Rot. Pat. Memb. 6.]

Spelman's Gloss. verbo Quintadecima says, that it was tributum singulis civitatibus, oppidis, villis totius Angliæ ab antiquo impositum; certum autem & definitum, quod tamen nec annuatim, nec sine parliamentario decreto exigatur. Alias tallagium & taxa. Gal. quinsieme, Angl. The tax. originem sumpsit e Saxonum danegeldo, quod vide, & hidagium: nam cum ex hidarum plerunque colligerentur descriptione hidagium, utique & pari ratione carucagium dicitur ab authoribus. Vide (inquam) has voces. Literæ Ed. 1. Willielmo Spileman & W. Gilberti.——Venire faciatis coram vobis tot & tales, tam milites, quam alios probos & legales homines de com. prædicto, tam infra libertates quam extra, pro quintadecima. Dat. 24 Oct. Reg. 3. Claus. Rot. ejusdem anni.

[2. A *thirtieth and twentieth was granted to E.* 1. Rot. Pat. 34. E. 1. Memb. 12.]

3. By the exposition of those of the Exchequer, *tax and tallage is no other but tenth, fifteenth, or other subsidy granted by parliament,* and the *fifteenth is of the laymen, and the tenth is of the clergy,* and is *to be levied of their land; and the tenth and the fifteenth of the lay gents is of the goods,* viz. *the tenth part of the goods in a city and borough, and the fifteenth part of the goods of the laymen in the country, which was levied in ancient times upon their goods;* that is to say, of the beasts upon their lands, which was very troublesome; *but now* it is levied *according to the rate of their lands by the yards of land,* and other quantities; so that now all know their certainty in

in every vill, and pay throughout the realm; but it is yet levied in ſome places upon their goods, but in ſeveral places upon their lands; which was agreed by the barons. Br. Quinzime, pl. 9. cites M. 34 H. 8.

Fol. 206.

(E. d) *How* it may *commence.*

See (D. d) in the notes of pl. 1.

[1. THE fifteenth is *not any inheritance in the king*, for he cannot have it without *the grant of his people*. 11 H. 4. 35. b.]

(F. d) How the *Taxation* ſhall be.

There is no number to this plea in Roll. Br. Impriſonment, pl. 12. cites S. C.

[1.] VIDE *the form* of the taxation. 1 E. 2. Rot. Pat. Memb. 7.

2. The prior of E. in London brought *attachment upon a prohibition againſt the collectors* of the tenth and fifteenth in London, and *counted that he had delivered the prohibition in the preſence of certain people, that they ſhould not diſtrain for rent of certain tenements held of him in London*; and notwithſtanding they had taken certain ſums of the rents of certain tenements of the prior for the tenths wrongfully, &c. the *collectors ſaid, that their commiſſion was to collect the tenths, among other goods and chattels, of goods ariſing of lands, and tenements purchaſed of religious*, as appears anno 21 E. 1. and becauſe the lands and tenements were purchaſed in forma prædicta, and becauſe the wards where, &c. were not ſufficient in goods, they took the rents of the tenements of the prior after the day of payment thereof; and the prior alleged, that they had levied the fifteenth * of the goods of the tenants inhabiting in the ſaid tenements, ſo ought he to be diſcharged from paying for the rent. And, per Curiam, becauſe the † tenants *paid for their goods in the tenements, the prior ought to be diſcharged from any payment for the rent of the ſame tenements*; by which it was awarded, that the *prior recover damages taxed to* 10*l. and* that the *collector capiatur*. Br. Quinzime, pl. 2. cites 7 H. 4. 33.

* All the editions are (del biens et tenements inhabitants in les, &c.)

† Orig. is (tenements).

But per Hill, *the laymen* ſhall be charged *for their goods* to the fifteenth, *and the lay tenants for their land.* Ibid.

3. Where *granges*, &c. *are charged to the fifteenth, and after are made vills and are inherited by laymen*, yet they *ſhall not be aſſeſſed to the fifteenth for their goods; for the lord is charged to the tenth.* Per Thirn. Br. Quinzime, pl. 3. cites 11 H. 4. 35.

4. If fifteenth, tenth, tax, tallage, or ſubſidy be granted, and the *vill of D. is taxed to* 10*l.* and *J. S. of D. is privileged therefrom by grant of the king*, there *his ſum ſhall be recouped*, and the vill ſhall be charged of the reſt. Per tot. Cur. Arguendo, quod nota, Br. Quinzime, pl. 5. cites 19 H. 6. 63.

4 Le. 111. pl. 227. S. C.

5. It was held, that *fifteenths* are *to be levied of goods and chattels properly*, and one townſhip ſometimes is richer than another, and therefore it is not reaſon that they pay their fifteenth always according

cording to the ſame proportion. *But by* Clerk Baron, where the *cuſtom* has been, that the fifteenth ſhould be *taxed according to the quantity of acres*, there the rate and purport ſhall be always one, whoſoever holds the land. 4 Le. 185. Trin. 32 El. in the Exchequer, Bartaſe and Hind's caſe.

6. *Since* the time of *magna charta*, *the manner* of the fifteenth *is altered*; for *now* the fifteenth, which is alſo called the taſk, *is not originally ſet upon the polls* as at that time it was, *but* now the [191] fifteenth *is certainly rated upon every town*. And this was *by* virtue of *the king's commiſſion* into every county of England *in* 8 *E.* 3. Taxations were made of all the cities, boroughs, and towns in England, and recorded in the Exchequer; and that rate was at that time the fifteenth part of the value of every town, and therefore retaineth the name of fifteenth ſtill. 2 Inſt. 77.

(G. d) *Who* ſhall *pay it.*

[1.] VIDE *the form of aſſeſſing it.* 34 E. 1. Rot. Pat. Memb. 12. 1 E. 3. 2. Rot. Pat. part 1. Memb. 7.] There is no number to this plea in Roll.

2. Note that *cities and boroughs ſhall pay to the tenths, and uplands to the fifteenths.* Br. Quinzime, pl. 8. cites 11 H. 4. 2. and ſays, this was likewiſe agreed in the Exchequer, anno 34 H. 8. S.P. Br. Exemption, pl. 13.

3. *And* ſee in the Regiſter, 181. that *none ſhall pay to the tenth but boroughs, and tenants in ancient demeſne*, and *others ſhall pay to the fifteenth, and none ſhall be double charged*, nor compelled to pay to the one and the other. Ibid. and cites F. N. B. S.P. Br. Exemption, pl. 13.

4. A. was aſſeſſed to a fifteenth, but upon refuſal to pay the ſame, the collector diſtrained his beaſts and ſold them. A. brought treſpaſs. The collector exhibited a bill againſt A. who ſhewed, that the *ſtatute* 29 *Eliz. which enacted this fifteenth, provides, that it ſhould be levied of the moveable goods, chattels, and other things uſual* to ſuch fifteenths and tenths, to be contributory and chargeable. And ſhewed further, *that his beaſts diſtrained were tempore diſtrictionis upon the glebe-land of a parſonage-preſentative, which he had in leaſe; which glebe-land is not chargeable uſually to fifteenths granted by the temporalty, nor the cattle upon it.* It was the opinion of the juſtices, that though the parſon himſelf ſhall pay tenths to the king, yet the *lay-farmer* ſhall pay fifteenths, and *his cattle are diſtrainable upon the glebe-lands of the parſonage.* And ſo the diſtreſs and ſale were awarded lawful. 3 Le. 259. pl. 344. Mich. 32 Eliz. B. R. Sledd's caſe. 2 Le. 146. pl. 179. Mich. 32 Eliz. S. C. by name of Stedd's caſe.

(H. d) *In reſpect of other Charge.*

[1. AN abbot or other *religious man ſhall not be charged to the fifteenth for thoſe goods of which he pays a tenth among the ſpiritual.* (Vide this) 1 E. 2. Rot. Pat. Memb. 7. 3 E. 2. Rot. Pat. Memb. 27.]

Br. Quinzime, pl. 3. cites S. C.

[2. If an abbot be charged for *tenths for his own he ſhall not be charged for the ſame for a fifteenth.* 11 H. 4. 35. adjudged.]

Br. Quinzime, pl. 3. cites S. C. per Thirn. And the king may be ſerved of his ſum of the goods of other lay-tenants.—It ſhall be diſcharged of the tenths. Per Thirn. And therefore it ſeems that it ſhall pay the tenth again. Br. Extinguiſhment, pl. 12. cites 11 H. 4. 34, 35.

[3 If *land* be *diſcharged of fifteenths in the lands of the abbot in reſpect of tenths* paid by him, if the land *after comes into the hands of tenants, and* after *comes back to the abbot*, yet it is not chargeable. 11 H. 4. 35. b. 37.]

[192] [4. If land *has been charged of fifteenths in the hands of the abbot, and there are no inhabitants upon the land; if after there are inhabitants* and a vill, yet the inhabitants ſhall pay fifteenths, though their lord pays tenths for the ſame land. 11 H. 4. 36. b.]

See (N. d) pl. 5.

(I. d) Fifteenths. *Tenths.*

[1. HE who *is aſſeſſed in one vill by his beaſts or goods* to the fifteenths, cannot be aſſeſſed alſo in another vill. 11 H. 4. 35. b. 21 E. 3. 42. b.]

[2. A man cannot be aſſeſſed to the fifteenth *for certain beaſts*, if he *has not any beaſts at the* time. 11 H. 4. 36. b.]

Br. Quinzime, pl. 4. cites S. C. per Hank.

[3. If I have *terretenants* in a vill, and they *pay for their goods to the fifteenth*, I, who have nothing in the vill but the *rent* of my tenants, *ſhall not pay* to the fifteenth. 11 H. 4. 45. b.]

Br. Quinzime, pl. 4. cites S. C. per Skrene.

[4. If I leaſe land for years or life, rendering rent; the leſſee ſhall pay to the fifteenth for his *goods*, and I ſhall pay *nothing for the rent*. 11 H. 4. 45. b.]

Br. Quinzime, pl. 2. cites S. C.

[5. *So* if *my tenants pay fifteenths for their chattels, I ſhall not pay tenths for the rent of the ſame land.* 7 H. 4. 33. b. adjudged.]

[6. If a *manor* be *annexed to the ſpirituality of a priory, and the prior is taxed after among the clerks for this*, yet the *tenants in fee of the manor ſhall be taxed to the fifteenth among the temporal men.* 29 E. 3. 28. b.]

* Fol. 207.

[7. And *ſo the prior* himſelf, *if any of thoſe tenements in fee come to* * *him by eſcheat*, ſhall be taxed to the fifteenth for them. 29 E. 3. 28. b.]

[8. *But* if any tenements which were in the hands of the *tenants by bondage*, or of tenants *for life or years at the time of the annexation of the manor to the priory*, ſhall after come to the prior in poſſeſſion, he ſhall not be taxed to the fifteenth for them. 29 E. 3. 28. b.]

9. 9 *H.* 4. 7. enacts, that *goods ſhall be chargeable towards the payment of tenths or fifteenths in the place where they were at the time the ſame were granted; howbeit, none ſhall be twice charged for his goods.*

10. The ancient way was *by tenths and fifteenths*, then by *ſubſidies*, and after by *royal aids*, and at laſt by a *pound rate*; the former were all on the perſon or perſonal eſtate, and were much the ſame thing; the latter was upon rents and lands. In 8 *E.* 3. *a*

valuation was made on all the towns in England, *and returned into the Exchequer*, which became the *ſtanding meaſure* for taxing. The firſt ſubſidy was in and by 32 *H.* 8. 50. which was a tax on the perſon for his lands and goods, payable by the party where he lived; and this continued till 15 *Car.* 1. The aſſeſſment of tax according to a pound rate came in in 17 *Car.* 1. and there was a clauſe impowering the tenant to deduct, and ſo it was in 1642, 44, 49, and thence it came to be provided in conveyances, that there ſhould be no deduction of taxes. 2 Salk. 615. Hill. 9 W. 3. B. R. Brewſter v. Kidgell.

(K. d) *For what Goods* they ſhall be taxed. [193]

[1.] OF this taxation of goods of the commonalty of all the counties ſhall be foreprized *armour*, * *horſe furniture, and robes to knights, and to gentlemen and their femes, and their veſſels of gold, of ſilver, and of braſs*; and *in cities and boroughs are to be excepted one robe for the man and another for the feme, and one bed* for both, *one ring and one buckle or claſp of gold or ſilver, or one girdle* † *of ſilk which ſhe always uſed, and* alſo *one cup of ſilver or of* ‡ *nazre*, out of which they drink. And of *goods of* § *houſes there, where they are governed by ſovereign, they are not to be taxed nor priſed; and if they be houſe governed by a* ‖ *meſne lord, their goods ſhall be taxed as well as others are.* And of *goods of people out of cities, burghs, and demeſnes of the king, which goods are found by taxation not to exceed the value of ten* ¶ *ſoudes, nothing is to be demanded or levied; nor of goods of people of cities, burghs, or demeſnes of the king, which do not paſs the value of* 15 *ſoudes, is any thing to be demanded or levied.*]

There is no number to this plea in Roll.

* Orig. is (monture, jueux.)

† Orig. is (de ſey.)

‡ Nacre de perles, ſignifies (mother of pearle.)

§ Orig. is (meſels.)

‖ Orig. is (mettre.)

¶ Soudes or ſoudes is ſmall money current at Ormus, in the Perſian gulph, and is of the value of about 10 French ſols. Richelet's Dict.—A ſol is about an Engliſh penny. See Boyer's Dict.

(L. d) *At what Place* it may be taxed.

[1. IF a man *has land in a vill, ſowed with corn, and has uſed time out of mind to carry the corn to another vill, and ſpend it there*, if the corn was growing there at the time of the grant of the fifteenth, and at the time of the aſſeſſing of the poles, and he taxed for this corn there, though he carries it into the other vill after, according to the preſcription, and [it is] there taxed, yet they ſhall be charged where the firſt tax was. 21 E. 3. 42. b.]

[2. *But* otherwiſe it had been, if he *had brought the corn after the grant, and before the taxing* of the poles according to the preſcription, and there had been taxed for them. 21 E. 3. 42. b. by iſſue.]

The caſe was, that *fifteenth was granted* to the king, at which time *J. N. who inhabited in W. had corn growing in H. and before the fifteenth was aſſeſſed, he cut and carried his corn and his other corn in W. and* yet was aſſeſſed *for the ſame corn in H.* and the collector diſtrained him, and he ſued replevin, and the other avowed for the fifteenth, &c. and the *iſſue was taken, if he had corn in H. at the time of the aſſeſſment or not.* Br. Quinzime, pl. 6. cites S. C.

(M. d) *How* it may be *levied.*

Manwood Ch. B. gave it for a general rule for all counſellors at law,

[1. A Collector of a fifteenth *may levy all the tax of a townſhip upon the goods of one inhabitant only* if he will, and the ſaid inhabitant ſhall have aid of the Exchequer to make every other inhabitant to be contributory. Tr. 8 Jac. Scac. Per Curiam.]

that they did *not* adviſe any collectors of ſubſidies or fifteenths, *to bring bills in the Exchequer*-chamber *for the non-payment* of ſubſidies, &c. for ſuch bills ſhould not be allowed hereafter, *becauſe they had remedy by diſtreſs.* It was alſo holden, that if any be aſſeſſed for the fifteenth which he ought to pay, or if two * towns are to pay together, and the *one town is taxed more than it ought* to be, or had been accuſtomed, thoſe which are grieved by ſuch ſeſſment *may have a commiſſion* out of the Exchequer, which is called *ad æqualiter taxand.* and that was put in ure in a caſe between BARTASE and HIND, where one of them was lord of the town of Little Marloe, and the other of Hedford. And as to this commiſſion, *ad æqualiter taxand.* Manwood and Fanſhaw ſaid, that they could ſhew above 20 precedents. 4 Le. 185. pl. 186. Trin. 32 Eliz. in the Exchequer.—4 Le. 111. pl. 227. S. C.—S. P. 2 Inſt. 79.

*[194]

2. The king is not inheritable to the fifteenth, but yet when it is granted, the king is inheritable to *diſtrain* for it. Per Hill. [and Norton.] Br. Quinzime, pl. 3. cites 11 H. 4. 35.

3. At a convocation the *clergy gave to the king by the hands of a metropolitan, two ſhillings in the pound of the temporal poſſeſſions of religious, and two ſhillings in the pound for the tenths, in the defence of the church of England;* and the *Exchequer awarded fieri facias* againſt abbots, &c. to levy it. Br. Quinzime, pl. 1. cites 28 † H. 6. 11.

† Orig. is (E. 6.)

Fol. 208.

(N. d) *Subſidy.*

See (I. c).

[1. 1 R. 2. AT a parliament, *the commons were ſpared,* and the *nobles, biſhops, abbots, judges, eſquires, parſons, knights, vicars, and all ſpiritual perſons charged* with the ſubſidies. Speed, 590.]

[2. 1 or 2 Rich. 2. a ſubſidy was granted, *that every man or woman, under a certain age, ſhould pay by poll* 12 *d.* which was the pretended cauſe of much miſchief after. J. Strawe. Speed, 594.]

[3. In time of H. 8. a ſubſidy was granted; to wit, *the tenth part of all temporal ſubſtance;* and cardinal Woolſey, who had the charge to levy, *would* [*have*] *had every man ſworn for his wealth;* but the citizens of London refuſed it, and the king was diſpleaſed with Woolſey for it. Speed, 761.]

[4. 4 E. 3. 5. there was a ſpecial grant, ſcilicet *for every knight, &c. for every town an armed man, to go into Gaſcony,* &c. and this pardoned by the king.]

[5. 18 E. 3. cap. 1, 2. *tenths and fifteenths granted* to the king *to go into France; ſo that the money* levied of the ſame *be diſpended in the buſineſs ſhewed to them, in this parliament, by the advice of the great men thereto aſſigned; and that the aids beyond Trent, &c. be put in defence of the North.*]

6. The ſubſidy *is uncertain,* becauſe it is *ſet upon the perſon in reſpect of his lands or goods,* which commonly do ebb and flow. 2 Inſt. 77.

7. *Auxilia*

7. *Auxilia at the* time of the *confirmation of charters*, &c. * 25 E. 1. was a general word, not only *including* aids due by law and tenure, as aid to make his ſon a knight, to marry his daughter, &c. but *aids* alſo *granted by the free-will of the ſubjects in parliament*, which afterwards were called ſubſidies. 2 Inſt. 528. in his comment upon the act of the confirmations of charters of the liberties of England, &c. made 25 E. 1. where lord Coke ſays, that yet the matter, upon which that act was made, was never in quiet, until it was more particularly explained by divers acts of parliament, which we have drawn into one body of a law divided into ſeveral branches. 1. No man ſhall be charged to arm himſelf, or to find men of arms, or any hoblers or archers (other than thoſe who hold by ſuch ſervices, or devoires of the king, or of other lords) if it be not by common conſent, and grant in parliament. 2. No man ſhall be compelled to go to the king's war out of his ſhire, but where neceſſity of ſudden coming of ſtrange enemies into the realm. 3. No man ſhall be charged to give any wages either to the preparers or conveyors of ſoldiers, or to the [195] ſoldiers, to go into Scotland, Gaſcoign, or elſewhere; but that men of arms, hoblers, archers, choſen to go into the king's ſervice out of England, ſhall be at the king's wages from the day they depart out of the counties where they were choſen, till they return; which acts of parliament are but declarations of the ancient law of England: and according to this ancient law, the commons after the ſaid declaratory acts of parliament did, when this point concerning maintenance of wars out of England came in queſtion, make their continual claim of their ancient freedom and birthright, as in 1 H. 5. and in 7 H. 5. &c. the commons made proteſtation that they were not bound to the maintenance of war in Scotland, Ireland, Calice, France, Normandy, or other foreign parts, and cauſed their proteſtations to be entered into the parliament roll, where they yet remain; which in effect agreeth with that, which upon like occaſion was made in this parliament of 25 E. 1. But here may be obſerved, that when any ancient law or cuſtom of parliament is broken, and the crown poſſeſſed of a precedent, how difficult a thing it is to reſtore the ſubject again to his former freedom and ſafety.

* See the ſtatute at (E. a).

(O. d) Martial Affairs, *Juſts* and † *Turnaments*.

† It was called turnamentum decurſus, of turning and winding, in reſpect of the agility, as well of the horſe as of the man; for in thoſe days this deed of

[1. ‡ *REX comitibus baronibus militibus*, & omnibus aliis hoc inſtanti die apud Kingſton conventur. Ad torneamentum ibidem ſalutem. *Prohibemus vobis ſub pœna amiſſionis omnium terrarum* & tenementorum, quæ in regno noſtro tenetis, ne ibi vel alibi dicto die vel aliis diebus *turneare*, juſtos facere, aventure quærere, ſeu alio modo ad arma ire præſumetis *ſine § licentia noſtra ſpeciali*. 1 E. 1. Rot. Pat. Memb. 15. Conſimile Memb. 17. Simile, 2 E. 1. Rot. Pat. Memb. 19. 22. 24.]

chivalry was at random, whereupon great peril enſued. Therefore in the reign of E. 3. for ſafety.—

‡ There is no number to this plea in Roll.

§ *But* if the king makes proclamation, *that there ſhall be juſts and turnaments*, &c. and *one kills another* in juſting, &c. *it is not felony*. Contra where it is without command or proclamation of the king. Br. Proclamation, pl. 13. cites 11 H. 7. 23. —— Br. Corone, pl. 228. (229.) cites S. C. per Fineux. —— S. P. 3 Inſt. 56. cap. 8. cites 11 H. 6. 22. —— S. P. 3 Inſt. 160.

In the reign of H. 2. it was enacted, that if in ſuch caſe one was ſlain it ſhould be no felony; for that in a friendly manner they contended to try their ſtrength, and to be able to do the king ſervice in that kind as occaſion ſhould be offered. 3 Inſt. 56. cap. 8. cites Mirror, cap. 1. ſ. 13. Des Aventures.

Bacon of Government, in his ſecond book, cap. 11. pag. 107, 108. ſays, that this of turnament crowded at length among other things to be *under the determination of the marſhal's court, though ſometimes under the direction of the conſtable* of England, as well as at other times under the marſhal; and calls it *a ſport, which, like a ſarcaſm, tickles the fancy, but wounds the heart*, and being of as little uſe in a commonwealth as of benefit, is therefore laid aſide.

See (E) pl. 9. 12. 14.

(P. d) * *Murage.*

* Murage *is a reaſonable toll* to be taken of every cart, wain, or horſe laden coming to that town, *for the incloſing of that town with walls* of defence *for the ſafeguard of the people* in time of war, inſurrection, tumults, or uproars, and is due either by grant or preſcription. 2 Inſt. 222. —— But if a wall be made which is not defenſible, nor for ſafeguard of the people, then ought not this toll to be paid; for the end of the grant or preſcription is not performed. Ibid. —— Murage is only a toll payable for the reparation of walls out of things ſold in market overt by † retail, and *does not lie in grant but in preſcriptions*. Dav. Rep. 13. a. Mich. 5 Jac. B. R. in the caſe of Cuſtoms.

† [196]

[1. AMONG the petitions of parliament of 18 E. 1. there is ſuch petition, *Cives London petunt muragium propter deteriorationem murorum; rex non vidit quod ſit neceſſarium.* 1 E. 2. Rot. Pat. Part. 2. M. 17. Pro Murag. Lond. 4 E. 2. Rot. Pat. M. 20.]

There is no number to this plea in the roll.

[2.] 23 E. 1. Lib. Parl. 104. *Ad petitionem hominum Wigorum, quod rex velit eis concedere muragium pro villa ſua claudenda ad ſecuritatem ejuſdem villæ.* Ita reſponſum, fiat per.]

(Q. d) *Tronage. Peſage.*

There is no number to this plea in the roll.

[1.] TRONAGIUM debet dari *de lanis & peſagium de mercibus*, and not tronagium de mercibus. Adjudged. H. 5 E. 3. B. R. Rot. 124.]

Fol. 209.

(R. d) *Aulnage.*

Prynne's Cott. Rec. Abr. 71. No. 31, 32. S. C.

[1. ROT. Parl. 22 E. 3. N. 31, 32. There is *a petition of the workers of cloths of worſted* in Norfolk, *againſt the office* of the aſſay of the aulnage of worſted granted to Robert de Poley, which was after repealed by the counſel of the king, as there appears.]

Prynne's Cott. Rec. Abr. 71. 72. No 11, S. C.

[2. Rot. Parl. 27 E. 3. N. 11. The *commons pray to take away the office* of aulnage. Anſwer, they ſhall treat to give recompence to the officer.]

Prynne's Cott. Rec. Abr. 76. No. 46.

[3. Rot. Parl. 25 E. 3. 1 Part. N. 40. The *commons pray that the office of aulnage be taken away.*]

Is made thereof [viz.] a motion touching the aulnage and meaſure of cloth. Anſwer, by a ſpecial ſtatute in this year.

4. 25 *Ed.* 3. 1. *All manner of cloths vendible, ſhall be meaſured by the king's aulnager, or his deputies, and all cloths which ſhall be found of leſs meaſure by a yard than the aſſize ſhall be forfeited to the king.*

5. 27 *Ed.* 3. 4. *Cloths ſhall not be forfeited, although they want of the aſſiſe; but the king's aulnager ſhall meaſure the cloth, and mark how much it contains, and for ſo much as the cloth wants of the aſſiſe, an allowance ſhall be made to the buyer, and the aulnager ſhall have for his fee, an halfpenny for a whole cloth, and a farthing for half a cloth, and nothing for cloths that are leſs; but cloths offered to ſale before they are marked, ſhall be forfeited to the king, and taken into his hands by the ſaid * collector or aulnager, or by the deputy of one of them, or elſe by the bailiffs of the town where ſuch vendible cloths not ſealed ſhall be found.*

An information was brought againſt the defendants, wherein the informer ſets forth, that on ſuch a day and place, he did ſeiſe as forfeited, a *cloth called a double bays*, and another called *a ſingle bays*, being goods of perſons unknown, made and wrought to ſell and utter, and which were *put to ſale, not being ſeal'd* by the mark of the maker, and the ſeal of the aulnager, &c. *contra formam ſtatuti*, &c. the defendants claimed property ſeverally to the ſaid bays, and ſeverally demurred to the informa-

6. There were ſeveral other ſtatutes concerning aulnage, as 3 *R.* 2. *cap.* 2. which enacted, that *if the aulnager ſeal faulty cloth, or ſeal it for more than it is, the cloth ſhall be forfeited, and he puniſhed.* —And alſo, 13 *R.* 2. *cap.* 11. which *exempted coarſe cloths from being of the aſſiſe of other cloths.*——And alſo, 17 *R.* 2. *cap.* 2. which enacts, that *every man of the realm may make and put to ſale, and ſell cloths, as well kerſies as other, of ſuch length and breadth as himſelf pleaſe, paying the aulnage ſubſidy, and other devoyers, that is to ſay, of every piece of cloth after the rate, notwithſtanding any ſtatute, ordinance, proclamation, reſtraint, or defence made to the contrary, and that none ſhall ſell or put to ſale any cloths before that they be meaſured by the king's aulnager, and ſealed with the ſeal to that ordained, upon the pains contained in the ſtatutes thereof made, and that no man ſhall put, meddle, cauſe, nor make other diſceit in the cloths of kerſies, upon pain of forfeiture of the ſame.*——And alſo, 5 & 6 *E.* 6. *cap.* 6. which *gives a forfeiture of* 20*s. for not paying the aulnager's fee,* † *and prohibits cloth to be exported without the aulnager's and owner's ſeal.*———And alſo the act of 8 *Eliz.* 5. which enacts, *that the length of Lancaſhire cloths ſhall be marked, and that the queen's ſeal ſhall be affixed thereto, on pain of forfeiture, and* alſo, *that the aulnager ſhall ſeal no cloth without weighing, on pain of* 20*s. for every pack.* But ſince thoſe ſtatutes there is a ſtatute made as follows, viz.

tion; the queſtion was, whether the ſubſidy of aulnage was due for bays by virtue of the ſtatute of 27 E. 3. cap. 4. not being any of the cloths mentioned in the ſtatute, and differing from them both in weight, length, and breadth? Hale Ch. B. ſaid, that it would be hard to bring them within that ſtatute, for the reaſon before mentioned, but there is a concurrent ſtatute made anno 17 R. 2. cap. 2. which makes the quantity a neceſſary ingredient to the ſubſidy; for 17 R. 2. proportions the ſubſidy given by 27 E. 3. which ſettles the duty only; and, agreeing with the other judges in opinion for the plaintiff, ſaid, he grounded his opinion for the duty upon 17 R. 2. the words whereof are, *(paying the duty according to the rate)* which words bring the ſtatute of 27 E. 3. to that of 17 R. 2. and upon both theſe ſtatutes together the duty ariſes, and the penalty for non-payment of it; and the generality of the words *(clothes, as well kerſies as other)* compriſe all; and there cannot be more comprehenſive words to include all manner of clothes; and by the demurrer they are confeſſed to be clothes as laid in the information. Hard. 205. 214. Mich. 13 Car. 2. in Scacc. Vere, qui tam, &c. v. Sampſon & al.

* Powis, Turton, and Ward, Ch. B. held, that no perſon had authority to ſeiſe the cloth forfeited by this ſtatute, but only thoſe very officers expreſſed in that ſtatute; and therefore they held, that a deputy aulnager whoſe deputation extended only to the counties of Devon and Cornwall, had no authority to ſeiſe at Ratcliff. Carth. 326. Trin. 6 W. & M. in Scacc. Martin v. Urlsford.

* [197]

7. 11 & 12 *W.* 3. *cap.* 20. *ſ.* 3. enacts, that *the ſubſidy and aulnage of the old and new draperies, and of all woollen manufactories*

ſhall ceaſe after the grants thereof are expired.——[Thoſe grants are long ſince expired.]

(S. d) Proclamation. The Force of a Proclamation.

[1. WHEN in the time of E. 1. the *Jews were baniſhed* out of the realm, all their debts and goods remained to the king, and were his chattels, and thereupon *proclamatio ſolemnis fiebat per totum regnum, & quod omnes qui debita aliqua alicui Judeo debebant aut de eorum debitis, bonis & catallis aliquid ſciebant, domino regi aut alicui de concilio ſuo ſcire facerent*, de qua quidem proclamatione nullus dicere poteſt quin ſcivit aut ſciviſſe debuit; and becauſe the defendant had concealed a certain debt, ideo in miſericordia. 21 E. 1. lib. Parl. 62. b. 63. Adjudged.]

[2. Vide Egerton's Poſtnati, fol. 12. and 31 H. 8. cap. 8. concerning the force of proclamations. 35 *H.* 8. *cap.* 23.]

[3. By 25 *H.* 8. *cap.* 2. it is enacted, *that the Lord Chancellor and others ſhall tax the price of certain victuals, and that after a proclamation under the great ſeal ſhall be made thereof, and that victuallers, &c. ſhall be bound to ſell according to the prices ſet forth in the proclamation under the pains to be expreſſed and limited in the ſaid proclamation to be forfeited and levied to the uſe of the king in ſuch manner as by the ſaid proclamation ſhall be declared.*]

[4. By 25 *H.* 8. *cap.* 12. it is enacted, *that proclamation ſhall be made* of the deceit of Elizabeth Barton, *and that it ſhall be contained in the proclamation, that all books, &c. concerning the ſaid deceits ſhall be brought to the Ld. Chancellor, under pain of impriſonment and fine to the king, and that every one* [*who*] *ſhall offend againſt this, being thereof by due examination convicted before any of the council of the king, ſhall ſuffer impriſonment, and make fine to the king by the diſcretion of the council of the king, and according to the merits of his offence.*]

[198] [5. 35 *H.* 8. *cap.* 16. *The ſtatute of ſtrangers where there is a proviſo that the ſtatute ſhall not be prejudicial to the proclamation made by the king* for the payment of cuſtom by ſtrangers *granted to endure for certain years, but that the ſaid proclamation ſhall ſtand in the ſame force as it is, and as if this act had not been made.*]

† There is no ſuch year of caſes in the Year-book to examine this by. The words * Fol. 210. (rex per totum) ſeem not to be right, and (rex) at leaſt ſeems to be ſurpluſage; but the ſenſe ſeems perfect enough without any of them.

[6. 27 *E.* 3. By the ſtatute of the ſtaple it was ordained, that *merchants aliens* might carry over the ſea merchandizes of the ſtaple, but not merchants *denizens*, and after by the aſſent of the king and his council, liberty was granted, and proclamation made accordingly to denizens for a certain time, *and becauſe merchants denizens doubteth them to be impeached in time to come for their merchandizes which they have paſſed by* * *virtue of ſuch grant and proclamation, foraſmuch as they were made out of parliament*, therefore it is granted now by parliament in 34 *E.* 3. 3. *cap.* 21. † P. 36 E. 3. B. R. rex per totum; *indictamentum diverſorum pro granis transferendis in partes exteras contra prohibitionem regis per proclamationem.*]

[7. Hill.

[7. Hill. 1 E. 2. B. R. Rot. 38. Diverſi implacitantur de eo quod contra proclamationem regis E. 1. inhibentem *ne quis duci faceret extra regnum* Angliæ *equos, armaturas, monetam, quacunque vaſa aurea ſeu argentea in maſſa ſine licentia*, &c. ipſi abduxerant divers ſums of money, &c.]

[8. The king by proclamation may *make the coin of a foreign realm current here.* 5 *El. cap.* 11. *admitted.*]

[9. Rot. Parl. 7 H. 5. N. 11. *Power given to the council to make an ordinance that the monies of England be not tranſported* out of the realm.]

Prynne's Cott. Rec. Abr. 557. No 11. S. C. The king by his proclamation or otherwiſe *cannot* change any part of the common law, ſtatute, or cuſtoms of the realm; nor can he *create*

10. It was agreed for law, that the king may make proclamation to his ſubjects, *quoad terrorem populi* to put them in fear of his diſpleaſure, *but not on other pain certain*, as to forfeit their lands or goods, or to make fine, or to ſuffer impriſonment or other pain; for no proclamation in itſelf will make a law which was not before, but to confirm and ratify an ancient law, and not to change this or make new; yet divers *precedents were ſhewn* out of the Exchequer *to the contrary, but the judges had no regard to them.* Dal. 20. pl. 10. 2 & 3 P. & M. Anon.

ary offence by proclamation, *which was not an offence before*, that being to change the law, and therefore *that which cannot be puniſhed without proclamation cannot be puniſhed with it*; and the ſtatute 31 H. 8. cap. 8. though it gives more power to the king than he had before, yet it is there declared, that proclamations ſhall not alter the law, ſtatutes, or cuſtoms of the realm, or impeach any in his inheritance, goods, body, life, &c. But if one be indicted for a contempt againſt a proclamation, he ſhall be fined and impriſoned, and ſo impeached in his body and goods. 12 Rep. 75. in the caſe of proclamations, cites Fortеſcue de Laudibus, &c. cap. 9. 18. 34. 36., &c. —— But a thing which is puniſhable by law, by fine and impriſonment, if the king prohibits it by his proclamation before that he will puniſh it, and ſo *to warn his ſubjects of the peril* of it; there, if he permits it after, this is a circumſtance which aggravates the offence. But he cannot by proclamation make a thing unlawful which was permitted by the law before; and this is well proved by the ancient and continual forms of indictments, which all conclude contra legem & conſuetudinem Angliæ, or contra leges & ſtatuta, &c. But *no indictment* was ever ſeen to conclude *contra regiam proclamationem.* 12 Rep. 75. Mich. 8 Jac. in the caſe of proclamations.

11. A proclamation *prohibiting importation of wines from France upon pain of forfeiture* is againſt law, it not appearing that there was any war between the realms. 2 Inſt. 63. cites Paſch. 1 Eliz. in the Exchequer. German Cioll's caſe.

12. Proclamations are *ſo far juſt, as* they are made *pro bono publico.* Hob. 251. in Armſted's caſe.

13. A proclamation *binds not, unleſs* it be *under the great ſeal.* Cro. C. 180. Hill. 5 Car. B. R. Keyly v. Manning.

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2 Roll. R. 172. Howard v. Slater.

(S. d. 2) Proclamation. *By whom made, and how pleaded.*

1. WHERE *pariſhioners make by-laws that every one ſhall pay a ſum for reparation of their church, and for default* of payment *to diſtrain by aſſent*, &c. there thoſe who are abſent, if proclamation be made to do it, ſhall be bound as well as thoſe who are preſent; per Kirton; quod non negatur. And ſo ſee that a common

Br. Cuſtom, pl. 6. cites 44 E. 3. 18. —*None* can make proclamation *but by au-*

thority of the king or mayors, &c. who have privilege in cities and boroughs mon perſon may make proclamation. Br. Proclamation, pl. 1. cites 44 E. 3. 18.

to do it, or have uſed it *by cuſtom*; and Sir Edmond Knightly, executor of Sir William Spencer, made proclamation in certain markets, that the creditors ſhould come by a certain day, and claim and prove their debts, &c. due by the teſtator; and becauſe he did it without authority, he *was committed to the Fleet, and put to a fine.* Br. Proclamation, pl. 1. cites 22 H. 8. — Ibid. pl. 1. cites S. C. *But* Brooke ſays *in London* they uſe to make proclamation *in the name of the mayor*; and adds a quære, if it be by cuſtom or not. —— Went. Off. of Executors, 100. cites S. C.

Objection was made to the pleading a proclamation, that it was not ſaid to be under the great ſeal, as all proclamations are or ought to be, with a writ to the ſheriff to proclaim them; but it ſeems as if the Court gave no regard thereto.

2. The Court upon the firſt motion were all of opinion, that where a proclamation is pleaded it *muſt be pleaded to have been under the great ſeal*; for it doth not bind unleſs it be under the great ſeal; and if it is denied, there can be no *iſſue* upon it, but only *nul tiel record*, which cannot be unleſs he pleads it to be ſub magno ſigillo. But afterwards it being again moved, Jones and Windham ſeemed to doubt thereof; becauſe when it is pleaded, that ſuch proclamation was made, it ſhall be *intended duly made*; as in reſcous, if it be returned quod fecit warrantum, although it be not pleaded to be in writing, yet it ſhall be intended. But it was anſwered, that true it is, when it is but by way of inducement; but otherwiſe when it is the ſubſtance of the plea. Whereupon it was adjourned. Cro. C. 180. Hill. 5 Car. B. R. Keyley v. Manning.

See 2 Roll. Rep. 172. Trin. 18 Jac. B. R. Howard v. Slater.

* N. B. There is no (T. d) in Roll.

* (U. d) King. [*Guardian.*]

[1. *IN the abſence of E.* 1. his brother Edmund was made guardian of the realm. (Nota the name of guardian) 18 E. 15. b.]

[2. Leonell the ſecond ſon of *E.* 3. was cuſtos regni. 21 E. 3. 59.]

(X. d) King. Guardian of the Realm. *The Power of the Guardian* in the Abſence of the King.

See this roll at large in the Appendix to Dr. Brady's Continuation of the Hiſt. of Engl. pag. 34. N°. 49.

[1. 1 E. 2. Rot. Pat. Part 2. M. 28. REX conceſſit Petro Gaveſton cuſtodi regni, &c. poteſtatem *ad concedendum licentiam eligendi paſtores in eccleſias cathedrales & conventuales & adhibendum aſſenſum electionibus nomine noſtro & fidelitat. capiend. & temporalia reſtituend. & benefic. &c. conferend. & ordinand. de cuſtodiis & maritagiis.*]

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[2. The guardian of the realm, in the abſence of the king, may *preſent to the advowſon in right of the king.* 18 E. 3. 15. b.]

See ſome precedents of ſuch writs at the beginning of the above-mentioned Appendix.

[3. When there is a guardian of the realm in the abſence of the king, the *writs original ſhall be in the name of the king.* 21 E. 3. 58. b.]

[4. *But* the *teſte ſhall not be* teſte *meipſo, but* teſte *L. filio noſtro chariſſimo cuſtode Angliæ.* 21 E. 3. 59.]

[5. 14

[5. 14 E. 1. Rot. Clauſo Memb. 3, 4. *Teſte Edmundo comite Cornub. conſanguinio regis apud Weſtm.* (This Edmund was cuſtos regni.) and ſo 16 E. 1. Memb. 9. in Dorſo, & 7. in Dorſo.]

(Y. d) King. *What* Things *ſhall go in Succeſſion*, and not to his Executor.

Fol. 211.

[1. IF the king *has title to preſent to a church which is void, and dies before preſentment*, his ſucceſſor ſhall have the preſentment, and not his executor * 7 H. 4. 25. b. 18 E. 3. 20. 21 E. 3. F. Eſtoppel, 161. admitted. 1 E. 3. 22. b.]

* Br. Preſentation, pl. 11. cites S. C.—— In quare impedit it appears that *chattels may deſcend to the king*; for where the king has the † *temporalties of a biſhop*, and dies, thoſe, *and all preſentations depending upon it*, ſhall deſcend to the new king. Br. Chattels, pl. 2. cites 11 H. 4. 7.—† S. P. Br. Prerogative, pl. 85. cites 44 E. 3. 42. and the executors ſhall not have them.

[2. *So* if the king be *ſeiſed of a ward*, and dies, his ſucceſſor ſhall have it, and not his executor. 7 H. 4. 42. b. 21 E. 3. F. Eſtoppel, 161.]

S. P. Br. Chattels, pl. 2. cites 11 H. 4. 7. —S. P. Br. Prerogative, pl. 81. cites 7 H. 4. 41. Per Gaſcoigne for law; for it *is a chattel real annexed to the crown.*

[3. The *treaſure and other valuable chattels* are ſo neceſſary and incident to the crown, that in caſe the king dies, they ſhall go with the crown to the ſucceſſor, and not to the executors. Co. 11. 92. Count DEVON.]

4. The king can have nothing in his natural capacity, unleſs in right of his dutchy, or an eſtate tail by the ſtatute de donis, and *dutchy lands* would now be in the queen, if not kept ſeparate by act of parliament. Per Holt. Far. 78. Mich. 1 Ann. B. R. in caſe of the Queen v. Smith.

(Y. d. 2) *Deſcent of Lands.* How.

1. IF the *king hath iſſue a ſon and a daughter by one venter, and a ſon by another* venter, *and purchaſes land and dies*, and the *eldeſt ſon enters and dies without iſſue*, the daughter ſhall not inherit theſe lands, nor any other fee-ſimple lands of the crown, but the younger brother ſhall have them; wherein note, that neither poſſeſſio fratris doth hold of lands of the poſſeſſions of the crown, nor half blood is no impediment to the deſcent of the lands of the crown. Co. Litt. 15. b.

‡ [201] The reaſon of theſe caſes is; becauſe the quality of the perſon does in theſe, and many other like caſes, alter the deſcent, ſo as the lands and poſſeſſions whereof the king ſeiſed is in jure coronæ ſhall ſecundum jus coronæ attend upon and follow the crown, and therefore to whomſoever the crown deſcends thoſe lands and poſſeſſions deſcend alſo; for the crown and the land, whereof the king is ſeiſed in jure coronæ, are concomitantia. Co. Litt. 15. b.

2. If one that is *king by the deſcent of the part of his mother purchaſes* lands *to him and his heirs*, and *dies without iſſue*, this land ſhall deſcend to the heir of the part of the mother, but in the caſe of a ſubject, the heir of the part of the father ſhall have them. Co. Litt. 15. b.

‡ 3. The *eldeſt daughter and ſiſter* of a king ſhall *inherit all his fee ſimple lands*. Co. Litt. 15. b.

4. If the *king purchaſes lands* of the cuſtom of *gavelkind*, and *dies*, *having iſſue divers ſons*, the eldeſt ſon ſhall only inherit theſe lands. Co. Litt. 15. b.

5. The king has two capacities; for he has two bodies, of which the one is a body natural, conſiſting of natural members, as every other man is, the other is a body politic, and his members thereof are his ſubjects. He may take in his body natural, lands or tenements, as heir to any of his anceſtors, and alſo in this capacity may *purchaſe* to him and his heirs, and his heirs ſhall retain it notwithſtanding that he is removed from the royal eſtate. And he may alſo take or purchaſe lands or tenements in fee in his body politic, that is to ſay, to him and to his heirs, kings of England, or to him and to his ſucceſſors, kings of England; and ſo his double capacity remains, as it does in other perſons, who have a double capacity, as biſhop or dean; and to prove that the eſtate royal does not * confound the other capacity, the caſe in 45 Aſſ. 6. was cited, where it appears that king H. 3. gave a manor to the earl of Cornwal in tail, ſaving the reverſion to him, and died; the earl gave the manor to another in fee by deed, with clauſe of warranty in exchange for another manor, and after the earl died without iſſue having aſſets, and the warranty and aſſets deſcended upon E. 1. being heir to the earl; and there it was adjudged, that the king, by this warranty with aſſets, was barred, by which the aſſignee of the alienee had reſtitution of the manor out of the hands of king E. 3. who had ſeiſed the manor into his hands for the reaſon aforeſaid. Which caſe proves that the capacity, which the king has in his natural body, remains after he is king, or otherwiſe the warranty could not have deſcended upon him, nor the aſſets to him as heir to the earl his anceſtor; and ſo by the warranty and aſſets which deſcended upon the body natural of the king, he was barred of the reverſion, which he demanded in his body politic; for it was parcel of the poſſeſſions of the crown for any thing which appears; and as his capacity remains to take by deſcent as heir, ſo it remains to purchaſe therein. Arg. Pl. C. 234. 3 Eliz. in the caſe of Willion v. Lord Barkley.

* S. P. per Weſton J. Pl. C. 242. in S. C.

6. The king may take in his body politic, as king, to him and his heirs, or as king to him and his ſucceſſors; for he may have heirs in his body politic, and he may have ſucceſſors in his body politic; and therefore a *gift to him his heirs and ſucceſſors* is good to the body politic in both the limitations; for *if the heirs fail, it ſhall go to the ſucceſſors;* and his heirs, as heirs to the king, may take in their bodies politic. Per Weſton J. Pl. C. 242. b. in the caſe of Willion v. Lord Barkley.

(Z. d) † King. In what Caſe by the *Name of King*, his *Succeſſors* ſhall be *comprehended.*

† A remainder limited to king H. 7. *b, the name of king H. 7.* is well limited to him by ſuch name; for the king naturally, aptly, and fully cannot purchaſe by other name than by name of king; for the name of king has merged his ſurname, and in

[1.] ‡ THE ſucceſſors of K. H. 8. are within the *ſtatute* 27 *H.* 8. *cap:* 24. *of reſumption of the liberty of purveyance* to have benefit of the ſtatute, though they are not named; for they are included within the general word king. Tr. 38 El. B. R. ‖ LORD DARCIE's caſe adjudged.]

in the name of king his *ſurname and proper name alſo are included.* Per Brown J. Pl. C. 244. b. Trin. 4 Eliz. in the caſe of Willion v. Lord Barkley.

Lord Coke, in his Commentaries upon Magna Charta, cap. 1. ſays, that at that time *hæredes* were *taken for ſucceſſores*, and *ſucceſſores for hæredes*. 2 Inſt. 5.——S. P. Ibid. 7. that anciently ſucceſſores and hæredes were ſynonima.——‡ There is no number to this plea in Roll.——‖ Cro. E. 512. S. C.

2. Patents, without the words (pro nobis, hæredibus, & ſucceſſoribus noſtris), and being *granted for a corporal exerciſe* of the office or ſervice, are good. Cited per Saunders Ch. Baron. Pl. C. 459. a. as reſolved by all the juſtices. 23 April, 1 Mar.

3. The words *(per nos)* in the king's grant *are ſpoken* by him *in his body politic*, and contain heirs and ſucceſſors, without preciſe mention. Per Saunders Ch. B. Pl. C. 458. a. Paſch. 16. Eliz. in Sir Thomas Wroth's caſe.

S. P. Pl. C. 176. Mich. 4 Mar. in the caſe of Hill v. Grange.

4. King H. 6. anno 20 of his reign, granted for himſelf, and did not ſay (for his ſucceſſors) *to the college of* All Souls in Oxford, *for them, their tenants, and farmers, to be diſcharged of toll;* it was agreed per Cur. that this grant to be diſcharged was good againſt his ſucceſſors, though not named, as well as in caſe of the grant of an intereſt, which in Plowd. Com. in Sir Thomas Wroth's caſe, was agreed to be good. Yelv. 13. Mich. 44 & 45 Eliz. B. R. Wood v. Hamſtead.

5. A grant by the king, without the words (pro ſe & heredibus) or (ſucceſſoribus) of an * *annuity, or rent, payable at the Exchequer, or by the hands of any receiver*, binds the ſucceſſor. Jenk. 209. pl. 41.

* All the barons in the Exchequer were of opinion, that ſuch a grant of an annuity ſhould bind the heirs and ſucceſſors of the king, notwithſtanding the omiſſion, inaſmuch as *the body politic* of the king *is charged*, which is perpetual, and never dies. Pl. C. 457. a. Trin. 15 Eliz. Sir THOMAS WROTH's caſe.——S. P. Pl. C. 176. Mich. 4 Mar. in the caſe of Hill v. Grange.

6. A *gift to the king* paſſes the inheritance without the word ſucceſſor. *So* of a *gift* made *by the king*. Jenk. 209. pl. 41.

7. A deed made to the king by the words *(Carolo regi)* or *(regi Angliæ)* paſſes the inheritance to the crown without the word (ſucceſſors). Jenk. 124. in pl. 50.

A gift to the king of any hereditament is a fee ſimple, of England.

as a gift to a mayor and commonalty, without mentioning ſucceſſors. By all the judges Jenk. 224. pl. 84.——S. P. Jenk. 271. pl. 89.

Dyer Ch. J. ſaid, that the *adding of ſucceſſors* in grants to the king, *is* but *of late time*, and a new device. Pl. C. 250. Trin. 4 Eliz. in the caſe of Willion v. Lord Barkley.

(A. e) † Council Privy of the King.

† The council board *is* a moſt noble, honourable, and reverend aſſembly of the king and his privy council in the king's court or palace; with this council the king himſelf doth ſit at his pleaſure; theſe counſellors conſult of and for the publick good, and the honour, defence, ſafety, and profit of the realm. It is *called* the council table, *a conſulendo*, ſecundum excellentiam. They are called *concilium regis privatum*, concilium *ſecretum*, and *continuum* concilium regis. The number of them *is at the king's will*, but *of ancient time they were* 12, or thereabouts. 4 Inſt. 53. cap. 2.

[1. ‖ TR. 16 E. 2. B. R. Rot. 42. *Baron de Bellomonte was committed to priſon for refuſing to counſel the king*, touching a truce propoſed between the king and the Scots, the ſaid baron being of the privy council of the king.]

‖ My

‖ My Lord Coke ſays, that the duty of a privy-counſellor appears by his oath, which conſiſteth of theſe articles or parts; 1. That he ſhall, as far forth as cunning and diſcretion ſuffereth, truly, juſtly, and evenly counſel and adviſe the king in all matters to be communed, treated, and demeaned in the king's council, or by him as the king's counſellor; 2. Generally, in all things that may be to the king's honour and behoof, and to the good of his realms, lordſhips, and ſubjects, without partiality, or exception of perſons, not leaving, or eſchewing it to do for affection, love, meed, doubt, or dread of any perſon or perſons; 3. That he ſhall keep ſecret the king's council, and all that ſhall be communed by way of council in the ſame, without that that he ſhall commune it, publiſh it, or diſcover it by word, writing, or in any otherwiſe, to any perſon out of the ſame council, or to any of the ſame council, if it touch him, or if he be party thereof; 4. That he ſhall not for gift, meed, nor good, nor § promiſe of good by him, nor by mean of any other perſon, receive or admit from any promotion, [or] favouring, nor for declaring, letting, or hindering of any matter or thing to be treated or done in the ſaid council; 5. That he ſhall, with all his might and power, help and ſtrengthen the king's ſaid council, in all that ſhall be thought to the ſame council for the univerſal good of the king and his land, and for the peace, reſt, and tranquillity of the ſame; 6. That he ſhall withſtand any perſon or perſons, of what condition, eſtate, or degree they be of, that would by way of feat, attempt or intend the contrary; 7. And generally, that he ſhall obſerve, keep, and do all that a good and true counſellor ought to do unto his ſovereign lord. By the force of this oath, and the cuſtom of the realm, he is a privy counſellor, without any patent or grant, during the life of the king that maketh choice of him. 4 Inſt. 54. cap. 2.

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Prynne's Cott. Records Abr. 56. 21 E. 3. N° 28.

[2. Rot. Parl. 21 E. 3. N. 28. The commons pray, that no people from henceforth by ſuggeſtion, or conſideration of any accuſers voluntary, be commanded *by writ to come to the council of the king, and then be conſtrained and compelled to make fine, or* pay down a great ſum of money, or otherwiſe to travel over the ſea as before this time has been in prejudice of all the people, pray that ſuch dureſſes and grievances from henceforth be not done. *Anſwer;* it pleaſes our lord the king, that henceforth ſuch things be not done againſt reaſon.]

[3. Rot. Parl. 22 E. 3. N. 4. *Fifteenths granted upon* divers *conditions* to be entered in rolls of parliament, ſcilicet, among others, *that no impoſition, tallage, nor charge by way of loan, nor other whatſoever manner be laid by the privy-council of the king, without their grant and aſſent in parliament.*]

* Orig. is (apprefts).

[4. Rot. Parl. 2. Part N. 16. The commons pray, that the * loans which are granted to the king by divers perſons of the commons be releaſed, and that none from henceforth be compelled to make ſuch loans or contributions againſt their wills, for it is contrary to reaſon and franchiſe of the land, and that reſtitution be made † to thoſe who have made ſuch loans or contributions. Anſwer; it pleaſes the king that it be ‡ ſo.]

† Fol. 212.

‡ Orig. is (oiſſ).

Prynne's Cott. Records Abr. 74. 25 E. 3. N° 16.

[5. Rot. Parl. 25 E. 3. 1. Part N. 16. The commons pray, that no man be *put to anſwer of his franktenement, nor of any thing which touches life and member, fines, and redemptions, by appoſals* before the council of the king, nor before his miniſters whatſoever, unleſs by proceſs of law thereof ‖ heretofore uſed. *Anſwer;* it pleaſeth the king, that the laws be kept, and that none be bound to anſwer of his franktenement, unleſs by proceſs of law; but of things which touch life or member, contempts or exceſs, be it done as has been uſed heretofore.]

‖ Orig. is (en arere).

Prynne's Cott. Records Abr. 106. 42 E. 3. N° 12.

[6. Whereas divers are accuſed, and are made to come before the council of the king by writ or other commandment of the king, upon § grievous pain againſt the law, the commons pray, that from henceforth if any accuſer propoſes any matter for the profit of the king, that this matter be ſent to the judges of the

§ Orig. is (grief).

one

one bench or the other, or of aſſ. thereof to inquire and determine according to the law; and if it touches the accuſer or * party, let him ſue at the common law; and that no man be *put to anſwer without preſentment before juſtices, or thing of record, or by due proceſs and writ original, according to the ancient law of the land*; and if any thing from henceforth be done to the contrary, be it void in law, and held for error. Anſwer; becauſe this article is an article of the great charter, the king willeth it. Rot. Parl. 42 E. 3. N. 12.]

* Orig. is (parte eite ſa ſuit).

[7. 1 H. 4. N. 160. The commons pray, that *no action perſonal between party and party be held by privy ſeal before the council of the king*; and they in the petition ſhew, that in the time of R. 2. it was ſo done for brocage made to ſome of the council. Anſwer; be the ſtatute, thereof made, held and kept there, where the one party is ſo great and rich, and the other poor, that he cannot otherwiſe have to recover.]

Prynne's Cott. Records Abr. 398. 1 H. 4. N° 161. is S. P. But N° 160. is about priſage of wines.

[8. 2 H. 4. N. 69. The commons pray, that all writs or letters of privy ſeal of our lord the king directed to divers lieges of the king to appear before our lord the king in his council, or in his Chancery, or Exchequer, upon certain pain comprized therein, be for ever hereafter ouſted, and that every liege of the king be treated according to the rightful laws of the land anciently uſed. Anſwer; let not ſuch writ be made unleſs in caſe where it ſeems neceſſary, and this by diſcretion of the chancellor or council of the king for the time being. Vide Simile, † 4 H. 4. N. 28.]

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Prynne's Cott. Records Abr. 410. 2 H. 4. N° 69.

† This in Prynne's Cott. Rec. Abr. 418. is a different point.

9. Mr. Prynne, in his animadverſions, &c. on 4 Inſt. pag. 45. cap. 2. refers the reader for the *ancient juriſdiction* and proceeding of the king's council to Mr. William Lambard's Archaion, 108 to 116.; Mr. Crompton's Juriſdiction of Courts, fol. 29, &c.; the ſeveral bundles of petitions to the king and his council in the Tower of London, and the anſwers to them; placita parliamentaria coram rege & concilio in the tally-office in the Exchequer, and in the parchment-book of them in the Tower under king Edward I.; the firſt part of my Brief Regiſter and Survey of Parliamentary Writs, p. 365 to 394. In what caſes and things their juriſdiction and proceedings have been reſtrained and *taken away* ſince theſe inſtitutes were compiled, *by* a ſpecial act made in the parliament of 17 *Car.* 1. *cap.* 10. intituled, An act for regulating the privy-council, and taking away the Star-chamber court, the act itſelf will beſt inform you.

10. 6 *Ann. cap.* 6. *ſ.* 1. enacts, that *the queen ſhall have but one privy-council for the kingdom of Great Britain, and ſuch privy-council ſhall have the ſame powers as the privy-council of England had at the time of the Union, and none other.*

11. 6 *Ann. cap.* 7. *ſ.* 8. enacts, that *the privy-council for the kingdom of Great Britain ſhall not be diſſolved by the death of her majeſty, her heirs or ſucceſſors, but ſhall continue ſix months, unleſs ſooner determined by the ſucceſſor.*

Fol. 213.

(B. e) Queen [*Conſort of the King*].

[1. THE queen, feme of the king, *may inform by her attorney-general in the Chancery by Engliſh bill, to have a decree made in the court of the queen confirmed.* For though ſhe be a ſubject, yet the hath ſuch prerogative of the king as that ſhe is his feme. M. 16 Ja. in Chancery. Sir *Robert Floyd*'s caſe, ruled upon a demurrer.]

[2. 2 E. 1. Rot. Clauſo Memb. 13. *Conventio inter reginam*, feme of the king, *and a common perſon for the enjoying of certain land for years*, and the *queen fecit attornatum*, and the other appointed to be in proper perſon.]

[3. 11 E. 1. Rot. Walliæ, Memb. 1. *The king gave a manor to the queen* his feme, *and her heirs for ever, adeo integre & plene, as J. S. held it.* Other ſuch grant. Memb. 3.]

King *E.* 4. *gave certain lands to the queen his feme for term of her life*, and *ſhe leaſed it for years*; and ſo it ſeems that ſhe has a capacity to take of the grant of the king, and ſhe may leaſe alone without the king; and ſo ſee ſhe is a perſon exempt. Br. Non-abilitie, pl. 61. cites 7 H. 7. 7. ——It was adjudged, that where H. 8. granted a manor to the queen his feme for life; there the queen was a ſole perſon exempt by the common law, and *may make leaſe or grant without the king*, and ſo may plead and be impleaded alone. 4 Rep. 23. b. Trin. 26 Eliz. in the caſe of Clark v. Penniſather.

[4. 2 E. 1. Rot. Walliæ, Memb. 2. The king granted to the queen his feme ſuch *land ad vitam ſuam, ita tamen quod maneria, &c. a corona Angliæ non ſeparentur.*]

[205] [5. 11 E. 1. Rot. Chart. Memb. 5. The king granted to the queen *a manor habendum ſibi & hæredibus.*]

[6. 3 E. 1. Rot. Chart. Memb. 4. In ſchedula annexa. *The feme of E. 1. was obliged to Robert de Bohun in mille libris ex aſſenſu & voluntate domini regis* domini noſtri, and after inſpeximus, and the king confirmed, &c.]

* Orig. is (grantera).

[7. 9 E. 1. Rot. Chart. Memb. 4. Pro Johanne Ferrer, *the queen, conſors regis,* * *granted manerium dilecto militi noſtro domino Johanni Ferrer.*]

[8. 8 E. 1. Memb. 4. The *queen by aſſent and conſent of the king granted a manor, &c.*]

[9. 10 E. 1. Rot. Chart. Memb. 3. Part 16. Inſpeximus the *grant of the queen of the manor in fee* familiari militi noſtro *Galfrido de Pichford, which had been granted to the queen and her heirs by another, &c.* The *king confirmed, &c.*]

[10. 11 E. 1. Rot. Chart. Memb. 4. The *king confirmed a grant which the queen had made, &c.* 18 E. 1. Memb. 11. 20. accordingly of a grant in fee by the queen.]

† Orig. is (d'unite la ſa feme), it ſeems (la) ſhould be (al).

[11. 3 E. 1. Rot. Pat. Memb. 14. In ſchedula annexa. The *king granted all debts* † *whatſoever to his wife.*]

[12. The *king cannot grant to another for life the office of making ſaddles for the queen*; becauſe ſhe is as a feme ſole, and ſo *may elect*

elect her own officers. Dub. P. 6 Ja. B. between AUBURCURMILL AND CURE.]

13. In *quare impedit* by the queen, the writ *wanted* theſe words, *et niſi fecerit.* Thorp ſaid the *queen* is a perſon exempt, and *ſhall not be amerced for her nonſuit;* and therefore ſhe *ſhall not find pledges de proſequendo,* and ſhe *ſhall have writ of form in all points as the king ſhall have;* and therefore the writ was awarded good. Br. Nonability, pl. 59. cites 18 E. 3. 12. & Fitzh. Brief, 355. Co. Litt. 133. a. cites S. C.—— S. P. Co. Litt. 127.

14. In ſcire facias it was admitted, that the *king may give* to the queen *certain portion by his letters patents,* by diviſion certain. And ſo ſee, that the queen has a capacity, though ſhe be feme covert, and may take of her baron; and this ſeems to be for term of life. Br. Nonability, pl. 58. cites 49 E. 3. 4. Br. Preſcription, pl. 12. cites S. C.

15. In *formedon* the *tenant vouched the queen and two others, as heirs of the duke of York,* and *ſhewed cauſe by the duke.* Brian ſaid the queen is not a perſon able to be vouched as here; for *this is a real matter;* but in *perſonal cauſes ſhe is exempt,* and has ability as a private perſon, and *may make gift or leaſe for term of her life;* and therefore by him the tenant *ſhall have firſt* * *aid of the king, and after of the queen, but not of both together.* And it was doubted if the queen be a private perſon † *exempted by the common law, or by ſtatute;* for if it be by ſtatute, it ought to be pleaded; per Brian; for it is a private ſtatute. But per Townſend, if ſhe be exempt by the common law, the tenant need not have aid of the king. Br. Nonability, pl. 56. cites 3 H. 7. 14. * In caſe of *aid prayer* of the queen, it is *domina regina inconſulta;* and the *cauſe* of the aid prayer *ſhall not be counter-pleaded* no more than in the caſe of the king. Co. Litt. 133. b.——

† The queen conſort of the king of England, is *an exempt perſon* from the king by the common law, *and is of* ability and *capacity to purchaſe and grant* without the king. Co. Litt. 3. a.——Per Brian, the queen is a *ſole perſon* by the common law, but *not to all intents.* Br. Aid del Roy, pl. 96. cites 3 H. 7. 14.

16. *Suit by petition* does not lie to the queen; for *aſſiſe, præcipe quod reddat,* and the like *lies againſt her.* Br. Nonability, pl. 60. cites 11 H. 4. 67. per Cur. Co. Litt. 133. b.

17. *In quare impedit* brought by the queen, ſome ſay that *plenarty is no plea,* no more than in caſe of the king. Co. Litt. 133. a.

18. If any bailiff of the queen's bring an *action concerning the hundred,* he *ſhall ſay in contemptum domini regis & reginæ.* Co. Litt. 133. a.

19. The queen ſhall *pay no toll.* Co. Litt. 133. b.

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20. If the *tenant of the queen aliens* a certain *part* of his tenancy *to one, and* another *part to another,* the *queen* † *may diſtrain in any one part for the whole,* as the king may do; but other lords ſhall diſtrain but for the rate; and therefore where the queen ſo diſtrains, there lies a *writ de de-onerando pro rata portione.* Co. Litt. 133. b. † This ſeems to be miſprinted, and that it ſhould be, may [not] diſtrain, &c. or otherwiſe here ſeems an inconſiſtency; and F. N. B. 235. (A) is, that the writ de de-onerando pro rata portione is awarded to the queen's officers where they diſtrain one tenant for the whole rent, where he holds but part of the lands, and ſeveral other tenants hold the reſidue thereof.

21. The

21. The writ of right ſhall not be directed to the queen no more than to the king, but to her bailiff; otherwiſe it is when any other is lord. Co. Litt. 133. b.

22. A *protection* ſhall be *allowed againſt* the queen, but not againſt the king. Co. Litt. 133. b.

S. P. Co. Litt. 131. a. 23. The queen is *not bound by the ſtatute of Marlebridge* for driving a diſtreſs into another county. Co. Litt. 133. b.

24. If any do *compaſs the death of* the queen, and declare it by any overt act, the very intent is *treaſon* as in the caſe of the king. Co. Litt. 133. b.

2 Hawk. Pl. C. 423. cap. 44. ſ. 11. 25. Queen conſort, in caſe of treaſon by her, ſhall be *tried per pares*, as Queen Anne, the wife of H. 8. was. Paſch. 28 H. 8. in the Tower of London before the D. of Norfolk then high ſteward. 2 Inſt. 50.

26. It was adjudged, that where the queen was tenant for life, and a *copyhold of inheritance eſcheats to her*; there the queen *may grant it* to whom ſhe pleaſes, and this ſhall bind the king, his heirs and ſucceſſors for ever; for ſhe was domina pro tempore, and the cuſtom of the manor ſhall bind the king. 4 Rep. 23. b. Trin. 26 Eliz. in caſe of Clark v. Pennifather.

(C. e) * Aurum Reginæ.

* It was reſolved, 1. That this ought to be *ſponte* by the ſubject *ſine coactione*, ſo that this ought to be at the pleaſure of the ſubject, whether he will offer, or give, or no. And for this all *fines upon judgment*, or by offer or fine for *alienation*, or in any other caſe where the ſubject does not do it *ſponte*, *ſine aliqua coactione*, viz. that the king of right ought to have it, there the queen ſhall have nothing.

2. It ought to be *ſponte ſine conſideratione alicujus reventionis ſeu intereſſe*, that the king hath in *eſſe in jure coronæ*, and for this upon *ſale or demiſe of his lands*, or wares, *or goods of felons, outlaws, & ſimili caſu*, for theſe are contracts and bargains concerning the revenues and intereſts of the king; and it cannot be ſaid in ſuch caſe, that the ſubjects *ſponte ſe obligant*, as to purchaſe or buying any the revenues or intereſts which the king has.

3. It ought to be *ſponte ſine conſideratione, & non ex mera gratia & benevolentia ſubditi*; for that which is of mere grace is not properly ſaid of obligation or duty, and the words of the records are to have *de iis qui ſponte ſe obligant*, and ſo it was ordained by the king and his counſel, as appears by the record of Hill. 4 E. 1. in Scaccario, &c.

4. It ought to be *ſponte ſuſer conſiderationem, quæ non attingat reventionem ſeu intereſſe coronæ* in any thing which the king has. As if the ſubject give to the king *ſponte* a ſum of money for *licence in mortmain, or* for *to create a tenure of himſelf* to have a *fair, market, park, chaſe, or warren, within his manor*, there the queen ſhall have it; for the ſubject did this *ſponte*, and was not conſtrained to it.—And this does not concern any revenue or intereſt of the king. *But if the king has a fair* or market, or park, or warren, *and grants it for a ſum of money*, there the queen ſhall have nothing; for this was a thing *in eſſ*, and parcel of the revenue of the crown; and by that it appears, that ſo much as little or nothing is given in ſuch caſe where this of right is due, this is not now of any ſuch value as was pretended. And this reſolution was reported to our ſovereign lord the king by Popham, in the gallery at *Whitehall*. 12 Rep. 21. Paſch. 4 Jac.

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Fol. 214.

[1. 15 *E.* 3. *cap.* 6. *ITEM, that the queen's gold ſhall not run in demand by reaſon of this grant.* This was upon the grant of the 9th lamb, fleece, and ſheaf, by way of ſubſidy. Rot. Parl. 15 E. 3. Dorſo, N. 60. for a fifteenth.]

[2. 31 *E.* 3. *cap.* 13. The commons grant a fifteenth to the king, *and our ſovereign lord the king hath granted to the ſaid commons, that the ſaid quinzim [being] ſo granted, no gold ſhall be demanded*

manded nor levied to the uſe of the queen, but that the ſaid commons ſhall be thereof wholly diſcharged.]

(D. e) * Monopolies.

[1. Rot. Parl. 1 H. 5. N. 41. THE commons pray, that *all merchants may export to any place abroad, or import from any place any goods, (except thoſe of the ſtaple,)* at their pleaſure, paying the cuſtoms and other duties due to you, any proclamation to the contrary notwithſtanding, &c. Anſwer; the king will be adviſed by his council.]

* A monopoly *is an* inſtitution, or *allowance* by the king by his grant, commiſſion, or otherwiſe, *to any perſon* or perſons, *bodies politic or corporate*, of or *for the ſole buying, ſelling*, making, working, or uſing of any thing, whereby any perſon or perſons, bodies politic or corporate are ſought to be reſtrained of any freedom or liberty that they had before, or hindered in their lawful trade. 3 Inſt. 181. cap. 85.——Hawk. Pl. C. 231. cap. 79. ſ. 1.——The *difference between monopoly and engroſſing* is, the one is by patent from the king, the other is by act of the ſubject between party and party. Arg. Skin. 169. Paſch. 36 Car. 2. B. R. in caſe of the Eaſt-India Company v. Sandys.

2. Monopolies *are againſt the* ancient and *fundamental laws of the realm.* 3 Inſt. 181. cap. 85.——Generally all monopolies are againſt *magna charta*, becauſe they are againſt the *liberty and freedom of the ſubject* and the law of the land. 2 Inſt. 47.

(D. e. 2) Monopolies *as to Printing*, and of *Suits relating thereunto.*

1. THE patent for printing *law books*, derived down to Col. Atkins, was to print *all law books that concern the common law*, wherein nobody elſe has an eſpecial privilege granted under the great ſeal of England. Afterwards an agreement was made, in purſuance of this patent, with the ſtationers, which was, that the ſtationers ſhould no longer print law books, without the aſſent of Col. Atkins. In arguing the caſe of printing Roll's Abridgment, being licenced by the judges, it was inſiſted and admitted by the counſel of the patentee in parliament, 1. That this grant is no public grievance; 2. That the ſtopping the impreſſion, though licenſed by the judges, is juſtifiable; 3. That the *law patentees may not print law books without the judges licence*; 4. That an injunction out of Chancery againſt printing ſuch book is juſt and right. The words of the act of 14 *Car.* 2. 33. whereby the licenſing of books is enacted, ſay, that *no man ſhall print a book till it be licenſed.* Therefore there are two things in this clauſe; 1. That no man can print a book till it be licenſed; 2. *The licence muſt purſue this act of parliament.* If I bring a book to the *licencer*, and he *will not* [*licenſe it*], I have *no remedy*, not ſo much as an action upon the caſe, *only a recourſe to the king to make complaint.* So that although this Abridgment be *licenſed by the judges, yet if* in truth it be *not licenſed by the king to print it*, though the book may well be printed by him that has authority, yet he that has no

authority cannot. It is one thing to licence a book, by saying, *this book is fit for publick view*; and another thing to say, *this book thus licenced shall be printed by any that can get it* into his hands. *Licence to print*, goes to the bookseller or printer; *licence to be printed*, goes to the king. Cart. 89. Mich. 18 Car. 2. in parliament. The Stationers v. the Patentees about printing Roll's Abridgment.

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S. C. cited Skin. 234. Pasch. 1 Jac. 2. B. R. in case of the Company of Stationers v. Parker.— But ibid. 236. the Court said, they thought it a hard case.

2. The company of stationers brought an action against S. for printing Gadbury's Almanack without their leave. Upon a special verdict found, the question was, whether the letter patents granted to the company for the sole printing of almanacks were good or not? The Court said, that *almanacks might be accounted prerogative copies, and* without doubt, this *might be granted* by the king, and accordingly gave judgment for the plaintiffs, nisi causa, &c. 3 Mod. 256. Trin. 29 Car. 2. C. B. The Company of Stationers v. Seymore.

——A question was, whether the grant of the crown to the Company of Stationers to have the *sole printing of almanacks*, provided they were licensed by the archbishop of Canterbury, and bishop of London, were a good grant, or void, because against the liberty of the subjects? It was argued in favour of the patent, that since the art of *printing* was found out, it has been more under the care of the crown than any other art whatsoever; 1st, Because it was an art introduced by the care of the crown; so said in Carter's case, which gave the crown a *property* in the trade; 2dly, Because of the *greatness of the inconvenience*, that may redound to the public, from the mismanagement of the press. In Cart. Rep 89. the controversy was about the printing *Rolle's Abridgment*, and was decreed in Chancery in favour of the patentees, and decree confirmed in the House of Lords. Mich. 24 Car. 2. the question was about the patent for sole printing of all *law books*; judgment against the patentee in B. R. for the *uncertainty of what shall be esteemed a law book*; but this judgment was reversed in the House of Lords. 1 Mod. 256. Seymour's case full in point, the same objections made as here. In 34 Car. 2. Company of Stationers v. Skinner, patent allowed for *primmers, psalters, psalms*, and *almanacks*. 34 Car. 2. in Chancery, Company of Stationers v. John Gale; no decree, indeed, for printing psalms, psalters, and almanacks; but the reason was, because the person controverting the patent, submitted without. 25 Jan. 34 Car. 2. Stationer's Company v. Wright; patent for printing *psalms* allowed. Mich. 33 Car. 2. Stationer's Company v. Lee; another patent for psalms. Trin. 12 W. 3. Stationer's Company v. ..... patent for almanacks. In stat. 9 Annæ, this very patent now in question was taken notice of. And per Cur. the patent for sole printing of law books is not now to be shaken, having had the sanction of the House of Lords. Monopolies are odious; this case is therefore to be distinguished, by deriving to the crown some special interest in almanacks. No opinion was given; but to be spoken to again. 10 Mod. 106, 107. Mich. 11 Ann. B. R. in case of Company of Stationers v. .....

S.P. 2 Chan. Cases, 76. Mich. 33 Car. 2. the Company of Stationer's case.

3. An *injunction* was granted *to stay* the *selling of* some *books imported from Holland*, &c. the sole printing whereof belonged to the company of stationers. 2 Show. 258 to 261. Hill. 34 & 35 Car. 2. the Company of Stationers v. Lee.

——2 Chan. Cases, 93. Pasch. 34 Car. 2. S. C.

4. King Charles 2. granted to the plaintiff the *sole printing of blank writs, bonds, and indentures, for* the space of 30 *years*. The defendant was a stationer, and the *company of stationers had* constantly *for* the space of 40 *years* last past, *before this grant, printed blank bonds*; the question was, whether this grant was good, exclusive of all others? The Court said, that the king had a prerogative to grant the sole printing to a particular person; but inclined, that the patent was not good. 3 Mod. 75. Pasch. 1 Jac. 2. B. R. Earl of Yarmouth v. Darrel.

5. King

5. King Charles 1. grants to the univerſity of Oxon, power to *print tam libros content. in the charter granted by king James to the ſtationers* of London, *quam alios non prohibitos.* In an action brought againſt P. by the ſtationers of London, he pleads theſe letters patents of Car. 1. The Court inclined for the defendant, for this is a *prerogative* of power *annexed to the perſon* of the king, *which he could not grant ſo, but that he may reſume; otherwiſe* it is of the grants *of an intereſt;* but adviſare vult. Skin. 233 to 236. Paſch. 1 Jac. 2. B. R. Company of Stationers v. Parker.

6. In 8 Ch. 1. there was a *patent granted to the univerſity of Oxford to print bibles* and other books not prohibited. 30 May, 8 Car. the patent is confirmed, and limits that there ſhall be but two preſſes and three printers. The plaintiffs claim as the king's [209] printers under ſeveral patents continued down by meſne aſſignments, and bring their bill to reſtrain the defendants from printing bibles, &c. The Lord Keeper was of opinion, that it *was never meant* by the patent to the univerſity, *that they ſhould print more than for their own uſe,* or at leaſt but ſome ſmall number more to compenſate their charge; but as they now manage it, they would ingroſs the whole profit of printing to themſelves, and prevent the king's farmers of the benefit. However, he ſaid, that the validity of their patents was *a matter proper to be determined at law,* and the plaintiffs were now proper only for a diſcovery, and therefore ordered, that the plaintiffs ſhould bring an action at law in B. R. againſt the univerſity, or thoſe who claimed under the univerſity, and that it ſhould be tried at the bar, and the defendants were to admit that they had printed a competent number of bibles at the trial. And though the plaintiffs preſſed much for *an injunction* to ſtay the univerſity printers, yet the Lord Keeper *refuſed* to grant it; becauſe, if it ſhould be found for them, they would receive a prejudice which he could not compenſate, nor make good to them. 2 Vern. 275. Mich. 1684. Hills & al. v. the Univerſity of Oxford & al.

7. Serjeant Hawkins ſays, it ſeems to be the better opinion, that the king may grant to particular perſons the ſole uſe of ſome particular employment, as of printing the holy ſcriptures, and law books, &c. whereof an unreſtrained liberty would be of dangerous conſequence. Hawk. Pl. C. 231. ſ. 6.

4 R. S. L. 243. ſays, that neither the ſerjeant's authorities, which are Mod. 256. 3 Keb. 792.

[Trin. 29 Car. 2. B. R. The Stationer's Company v. Seymour,] & 3 Mod. 75. [Paſch. 1 Jac. 2. Earl of Yarmouth v. Daniel,] nor his reaſons ſeem to carry any great weight with them; that as to the caſe of the COMPANY OF STATIONERS v. SEYMOUR, which is moſt to his purpoſe, the action was brought againſt Seymour, for printing an almanack, which was there held to be the proper copy of the Company of Stationers, only with ſome trifling additions concerning the weather, &c. Beſides, the act of 13 & 14 Car. 2. againſt printing without licence was then in force, as it was alſo, when that judgment in the Houſe of Lords, cited in that caſe, was given againſt one who printed a law book, from the patentee. [And after other things, he ſays,] but further, the *patent for* printing *law books as it ſtands* at this day, *does not at all prevent the inconveniencies* Mr. Hawkins would redreſs; for theſe books are never peruſed by any of the learned before they are put to the preſs; and if the *maxims of Tom Thum, or Doctor Doolittle,* came to their preſs under the title of law, I dare undertake, the patentees would make no ſcruple of printing them as ſuch; therefore if it ſhould be admitted to be reaſonable that ſome learned man of the reſpective profeſſions of law, divinity, and phyſick, &c. ought to peruſe every book before it goes to the preſs, this is far from being a reaſon for eſtabliſhing ſuch a patent as is contended for; if there be any dangerous conſequences to be apprehended, they muſt ariſe from the books not being peruſed by a man of judgment, appointed by authority, and not from the printing them by this or that man; for let the book be firſt peruſed, and have the ſanction of an im-

primatur, the printing will be probably better performed, and the publick better uſed, where there are ſeveral ſhops to go to, than where we are tied up to one; for in this laſt caſe, whatever hardſhips or unfair dealing we meet with, it may be difficult to find redreſs.

[As to the law patent, I believe I may confidently affirm, that there is not one individual gentleman of learning in the profeſſion, but thinks the patentees have moſt groſsly abuſed it, to the great diſhonour and diſreputation of the law, and the great injury of the body of its profeſſors. Whence ariſes the great diſeſteem entertained by foreigners of our laws, but from the many trifling, paltry books, which the patentees, from a plenitude of power, which they flatter themſelves to be inveſted withal, as well as want of modeſty, and decent regard to their ſuperiors, and in defiance and contempt of the profeſſion, have from time to time uſhered into the world? And nothing probably can ſecure the honour and dignity of our laws, but putting a ſtop to theſe licentious practices, by reſtraining the patentees from publiſhing any book, within the compaſs of their patent, without the ſanction of an imprimatur; and under ſuch reſtriction, I am inclined to think, the patent may prove not prejudicial to the publick.]

(E. e) *In what Caſes* it may *be granted. And what is a Monopoly.*

S. C. argued Nov. 173 to 185. —— S. C argued and adjudged. 11 Rep. 84. b. to 88. b. Trin. 44. Eliz. ——

[1. A Monopoly granted to a man of the *ſole making of cards within the realm* is void, and againſt the common law and divers ſtatutes, becauſe it is an hindrance of trade. Co. 11. * MONOP. 86. See the ſame caſe argued, Tr. 44. between DARCY AND ALLEN.]

Hawk. Pl. C. 231. cap. 79. ſ. 5. —— Mo. 671. S. C. —— 8 Rep. 125. S. C. cited — 2 Inſt. 47.

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A grant to any particular corporation of the ſole importation of any merchandize is void, whether ſuch merchandize be *prohibited or not*, as being againſt the freedom of trade, and diſcouraging labour and induſtry, and reſtraining perſons from getting an honeſt livelihood by a lawful employment, and putting it in the power of particular perſons, to ſet what prices they pleaſe, all which are manifeſt inconveniencies. Hawk. Pl. C. 231. cap. 79. ſ. 2, 3.

[2. If a *ſtatute pro bono publico reſtrains the importation of divers manufactures*, becauſe the ſubjects ought to apply themſelves to the making of them, now if the *king grants the ſole importation of them to one or divers (without any limitation)* notwithſtanding the act; this is a monopoly againſt the common law, and the intent of the ſtatute. Co. 11. MONOPOLIES, 88.]

[3. *As* where the ſtatute of 3 *E.* 4. *enacts, that none ſhall import any cards*, &c. if the king grants to a man, that he ſhall import, notwithſtanding the act; this is a monopoly, and void by the ſaid act. Co. 11. 88.]

Hawk. P. C. 231. cap. 79. ſ. 4. ſays, it has been reſolved for the like reaſons as in the note on pl. 2 and 3 above. Jo. 231. Hill 6 Car. B. R. the S. P. was adjudged. Mounſon v. Lyſter.

[4. If the king grants by patent *the ſole ingroſſing of wills and inventories in the prerogative court J. S.*; this is a monopoly, and ſo void; for it takes away the liberty of the ſubject, who may ingroſs it himſelf, or any other whom he pleaſes. At the parliament of 18 and 19 Jac. reſolved in Sir ROBERT FLUDD's caſe. And the patent, adjudged by the parliament to be a grievance, and *Sir Robert Fludd put out of the houſe for a projector.*]

Hawk. P. C. 321. cap. 79. ſ. 4.

[5. If the king grants by patent *the ſole making of bills, pleas, and briefs in the council of York to J. S. for a certain fee*, where before the attornies uſed to make them, and to have the fees, by which new fees are allowed to the attornies; this is a void patent, and a grievance, for this is a monopoly; for by the ſame reaſon, by ſeveral patents, the ſole making of bills and declarations may be limited to certain perſons in every court of Weſtminſter, and ſo lawyers

lawyers utterly excluded to make any of them. At the parliament 18 and 19 Jac. reſolved in LEIPTON's caſe, and his patent adjudged a grievance; for it is againſt reaſon that every one ſhall be compelled to ſhew his evidence to one man, and upon croſs bills he ſhall have the view of the evidences of both ſides, which is not reaſon.]

6. In 50 E. 3. John Peachie of London was ſeverely puniſhed for *procuring a licence* under the great ſeal, *that he only might ſell ſweet wines* in London. 3 Inſt. 181. cap. 85.

7. King Philip and Queen Mary, by their letters patents, granted to the mayor, bailiffs, and burgeſſes of Southampton and their ſucceſſors, (for that king Philip firſt landed there,) *that no* wines called *malmſies*, brought into this realm from the parts beyond the ſeas by any liege man or alien, *ſhould be* diſcharged *or landed in any other part* of the realm, *but* only *at* the ſaid town and port of *Southampton*, with a prohibition, that no perſon or perſons ſhall do otherwiſe, *upon pain to pay treble cuſtom*; and it was reſolved by all the judges of England, that this grant made in reſtraint of the landing of the ſame wines was againſt the laws and ſtatutes of this realm, viz. magna charta, 29, 30. 9 E. 3. cap. 1. 14 E. 3. 25 E. 3. cap. 2. 27 & 28 E. 3. ſtatute of the ſtaple, 2 R. 2. cap. 1. and others; and alſo that the aſſeſſment of treble cuſtom was againſt law, and merely void; and after at the parliament holden in anno 5 Eliz. the patent, as to aliens, was by a private act confirmed by parliament, and not for Engliſh. 3 Inſt. 182. cap. 85.

8. The judges have hitherto *allowed* of monopoly patents, *where* any man *by his own charge* and induſtry, or by his own wit, *or invention*, doth bring any *new trade* into the realm, *or any engine* tending to the furtherance of a trade, *that never was uſed before*; and that *for the good* * *of the realm*; that in ſuch caſes the king may grant him a monopoly patent for ſome *reaſonable time*, until the ſubjects may learn the ſame, in conſideration of the good that he doth bring by his invention to the commonwealth; otherwiſe not. Noy, 182. Arg. cites 9 El. Haſtings's caſe.

Salk. 446. Edgeberry v. Stephens. S. P. ——In ſuch caſes it is good, being indulged for incouragement of ingenuity; but the ſtatute 21 *Jac.* 1. *cap.* 3. *ſ.* 6. *reſtrained it to the term of fourteen years*, it being preſumed, that after that time, it will be a known trade. Per Parker Ch. J. Wms.'s Rep. 183. Hill. 1711. B. R. in the caſe of Mitchel v. Reynolds.

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9. A patent was granted *for ſole making friſadoes*, upon ſuggeſtion of bringing the ſkill of making them into England, and a forfeiture was given of the goods and of 100l. one moiety to the king, the other to the patentee, upon any offender; thereupon an information was exhibited in the Exchequer againſt ſeveral, who demurred; for that it was againſt law to have ſuch *penalties of the goods and* 100 *l.* to be forfeited by force of letters patents. And the Court being of opinion againſt the patentee, he exhibited his Engliſh bill, in the Exchequer-chamber againſt them, whereupon the examination of the cauſe, it appeared, that ſome clothiers did *make baies very like to the patentee's* friſadoes; and that they *uſed to make them before the patentee's patent*; for which cauſe they were

So where a patent was granted to A. for the ſole making of *knives with bone hafts, and plates of lattin*; becauſe, as the patents ſuggeſted, he brought the firſt ufe thereof from beyond ſeas;

yet nevertheleſs, when the wardens neither puniſhed nor reſtrained from making their baies like to his friſadoes. Noy, 182, 183. Haſtings's caſe.

of the company of cutlers ſhewed before ſome of the council, and ſome learned in the law, that they *uſed to make knives before, though not with ſuch haſte*; and that ſuch a *light difference* or invention ſhould be no cauſe to reſtrain them; thereupon he could never have benefit of this patent, although he laboured very greatly therein. Noy, 113. Mathey's caſe.

The *difference* is between a grant to particular perſons for the ſole uſe *of a trade known*, and a *new-invented art*. See Wms.'s Rep. 183. by Lord Ch. J. Parker, Hill. 1711. in the caſe of Mitcel v. Reynolds. —— Where the *new invention*, for which a patent was granted, is only a varying in the form of making it, and not in ſubſtance, the patent was adjudged void. Arg. 2 Brownl. 114. Mich. 9 Jac. in the caſe of Croſs v. Weſtwood, cites the caſe of Haſtings and Johnſon.

Roll. Rep. 4, 5. in the Taylors of Ipſwich and Sherring.

10. If a man has brought in a *new invention*, *or* a new *trade*, within the kingdom, *in peril of his life, and conſumption of his eſtate* or ſtock, &c. *or* if a man has *made a new diſcovery* of any thing, in ſuch caſes the king of his grace and favour, in recompence of his coſts and travail, may grant by charter to him, that he only ſhall uſe ſuch a trade, or traffic, for a certain time; becauſe at firſt the people of the kingdom are ignorant, or have not the knowledge or ſkill to uſe it; but when that patent is expired, the king cannot make a new grant thereof; for when the trade is become common, and others have been bound apprentices in the ſame trade, there is no reaſon that ſuch ſhould be forbidden to uſe it.— Godb. 254. pl. 351. Paſch. 12 Jac. B. R. in the caſe of Cloth-workers of Ipſwich.

11. A patent for *Greenland* is good, becauſe it was found at great peril of the life of the firſt finder. Arg. Roll. R. 5. in the caſe of the Taylors of Ipſwich v. Sherring.

12. The patent to the *College of Phyſicians*, that none practiſe phyſic but ſuch as are allowed by them, had not been good, if not confirmed by act of parliament. Per Croke J. and agreed to by Coke Ch. J. Roll. R. 5. in the Taylors of Ipſwich caſe.

This act is forcibly and vehemently penned for the ſuppreſſing all monopolies; for monopolies in times paſt were ever without law but never without friends. 3 Inſt. 182. cap. 85.—

13. 21 *Jac.* 1. *cap.* 3. *ſ.* 1. enacts, that *all monopolies, commiſſions, grants, licence, charters, and letters patents, granted to any perſons, bodies politic or corporate, for the* * *ſole buying, ſelling, making, working, or uſing of* † *any thing within this realm, or of any other monopolies, or power, or liberty, to diſpenſe with any others, or to give licence to do, uſe, or exerciſe any thing againſt the tenor of any law or ſtatute, or to give any warrant for ſuch diſpenſation or licence; or to agree or compound with any others for any penalty limited by any ſtatute, or of any grant of the benefit of any forfeiture, or any ſum of money, that ſhall be due by any ſtatute before judgment thereupon had; and all proclamations, inhibitions, reſtraints,* ‡ *warrants of aſſiſtance, and all other matters and things whatſoever, tending to the inſtituting, erecting, or furthering the ſame, ſhall be void.*

* This word [*ſole*] is to be applied to five ſeveral things, viz. buying, ſelling, making, working, and uſing, four of which are ſpecial, and the laſt, viz. (ſole uſing) is ſo general, as no monopoly can be raiſed, but ſhall be within the reach of this ſtatute; and yet for more ſurety theſe words (or of any other monopolies) are added, and by reaſon of theſe words [ſole uſing] divers proviſions are made by this act, as hereafter ſhall appear. 3 Inſt. 182. cap. 85.

† As the words before are general, ſo theſe words (of any thing) are of a large extent, and this word cauſeth ſome exceptions hereafter to be made, whereof we ſhall ſpeak in their proper place. 3 Inſt. 282. cap. 85.

‡ [212]

S. 3. *All perſons ſhall be diſabled to have any monopoly, or any ſuch grants as aforeſaid.*

S. 5.

S. 5. Letters patents of new manufactures heretofore granted for twenty-one years *or under, to the inventors thereof, where they are not* * *contrary to law, or any way* † *prejudicial to the commonwealth, are ſaved; ſo alſo are ſuch as have been heretofore granted, for more than twenty-one years, good for twenty-one years from the date of their patent, notwithſtanding this ſtatute.*

* Such a privilege as is conſonant to law muſt be ſubſtantially and eſſentially newly invented; but if the *ſubſtance was in eſſe before, and a new addition thereunto*, though that addition make the former more profitable, yet it is not a new manufacture in law; and ſo it was reſolved in the Exchequer chamber, Paſch. 15 Eliz. in BIRCOTT'S CASE for a privilege concerning preparing and melting of the lead ore; and there it was alſo reſolved, that if the new manufacture be ſubſtantially invented according to law, yet no old manufacture in uſe can be prohibited. 3 Inſt. 184.——Hawk. Pl. C. 233. cap. 79. ſ. 15, 16, 17.

† It may be miſchievous to the ſtate, by raiſing of prices of commodities at home. In every ſuch new manufacture that deſerves a privilege, there muſt be *urgens neceſſitas, & evidens utilitas*; neither muſt it be *to the hurt of trade*, nor *generally inconvenient*; there was a new invention found out heretofore, that bonnets and caps might be thickened in a ‡ *fulling mill, by which means more might be thickened in one day, than by the labours of* 80 *men, who got their living by it*; it was ordained, that bonnets and caps ſhould be thickened and fulled by the ſtrength of men, and not in a fulling mill; for it was held inconvenient to turn ſo many labouring men to idleneſs; if any of theſe qualities fail, the privilege is declared void by this act, and yet this act, though they have all theſe properties, ſets monopolies in no better caſe than they were before this act, 3 Inſt. 184.——‡ [So a mill for ſawing of timber, &c. erected in or near Southwark was ordered to be demoliſhed for the like reaſon many years ſince; and for the like reaſon, printing is ſaid to have been prohibited in the Turkiſh empire.]

S. 6. Neither ſhall this act extend to grants of § *new manufactures hereafter to be made to the inventors thereof for* 14 *years or under, being not contrary to law, or prejudicial to the commonwealth,* ‖ *nor to grants heretofore confirmed by act of parliament, ſo long as ſuch acts continue in force.*

§ The cauſe wherefore the privileges of new manufactures, either before this act granted, or which after this act ſhould be granted, having theſe ſeven properties, were declared to be good, was, for that the reaſon, wherefore ſuch a privilege is good in law, is, becauſe the inventor bringeth to and for the commonwealth a new manufacture of his invention, coſts and damages; and therefore it is reaſon, that he ſhould have a privilege for his reward (and for the encouragement of others in the like) for a convenient time; but it was thought that the time limited by this act were too long for the private, before the commonwealth ſhould be partaker thereof, and ſuch as ſerved ſuch privileged perſons by the ſpace of ſeven *years in making and working* of the new manufacture (which is the time limited by law of apprenticehood) muſt be apprentices or ſervants ſtill, during the reſidue of the privilege, by means whereof ſuch numbers of men would not apply themſelves thereto, as ſhould be requiſite for the commonwealth, after the privilege ended; and this was the true cauſe, wherefore both for the time paſt, and for the time to come, they were left of ſuch force, as they were before the making of this act. 3 Inſt. 184.

A grant of a monopoly may be to the firſt inventor by 21 Jac. And if the *invention be new in England, though* the thing was *practiſed before beyond ſea*; (for the ſtatute ſpeaks of new manufactures within this realm;) ſo that if it be new here, it is within this ſtatute; becauſe the act intended to encourage new devices uſeful to the kingdom, and whether learned by travel or by ſtudy, it is the ſame thing. 2 Salk. 447. ſays it was agreed by Holt and Pollexfen, in the caſe of Edgebury v. Stephens.

‖ This was added, for that the city of London, and other cities and boroughs, &c. have ſome privileges for buying, ſelling, &c. by acts of parliament; for example, the ſtatute of 1 & 2 Ph. & Mar. giveth a privilege to cities, boroughs, towns corporate, and market towns, for the ſale by retail of certain wares and merchandizes, and ſome other acts of parliament in the like caſe; all which do prove, that ſuch privileges could not be granted by letters patents. But ſpecially this clauſe was added in reſpect of the generality of theſe words (ſole uſing). 3 Inſt. 184, 185.

¶ [213]

S. 9. This act ſhall not be prejudicial to London, or any other corporation, for any grant made them concerning their cuſtoms; nor any corporation, ¶ *company, or fellowſhip of any art, trade, or myſtery, nor to any company or ſociety of merchants, for the ordering of any trade.*

By this proviſo, not only the grants, charters, and letters patents, to any city or town corporate, &c. but alſo the cuſtoms uſed within the ſame, are excepted out of this act, which ſeemeth to be more than needed, becauſe the firſt clauſe of the purview of the act doth extend but to commiſſions, grants, licences, charters, and letters patents. 3 Inſt. 185.

So as to the thing by this branch excepted, four things are required. 1ſt. That it be an office; this extendeth only to lawful offices for divers cauſes. 1. It was neceſſary to except lawful offices in reſpect of theſe words [ſole uſing].

S. 10. *Neither ſhall it extend to any grant of privilege for printing, digging, or making or compounding of ſalt-petre, of gunpowder, or caſting, or making of ordnance, or ſhot for ordnance, nor to any grant of any office now in being, other than ſuch as are decried by the king's proclamation.*

S. 11. *Nor to any privilege of digging, or making of allom.*

S. 12. *Nor to the liberties of Newcaſtle concerning ſea coals, nor to licenſing of taverns, ſo as the king receive the benefit.*

S. 13. *Nor to the patent granted to Sir Robert Manſfield for making of glaſs, nor to that granted to James Maxwell, Eſq; for tranſportation of calves-ſkins.*

S. 14. *Nor that of Abraham Baker, for making of ſmalt; nor to that of Edward Lord Dudley, for melting of iron ewer, and making the ſame into caſt works or bars, with ſea or pit coals.*

2. Offices are duties, ſo called, to put the officer in mind of his duty. 3. That which is void and againſt law, is no duty, unleſs it be not to uſe them. 4. Such as are erected againſt law are monopolies and oppreſſions of the people, and no offices. 5. In acts of parliament, lawful offices are intended, as in like caſes has been often adjudged; therefore unlawful offices are all taken away by this act, and lawful offices remain and continue. Secondly, That it be an office heretofore erected; by this act the erection of all new offices, which were not erected before this act, are wholly taken away. Thirdly, That it be now in being, and put in execution. Though the office was erected before this act, yet if it were not in being, and put in execution, the 10th day of February, in the 21ſt year of the reign of king James (at which time this parliament begun) it is clearly taken away by this act. Fourthly, That it be ſuch an office as hath not been decried, that is (for ſo is the record of parliament, and not (decreed) as it is in the printed book) by any of his majeſty's proclamations; for all ſuch offices as be decried, that is, either forbidden or prohibited by any of his majeſty's proclamations, or where the party grieved is left to his remedy at the common law by any proclamation, they be alſo decried; for being contrary to the laws of this realm, as it is declared and enacted by this act, they are alſo decried with a witneſs, and can never be granted hereafter. The fifth proviſo, concerning the making of * allom, or allom mines, needed not; for they belong to the ſubject in whoſe ground ſoever the ore is; and therefore any privilege thereof cannot be granted, but in the king's own ground. The ſixth proviſo concerns the hoſtmen of Newcaſtle, &c. This clauſe was inſerted in reſpect of theſe words (ſole uſing). The reſt of the proviſoes concern particular perſons, and do exempt and except certain ſuppoſed privileges out of the purview and penalty of the law, but leaveth them of like force and effect, as they were before the making of it; but it is to be obſerved, that all the proviſoes, after the ſixth, extend only to the ſuppoſed privileges therein particularly mentioned, already granted, and not to any to be granted hereafter. 3 Inſt. 185.

* Hawk. Pl. C. 234. cap. 79. ſ. 23.

14. In treſpaſs for ſeiſing a ſhip, &c. whereby the plaintiff loſt his voyage, the defendant juſtified under the *Canary patent* granted by the king to ſuch perſons *to have the ſole trade;* but the plaintiff had judgment; for the king cannot grant that the ſubjects goods ſhall be forfeited for doing a thing prohibited by patent. Sid. 441. Hill. 21 & 22 Car. 2. Horn v. Ivy.

S. C. cited by Ld. Ch. J. Parker. Wms.'s Rep. 184. in caſe of Mitchel v. Reynolds.

15. It has been often reſolved, that *cuſtom may create* a monopoly, as the caſe in the Regiſter is, that none ſhould exerciſe the trade of a dyer in Rippon without the archbiſhop of York's licence. Vent. 196. Paſch. 24 Car. 2. in the caſe of Broadnox.

——S. C. cited 1 Le. 143. 199. in caſe of Sir George Farmer v. Brook.——S. C. cited Ow. 67. in caſe of Sir George Farmer v. Brook.

S. P. in caſe of Eaſt India Company v. Sandys. Vern. 130. Hill.

16. The Eaſt-India Company brought a bill in Chancery, ſetting forth their letters patents, and the great charges they were at in making leagues with princes, and building forts, and maintaining forces in India; and the defendants having traded thither, the plaintiffs

plaintiffs prayed a diſcovery what the defendants had traded for, and that they might be compelled to bear a proportionable part of the ſaid charge. The defendants pleaded, anſwered, and demurred: they pleaded *that they were free merchants, and ſet forth the ſtatute* 21 *Jac.* againſt * reſtraining trade, *and* 9 *E.* 3. *that merchants might trade any where not in enmity with the king; and averred the Indians were not in enmity.* Lord K. North held, that this was only a charter for regulating trade, and that there had been many patents for that pupoſe ſoon after the making of the ſtatute of 21 Jac. which had never been thought illegal, nor complained of in any ſubſequent parliament, and therefore over-ruled the plea and demurrer, and ordered the defendants to anſwer the plaintiff's Bill. Vern. 305. pl. 300. Hill. 1684. Eaſt-India Company v. Evans & al.

1682. Lord K. North took notice of an objection that this patent was a monopoly, and ſaid that if it be now reduced into fewer hands, and ſo become a monopoiy, it is hard to ſay when it became ſuch; and compared it to the nuiſance of the buildings in London; there no one can ſay when it became ſo, or which particular houſe firſt made it ſuch. And ſaid that it is to be obſerved, that the words of the ſtatute of monopolies are, that there ſhall be no monopoiy within this kingdom; and ſaid that what influence that might have on this caſe, was worthy conſideration.

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17. In a ſpecial action on the caſe the plaintiffs declared, that in the reign of H. 4. there was a ſociety of merchants-adventurers in England, and that afterwards queen Elizabeth did *incorporate* them by name of *the governor and company of the merchants-adventurers*, &c. with *privilege to trade to Holland*, Zealand, Brabant, Flanders, &c. *prohibiting all others* not free of that company, &c. and that the defendant, not being free of the ſaid company, did trade there without their authority, and imported goods from thence ad damnum, &c. The *defendant pleaded the ſtatute of Ed.* 3. that the ſeas ſhall be open to all merchants to paſs with their merchandize whither they pleaſe; and upon *demurrer* to the plea, the queſtion was, whether the king had a prerogative to reſtrain his ſubjects from trading to particular places? See the arguments on both ſides; but it does not appear that any judgment or opinion of the Court was given. 3 Mod. 126. Trin. 2 Jac. 2. B. R. the Company of Merchant-adventurers v. Rebow.

18. In trover of a ſhip, the jury found, that Cha. 2. granted to the African company *all the regions, countries, &c. from Sally* incluſive *to Cape of Good Hope* incluſive, *with all iſlands near adjoining to thoſe coaſts, &c. and all ports, &c.* to hold to them and their ſucceſſors *for* 1000 *years, with licence for them and no others, to ſend ſhips, &c. and to have all mines of gold and ſilver there, &c. and the intire and only liberty to trade there*, any law or ſtatute to the contrary notwithſtanding, and prohibiting any to trade there, unleſs by licence firſt had, under pain of impriſonment during pleaſure, and the forfeiture of ſhips and goods, &c. with power to ſearch and ſeize, &c. one moiety to the king, and the other to the company; and erected a court of judicature for hearing and determining all caſes of forfeiture and ſeizure for trading thither. The company by virtue of this grant authoriſed certain perſons to ſeize the ſhips, &c. of ſuch as ſhould trade in an infidel country within the limits of that company. Accordingly the defendants ſeized the plaintiff's ſhip and goods, and at the defendant's inſtance there was a proceſs

in the Admiralty againſt the ſaid ſhip; and none appearing for her there, ſhe was condemned; but whether the defendant be guilty, the jury ſay they know not, et ſi, &c. pro quer. damages to 4300l. and coſts to 2l. 3s. 4d. et ſi, pro defend. &c. This ſpecial verdict was obtained at the importunity of their majeſty's counſel for the defendant.. It was adjudged for the plaintiff by the whole Court. Show. 135 to 145. Hill. 1 W. & M. (where is a long argument prepared by the reporter) Nightingale v. Bridges.

19. 2 *W & M. ſ.* 2. *cap.* 9. enacts, that *letters patents for the ſole making of brandy or ſpirits from malted corn, &c. as a new invention, are declared void.*

[215] (E. e. 2) Monopolies. Tried where, and how.

This act having declared againſt all monopolies, &c. to be void by the common law, hath provided by this clauſe, that they ſhall be examined, heard, tried and determined in the courts of the common law, according to the common law, and * not at the Council-table, Star-chamber, Chancery, Exchequer-chamber, or any other court of like nature, but only according to the common laws of this realm, with words negative, (and not otherwiſe;) for ſuch boldneſs the monopoliſts took, that often at the Council-table, Star-chamber, Chancery, and Exchequer-chamber, petitions, informations, and bills were preferred in the Star-chamber, &c. pretending a contempt for not obeying the commandments and clauſes of the ſaid grants of monopolies, and of the proclamations, &c. concerning the ſame; for the preventing of which miſchief this branch was added. 3 Inſt. 182, 183. cap. 85. * Hawk. Pl. C. 232. cap. 79. ſ. 11.

1. 21 *Jac.* 1. *cap.* 3. *ſ.* 2. ENACTS, that *all commiſſions, grants, licences, charters, letters patents, proclamations, inhibitions, reſtraints, warrants of aſſiſtance, and other matters and things tending to a monopoly, ſhall be examined, heard, tried and determined by, and according to the common laws of the realm, and not otherwiſe.*

(E. e. 3) Judgment. And recovered, what.

By this branch theſe things are provided and enacted: 1ſt, Remedy is given to the party grieved at the common law by action or actions to be grounded upon this ſtatute. 2dly, This remedy may be had † in the Court of the King's Bench, Common Pleas and Exchequer, or any of them at the election of the party grieved. 3dly, The party grieved ſhall recover treble damages and double coſts, 4thly, No eſſoign, protection, wager of law, aid prayer, privilege, injunction, or order of reſtraint, to be allowed in any ſuch action. By [aid prayer] is intended as well the writ de domino rege inconſulto, as the uſual form of aid prayer; for both are to one end, and (order of reſtraint) was added for the Council-table, Star-chamber, Chancery, Exchequer-chamber, and the like. 3 Inſt. 183. cap. 85. —— † Hawk. Pl. C. 232. cap. 79. ſ. 13.

1. 21 *Jac.* 1. *cap.* 3. *ſ.* 4. ENACTS, that *the party grieved by pretext of any of the matters or things aforeſaid, ſhall recover (in one of the courts at Weſtminſter) treble damages and double coſts; in which ſuit no eſſoin or other delay ſhall be allowed, nor anymore than one imparlance.*

This clauſe extends to the Privy-council, Star-chamber, Chancery, Exchequer chamber, and the like; and likewiſe to thoſe that ſhall procure any warrant, &c. from the king, &c. And ſo it was reſolved by a committee of both houſes before this bill paſſed; but it extendeth not to the judges of the court before whom any ſuch action ſhall be brought; for before judgments, days muſt be given by orders of Court, &c. 3 Inſt. 183. cap. 85.

S. 4. *If any perſon or perſons ſhall, after notice given, &c. cauſe or procure any ſuch action to be ſtayed or delayed before judgment, by colour or means of any order, warrant, power, or authority, ſave only of the Court wherein ſuch action ſhall be brought and depending, the perſon or perſons ſo offending ſhall incur the danger of premunire, &c.*

S. 4.

S. 4. *Or after judgment had upon ſuch action ſhall cauſe or procure execution of, or upon any ſuch judgment to be ſtayed by colour or means of any order, warrant, power, or authority, ſave only by writ of error, or attaint, the perſon or perſons ſo offending, ſhall incur the danger of premunire, &c.* This clauſe is more general than the former, being the fifth clauſe, for this extendeth alſo to the judges of the court where the action is brought or depending, if any ſtay or delay be uſed by them after judgment; and ſo it was reſolved as is aforeſaid. 3 Inſt. 183. cap. 85.——Hawk. Pl. C. 232. cap. 79. ſ. 13.

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Fol. 215.

(F. e) *Intruder. In what Caſes* a Man ſhall be *ſaid* an Intruder.

[1. WHERE the *determination of the leaſe appears of record*, the reverſion being in the king, the *leſſee* ſhall be an intruder *by continuing of the poſſeſſion after*. M. 32, 33 El. B. R. per Manwood.]

[2. If a leſſee for years of the king *holds over his term*, he is not a tenant at ſufferance, but an intruder. M. 32, 33 El. B. R. per Manwood. Agreed.] S. P. Hard. 25. Arg. cites 35 H. 6. & Br. Coron. 188.

[3. If the king *leaſes* for years *rendering rent at the Exchequer, or* to his receiver, upon condition *for nonpayment, that his eſtate ſhall be void*, and the leſſee *doth not pay* the rent at the day by which his eſtate is void, if he *continues his poſſeſſion* of the land after, yet he is not any intruder till *office found*, but is only *bailiff de ſon tort*, becauſe it does not appear of record that his eſtate is determined; for he might pay the rent in pais to the hands of the receiver. M. 32, 33 El. B. R. per Manwood, in Sir MOYLE FINCH's caſe.] See (H. b) pl. 1. S. C.—Mo. 295. S. C.

[4. *But* if the king *leaſe* for years *upon condition that if the leſſee does not ſurrender, the leaſe ſhall be void*; if he *does not ſurrender* at the time by which his leaſe is void, he ſhall be an intruder *before office found*; becauſe the forfeiture appears of record. M. 32, 33 El. B. R. per Manwood.]

5. Where the *king grants the cuſtody of land and heir of a ward*, and a *ſtranger enters*, this is an intruſion upon the poſſeſſion of the king; for he remains in poſſeſſion, and ſhall make livery at full age. *Contra of entry upon tenant for term of life, the reverſion to the king*: for the *one has frankteneement*, and may have aſſize, and *the other* not, and *has only chattel*. Br. Intruſion, pl. 12. cites 4 H. 6. 11. per Cur.

6. Where tenant of the king dies, his *heir may enter till office be found*; for he *cannot intrude before office*, which finds the dying ſeiſed of the anceſtor; for the *king has no poſſeſſion before office*, which finds his title, but after office he cannot enter but by livery of the king; and *upon office found* for the king of the dying ſeiſed of the anceſtor, there *the heir ſhall anſwer the profits by him taken* before; for the office ſhall have *relation* to the death for the profits, but he ſhall not be an intruder but by entry after office. Br. Intruſion, pl. 18. cites 1 H. 7. 18. and M. 26 H. 8. accordingly. Br. Office devant, &c. pl. 25. cites 1 H. 7. 17. S. C.—*But where the tenant of the king aliens without licence*, there, if *office be found 7 years after, he ſhall not render the profits, but from the time of the office found*; note the diverſity, but *ſuch entry* by purchaſe

chaſe is not called an *intruſion, but a treſpaſs*; and ſo are the words of the pardon thereof, that we pardon the treſpaſs aforeſaid. Br. Intruſion, pl. 19. cites 33 H. 8.

7. If the *king, having no title by matter of record or otherwiſe*, enters upon me, and puts me out, there, if I enter again, my entry is lawful, and no intruſion; ſo though there be a record, if the record gives him no title. Fin. Law, 8vo. 201.

8. The queen by letters patents made a *leaſe of the parſonage of D.* for 21 years; an information of intruſion does not lie for *detaining the tithes* by a pariſhioner, unleſs they were *ſevered* from the 9 parts; per Manwood Ch. B. And per Shute J. the reaſon is, becauſe the queen has no intereſt to ſue for the tithes during the years; but the leſſee may ſue in the ſpiritual court, or in the court of pleas by quo minus, or, as he ſaid, by Engliſh bill. But if the tithes are ſevered, and a ſtranger takes them, the queen may have information, but not an aſſize; for ſhe is not out of poſſeſſion of her frank-
[217] tenement, and therefore it is intruſion to her, and treſpaſs to the party. And as a common perſon leſſor may have aſſiſe on an ouſter made to the tenant for years, ſo may the queen have intruſion. Quod Curia conceſſit. Savil. 68. pl. 142. Paſch. 25 Eliz. Anon.

Ib. Marg. S. P. and ſays, that Plowden in his Quæries, 381. ſeems of opinion, that the intruder by building has not gained any eſtate in poſſeſſion.—

9. The king being ſeiſed of the manor of Beverly in the county of York, in fee, in jure coronæ, a *ſtranger erected a ſhop in a vacant piece of land of the manor*, and took the profit thereof *without paying any rent* to the queen for the ſhop. The queen granted the manor in fee to the E. of Leiceſter, and he never entered into the ſhop nor took any rent thereof. The occupier of the ſhop *died in poſſeſſion of it, and his ſon entered.* It ſeemed to Whiddon, Saunders, Dyer, and Catlin, that this was no deſcent; but Manwood and Wray, Serjeants, e contra. D. 266. b. pl. 10. Mich. 9 & 10 Eliz.

Ibid. cites Hill. 31 Eliz. B. R. Bury v. Goodman, that where A. intruded upon the king, who granted it over to B. and A. continued poſſeſſion, and died ſeiſed; the beſt opinion was, that this does not take away the entry of B. For the Court gave day to Coke, who argued that the entry was tolled, to ſhew cauſe why judgment ſhould not be given againſt him.

10. It was found by office, that one F. *tenant of the queen* in capite, *died ſeiſed* of the manor of D. in the county of Eſſex; R. F. *his heir*, being of full age *tendered his livery*; but *before it was ſued out he made feoffment* in fee, by deed inrolled, to J. B. and others, to the uſe of himſelf for life, and after of his feme for life, with other limitations over. It was moved, if any fine ſhould be paid, inaſmuch as the feoffment ſeemed to be void. Manwood ſaid, it ſeemed to him, that a fine ſhould be paid, and that the feoffment is good. But Shute, contra; for here he has intermeddled with the land before his livery ſued, which is an intruſion. But otherwiſe it is of bargain and ſale by deed indented and inrolled, or fine levied, which is a bar to the party and his heirs. Manwood and Clinch ſaid, there will be a diverſity between feoffment and fine and deed inrolled. Quære. Sav. 32. pl. 77. Mich. 24 & 25 Eliz. Franks's caſe.

Godb. 139. pl. 153. S.C. If the *queen's leſſee is ouſted by a*

11. If one intrudes upon the *poſſeſſion* of the king, *and another enters upon the intruder*, he ſhall not have *treſpaſs* for that entry; for treſpaſs cannot be brought but by one that has poſſeſſion. But in ſuch caſe he *has no poſſeſſion*; for *every intruder ſhall*

anſwer to the king for his own time, and every intruſion ſuppoſes the poſſeſſion to be in the king. Per omnes Juſt. præter Periam. And Rhodes Juſtice ſaid, and cited 19 E. 4. to be, that he cannot ſay in an action of treſpaſs, *quare* clauſum ſuum fregit. 4 Le. 184. pl. 234. Mich. 30 Eliz. C. B. Anon.

ſtranger, yet, though he is out of poſſeſſion, he may aſſign over his term.

reverſion being in the queen, he cannot be out of poſſeſſion but at his pleaſure. Cro. E. 275. Wingate v. Mark. For the re-

(F. e. 2) Statutes relating to Intruſion on the King.

1. 17 *E.* 2. 13. *Prerog. Reg.* *WHEN the king's tenant in chief dies, and his heir enters into the land before he hath done homage to, or received ſeiſin of the king, he ſhall thereby gain no freehold; and if he dies ſeiſed during that time, his wife ſhall not be endowed thereof; as it fell out in the caſe of* Manſel *the marſhall.*

Fine levied by the heir of the king's tenant, *who had intruded* upon the poſſeſſion of

the king, *is void*; for the ſtatute is, that he ſhall thereby gain no freehold, &c. *But* if he levy a fine *without intruding*, this is good. Per Huſſey and the Chief Baron; for the franktenement is in him. Br. Fines, pl. 86. cites 1 H. 7. 5.

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2. 21 *Jac.* 1. 14. *When the king, or any claiming under his title, ſhall be out of poſſeſſion or not have received the profits of the land, &c. within the ſpace of* 20 *years before any information of intruſion be brought to recover the ſame; in this caſe the defendant ſhall plead the general iſſue if he think fit, and ſhall not be preſſed to plead ſpecially, and ſhall alſo retain the poſſeſſion thereof till the title be found for the king.*

Where an information of intruſion may fitly be brought on the king's behalf, no ſcire facias ſhall iſſue, whereupon the ſubject ſhall be forced to ſpecial pleading, and be deprived of the grace intended by this act.

[Before this act] the ancient courſe of the Exchequer has been, that if in an information of intruſion into lands or tenements, the defendant pleads

not guilty, he ſhall loſe the poſſeſſion; and it is ſaid, that the reaſon of this courſe is, firſt, for that regularly the king's title appeareth of the record, and therefore the defendant may take knowledge thereof; and the rather, for that in every information of intruſion it is ſpecified of whoſe poſſeſſion the lands, &c. were; but if the defendant pleads not guilty, the king's learned counſel cannot know the defendant's title, to provide to anſwer the ſame, as the defendant may do to the king's title. 4 Inſt. 116. cites D. 7 El. 238.——D. 238. b. pl. 37. Paſch. 7 El. Sir R. Leigh v. Hudson was upon the pleading a que eſtate of a term which was alleged to be inſufficient if the Attorney-general had demurred upon it; but he having traverſed the original leaſe, and that being found againſt the queen, it is too late now to take advantage thereof; for which reaſon judgment was given againſt the queen. Mich. 7 & 8 Eliz.

(F. e. 3) Intruſion. Proceedings, Pleadings, Judgment, &c.

1. AN *information* of intruſion *lies* for the king *in the Exchequer* upon office found, *although the record be not there* but in Chancery, or with the eſcheator, or their executors. It is ſufficient, that there was ſuch an office found. By the judges and the counſel of the king. Jenk. 199. pl. 14.

Keilw. 201. a. b. pl. 16. Mich. 11 H. 8. S. C.

2. Information of intruſion was for intruding *into a certain portion of tythes of the rectory of D.* in the county of Lancaſter. The defendant pleaded *non intruſit*; whereupon a *commiſſion was prayed*

ed to examine witneſſes who are not able to come to the court. But Manwood denied it; for this information is to prove a title for the queen, and is in the nature of an inquiſition, and is not to try the right; but had it been to try the title of the defendant upon a bill whereto the defendant had anſwered, and that they had proceeded to iſſue, then he might either join in commiſſion or have commiſſion alone; and that ſo it was in a caſe of the EARL OF NORTHAMPTON, in Trinity term, where certain commiſſioners had certified a chantry with certain tenements; to which the defendant anſwered, that it was a chapel of eaſe, and prayed a commiſſion to prove it, and it was denied. Sav. 4. pl. 10. Paſch. 22 Eliz. Norris v. Butler.

3. Information of *intruſion* is exhibited by name *of Outground, New Midd. Marſh, alias Marſh.* The *defendant* pleads not guilty, and *gives in evidence the letters patents of Stebunheath Marſh.* The jury nor the Court is not to intend this to be the marſh contained in the information, but the defendant *ought to have pleaded the letters patents verbatim, and aver that the marſh vocat. Stebunheath Marſh* contained in the letters patents, *and the marſh* contained *in the information are one and the ſame,* &c. And if they will take advantage of its being reputed or known to be ſo, they ſhall aid themſelves by pleading the patent, and *ſaying, that they were reputed time out of mind,* &c. and *not ſay,* that *at the day of the date of the letters patents they were ſo reputed;* or otherwiſe, *to ſhew how once they were parcel, and* how they were *ſevered, and how they came to the king again;* as it was in the caſe of the EARL OF LEICESTER. But to ſay, that the jury or the Court ſhall ſeek the reputed thing, is not reaſon. Per Manwood Ch. B. Sav. 48. Paſch. 25 Eliz. Anon.

[219] 4. *General informations* for intruſion *in certis terris et tenementis,* are as good as treſpaſs quare clauſum fregit, which is uſed in treſpaſs at common law, which does *not expreſs a certain quantity of acres;* and cited the caſe of MINES in Plowden's Commentaries, which is quod cum domina regina fuit ſeiſita de certis terris, vaſtis, &c. Per Manwood Ch. B. Sav. 48. Paſch. 25 Eliz. Anon.

5. Information was for intruſion *into* 100 *acres of land and* 40 *acres of wood,* &c. The defendant pleading not guilty, the jury *found him guilty in* 20 *acres of land and* 12 *acres of wood, and as to the reſt not guilty.* It was moved in arreſt of judgment, that it is *not certainly found in what* 20 *acres of land and* 12 *acres of wood the defendant had intruded;* ſo that the Court knew not into which to put the queen in poſſeſſion. But, per Manwood Ch. B. this ſhall be at the apportionment of him that proſecuted for the queen; and if he enters into other lands or woods than thoſe in which the queen has intereſt, at his own peril be it. And this he ſaid was the opinion of the Juſtices in the Star-chamber. Sav. 28. pl. 67. Trin. 24 Eliz. Attorney-general v. Ayleworth.

6. Where information of intruſion is for intruding *into lands* or tenements, *and taking the profits,* &c. and the defendant is found guilty, the judgment ſhall be *quod convincatur* without any judgment for damages; but where it is for intruſion and *cutting of trees,*

or

or taking other things which are valuable, the *judgment* ſhall be *quod reddat dampna*, &c. Per Manwood Ch. B. and agreed by Fanſhaw the Remembrancer. Quære, Savil, 49. pl. 103. Paſch. 25 Eliz. Anon.

7. Information was in the Exchequer for intruding into the manor of D. in the county of E. The defendant pleaded to *iſſue*, which *was found for the queen*, and judgment was prayed for the queen. Manwood Ch. B. ſaid, they need not be ſo haſty, for there was no danger, for if the defendant die there is no prejudice to the queen; for every *verdict is as judgment for the queen*, ad quod fuit conceſſum. Sav. 57. pl. 123. Paſch. 25 Eliz. Anon

8. If in an information of intruſion the *defendant pleads a gift in tail, leaſe for life, or years, it ſuffices for the queen to deny the leaſe without maintaining her title;* for the defendant confeſſed the title in the queen, if his leaſe be not good; and therefore to deny the leaſe is ſufficient. Per Shute Baron. To which Manwood and Clenche agreed. Sav. 64. pl. 136. Paſch. 25 Eliz. in the caſe of the Attorney-general v. Lord Berkley.

9. An information was exhibited for intruding into certain lands called W. The *defendant ſaid, that* 16 *H.* 8. *one M. L. the defendant's mother, was ſeiſed* of the tenements in the information *in her demeſne as of fee, and ſo ſeiſed died thereof ſeiſed, and they deſcended to the defendant, &c. and ſhewed how, and traverſed the intruſion.* Shute ſaid, this deſcent ſhall not bind the queen, and therefore it is no plea. But Savil ſaid, this deſcent is made before the queen had poſſeſſion, viz. 16 H. 8. and is therefore good. Manwood Ch. B. aſked, if they would have a deſcent 40 years paſt and more to make a title againſt the queen, and ſaid it was not reaſonable; therefore bid them to amend their plea. Sav. 45. pl. 97. Hill. 35 Eliz. Ex Relatione Becket v. Lacy.

10. *Information* of intruſion *is not real but perſonal*, and to be reſembled in all points to treſpaſs; for it ſuppoſes the king in poſſeſſion, as action of treſpaſs ſuppoſes a ſubject, and the land is not demanded nor recoverable, but damages only as in treſpaſs, and the defendant is to be *fined* ſi convincatur de intruſione, as in treſpaſs if he be found guilty of entry vi & armis. Arg. Mo. 375, 376. Mich. 36 & 37 Eliz. in Perrot's caſe.

A bill of intruſion is but in nature of a poſſeſſory action, as an action of treſpaſs; per Manwood Ch. B. Le. 48. pl. 49. in caſe of the Queen v. the Ld. Vaux & al.

(G. e) Office. In what Caſes the *Eſtate of the King* ſhall be *deveſted without Office*. [220]

[1. IF *a man by deed inrolled leaſe* land *to J. S. for life*, the *remainder in fee to the king upon condition*, that *if he pay a certain ſum* of money *to the leſſee*, that *then he may re-enter*, and after *he pays the money* he may well re-enter upon the leſſee, and deveſt the eſtate of the king without office; for all the ceremony of the condition is to be done to the leſſee, and the ſtate of the king depends upon it; between HEMPSLEY AND BRICE, per Curiam.]

Cro. E. 639 to 642. S.C. by name of HEMSLEY v. PRICE ſays, that it was held by all except Gawdy, that by the performance of the condition the entry is lawful upon the tenant for life; and the franktenement being defeated,

feated, the queen's eſtate is defeated; for ſhe is the perſon againſt whom the freehold was demandable and recoverable.

Cro. E. 639 to 642. S.C. by name of Hemſley v. Price.

[2. *But if* land be *given to the king* by deed inrolled upon condition, if the *condition be broken* the donor cannot enter without office; for the eſtate which commences by matter of record, ought to be be defeated by matter of record. M. 40, 41 El. B. R. per Cook.]

Jo. 393. Trin. 13 Car. B. R. S. C. ſays, that it was reſolved, that a grant of the reverſion by deed inrolled is a good revocation of the uſes limited in remainder to the king without office or any other act.——Cro. C. 472. S. C.

[3. If a *feoffment* or other conveyance of land be made *to the uſe of one for life, with divers remainders over*, the *remainder in fee to the king*, with a *power to the tenant for life to revoke* the ſaid uſes, and to limit new uſes; he may revoke the ſaid uſes, and thereby deveſt the eſtate of the king in remainder, and limit new uſes, becauſe the eſtate is in the king, but *quouſque*, &c. and limited. Hill. 11 Car. B. R. between SNAPE AND TURTON. Adjudged per Curiam. Intr. Tr. 11 Car. Rot. 1137.]

4. If *eſcheator ſeiſes ward for the king to which I have title*, and not the king, *I may re-take him; contra if it be found by office for the king*; quod nota bene. Br. Prerogative, pl. 83. cites 4 H. 4. 15. per Hank. and Hul.

5. *General livery* cannot be but upon office found, but *ſpecial livery* may be without office, and without proving of the age; but there he ſhall be bound to a rate and ſum certain to be paid to the king. Br. Livery, pl. 56. cites 28 H. 8.

Fol. 216.

(H. e) In what Caſes the Eſtate ſhall be *void* without Office.

See (H. b) pl. 1.—S. P. And per Manwood Ch. B. the leaſe is merely void and determined in right in privity, and in tenure; for ſo is the pleaſure of the prince expreſſed in the letters patents, that it ſhall be then void, and of no effect. And judgment was given accordingly againſt the leſſee. 2 Le. 134 to 145. 33 Eliz. in the Exchequer. Sir Moyle Finch's caſe.

[1. IF the king *leaſe for years, rendering rent at the Exchequer, and for non-payment the eſtate to be void.* Upon *non-payment* the eſtate ſhall be void without office; for this is in nature of a limitation, and the non-payment appears of record. Dub. between ROYSTONE AND CINNOCK. M. 3 Ja. B.]

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(H. e. 2) Limitation. Statutes of Limitations as to the Prerogative. Concealed Lands, &c.

Before the making this ſtatute in reſpect of that ancient prerogative of the

1. 21 Jac. 1. cap. 2. ENACTS, that *the king, his heirs or ſucceſſors, ſhall not hereafter ſue, impeach, &c. any perſon, &c. for or concerning any manors, lands, tenements, rents, tithes, or hereditaments, (other than liberties and franchiſes, or the iſſues and profits which concern the ſame,) nor make any right, claim, or demand of, in, or to the ſame,*

ſame, by reaſon of any right or title accrued 60 years paſt and more, and now in eſſe;

crown, that nullum tempus occurrit regi, the titles of the king were not reſtrained to any limitation of time; for that no ſtatute of limitation that ever was made, did ever limit the title of the king to any manors, lands, tenements, or hereditaments to any certain time; and where many records and other muniments, making good the eſtate and intereſt of a ſubject, either by abuſe or negligence of officers by devouring time were not to be found; by means whereof, certain indign and indigent perſons, prying into many ancient titles of the crown, and into ſome of later time concerning the poſſeſſions of divers and ſundry biſhoprics, dean, and chapters, and the late monaſteries, chaunteries, &c. of perſons attainted, and the like have paſſed ſurreptitiouſly in letters patents, oftentimes under obſcure and general words, the manors, lands, tenements and hereditaments of long time enjoyed by the ſubjects of this realm, as well eccleſiaſtical as temporal; now to limit the crown to ſome certain time, to the end, that all the ſubjects of this realm, their heirs and ſucceſſors, may quietly have, hold, and enjoy, all and ſingular manors, lands, tenements and hereditaments, which they, their anceſtors, or predeceſſors, or any other, by, from, or under whom they claim, have of long time enjoyed, this act was made and moved from the Houſe of Commons; the body whereof conſiſts of three parts; firſt, that part, which above is in part rehearſed, conſiſts of three branches: firſt, That the king, his heirs or ſucceſſors, ſhall not at any time hereafter ſue, impeach, queſtion, or implead, any perſon or perſons, bodies politic or corporate, for or in any wiſe concerning any manors, &c. 2dly, Or for, or concerning the revenues, iſſues, or profits thereof. 3dly, Or make any title, claim, challenge, or demand, &c. This part is excluſive and negative, and herein ſix things are to be obſerved. 1ſt, This clauſe extends to all manner of ſuits, &c. either in law or in equity. 2dly, To all manner of courts whatſoever. 3dly, It extends not only to all manner of ſuits, but to all impeachments, queſtionings, impleadings, making of title, claims, challenges, or demands. 4thly, Under theſe words (right and title) not only bare rights and titles are comprehended, but real eſtates alſo. 5thly, Not only ſuits, &c. for or concerning any manors, &c. but for and concerning the revenues, iſſues, or profits, &c. And this extends to the ancient demeſnes of the crown, which are mentioned to be reſtrained by an act 11 H. 4. 6thly, So as all writs of ſcire facias, or other proceſs upon any record; all informations of intruſion, or charging any man as bailiff; all finding of offices, either intitling the king, or of informations, are reſtrained, not only within theſe words, (impeach or queſtion,) but alſo within theſe words, (or make any title, claim, challenge, or demand,) which are large and beneficial words, and all other ſuits, &c. of what kind or nature ſoever. But this negative clauſe muſt have four incidents; 1ſt, The king's right and title muſt accrue unto him above 60 years paſt before the 19th day of February, in the 21ſt year of King James, which was the day of the beginning of this parliament; the reaſon hereof was, that if any title of eſcheat, forfeiture, &c. accrued within 60 years, then it ſhould be out of this act; for generally the time of limitation to bar the king was 60 years, but ſuch right or title muſt now be in eſſe. 3 Inſt. 188, 189. cap. 87.

Unleſs the king, or ſome of his predeceſſors, or ſome other under whom he claims, have been anſwered (by force of ſuch right or title) the rents, iſſues, and profits thereof within 60 years next before the beginning of this parliament.——[The 3d incident is,]

In this branch, theſe words (by force and virtue of any ſuch right or title) were materially added, for otherwiſe if the king had been anſwered the rents, revenues, &c. by reaſon or pretext of wardſhip, primer ſeiſin, extent, or the like, it might have made a doubt, whether ſuch an anſwering of the revenues, &c. had been within this act, which doubt is cleared, that it muſt be by force or virtue of any ſuch right or title whereby the king impeaches the ſtate of the ſubject. 3 Inſt. 189. cap. 87.

Or that the ſame have been duly in charge to the king, or queen Elizabeth within the ſpace of 60 years.———[The 4th incident is,]

(Duly in charge) in judgment of law, is the roll of the pipe; for although a note before the auditor, or any other, may be a mean to bring it in queſtion, and to be put in charge, yet that is not in judgment of law ſaid to be duly in charge, unleſs it be in charge in the pipe. 3 Inſt. 189. cap. 87.

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Or have ſtood inſuper of record within the ſaid time.

It cannot ſtand inſuper, unleſs the thing in queſtion were before duly in charge. 3 Inſt. 189. cap. 87.

And that every perſon and perſons, bodies politic and corporate, their heirs and ſucceſſors, and all claiming by, from, or under them, or any of them, for and according to their, and every of their ſeveral eſtates and intereſts, which they have or claim to have in the ſame reſpectively, ſhall hereafter quietly and freely have, hold, and enjoy againſt his majeſty, his heirs and

This is the ſecond part of the body of the act, and as the firſt part is negative and excluſive of

the right and title of the king, ſo this part is affirmative and eſtabliſhing the

and ſucceſſors, claiming by any title accrued, or grown 60 years paſt, or above, and now in eſſe, all and ſingular manors, lands, tenements, rents, tithes, and hereditaments whatſoever, except liberties and franchiſes, which he or they, or his or their, or any of their anceſtors or predeceſſors, or thoſe from, by, or under whom they claim, have held or enjoyed.

ſtate of the ſubject. The miſchiefs before this ſtatute were of two ſorts, viz. either when the king had an eſtate veſted, or continued in him; or where the king had but a bare right; for example, the king's tenant ſeiſed of lands, &c. in fee, is attainted of felony and dies, the king has a real eſtate in him; but if before the felony, the king's tenant were diſſeiſed, and after is attainted and dies, now has the king but a bare right in both theſe caſes, & ſic in ſimilibus the ſubject is provided for by this act, both by the firſt part and by this alſo; for where in this part it is ſaid, (according to their and every of their ſeveral eſtates and intereſts which they have or claim,) if they have an eſtate, and the king but a bare right or title, then are they within theſe words, (which they have). And if the king has a real eſtate in him, then are they within theſe words, (or claim,) ſo as the remedy is applied to both the miſchiefs; again, the words in this part are further, (have held or enjoyed,) that is, where the ſubject has an eſtate, and the king but a bare right or title. 3 Inſt. 190 cap. 87. ——— Moreover, the words of this part are (againſt him, his heirs ſucceſſors), ſo as admit in the caſe put before, the king's tenant being diſſeiſed, as is aforeſaid, before this attainder of felony, that that diſſeiſor had been diſſeiſed, or had mortgaged the land before this ſtatute, this act in this caſe bars the king of his right and title, and to that end works upon the ſtate of the diſſeiſor or mortgagee; but yet the firſt diſſeiſor or the mortgagee for the condition performed or broken may re-enter; for the words of this part be (againſt the king, his heirs and ſucceſſors), ſo as the bar is only againſt them; and every ſubject ſhall take benefit of this act, for the king's right and title is thereby utterly barred; and there is a ſaving hereafter in this act to all perſons, &c. other than the king, &c. all ſuch right, &c. as they ought to have had before this act. 3 Inſt. 190. cap. 87.

* Theſe words extend to all caſes where the real eſtate is in the king; hereby is underſtood the actual taking of the rents, iſſues, revenues or profits by one that claims an intereſt in the land;

*Or taken the * rents, revenues, iſſues or profits thereof by the ſpace of 60 years next before the beginning of this preſent ſeſſion of parliament, unleſs his majeſty, or ſome of his progenitors or anceſtors, or ſome other perſon or perſons, bodies politic or corporate, by, from, or under whom his majeſty any thing has, or lawfully claimeth, in the ſaid manors, lands, tenements, rents, tithes or hereditaments, by force of any right or title, have been anſwered within 60 years next before the beginning of this preſent ſeſſion of parliament, or that the ſame have been duly in charge, or ſtood inſuper of record, as aforeſaid, within the ſaid ſpace of 60 years.*

for albeit the king may in law charge him as bailiff, yet without queſtion de facto, he did take the rents, iſſues, revenues, and profits, and ſuffices to anſwer the letter and meaning of this act. 3 Inſt. 190.

†[223]

This part ſecures the ſubject againſt the ſubject, viz. againſt patentees and grantees of concealments, defective titles or lands not in charge, and all claiming under them. A beneficial law both for the church and the commonwealth, in reſpect of the multitude of letters patents and grants of theſe natures and qualities, and many of them of large extents, and in general words, and

And furthermore, that every perſon, &c. their heirs and ſucceſſors, and all claiming by or under them, &c. ſhall quietly enjoy ſuch manors, lands, &c. (except liberties and franchiſes) as they now claim and enjoy, (whereof his majeſty, his progenitors, &c. by force of ſome right or title, have not been anſwered the rents, &c. thereof, within 60 years next before the beginning of this preſent ſeſſion of parliament,) nor the ſame have been duly in charge, or ſtood inſuper of record as aforeſaid, within the ſpace of 60 years, againſt all perſons, their heirs, &c. claiming any eſtate or right, &c. in or to the ſame, by any letters patents, or grants upon ſuggeſtion of concealment, or wrongful detaining, or not being in charge, or defective titles, of or for which ſaid manors, &c. or any of them, no verdict, judgment, decree, judicial order upon hearing or ſentence now ſtanding in force, has been had or given in any action, &c. in any of his majeſty's courts at Weſtminſter, for or in the name of the king's majeſty, or of the late queen † Eliz. or for any the ſaid patentees or grantees, or for their, or any of their heirs or aſſigns within 60 years next before the beginning of this preſent ſeſſion of parliament.

and had paſſed through the hands of many indigent and needy perſons, &c.——This part extends to liberties and franchiſes which the former two parts did not. 3 Inſt. 190. cap. 87.

This act ſhall not extend to impeach the king's right or title to any reverſion or remainder, nor to alter the tenures or ſervices of lands; and here alſo the right of all others (ſave of the king) is ſaved.

Neither ſhall this act extend to annul the cuſtom of 2d. paid for every chaldron of ſea-coals at Newcaſtle upon Tyne.

All fee farm rents, and other rents paid by the more part of 60 years, are hereby confirmed. This was added for preſerving of the king's fee-farms and rents out of ſuch manors and rents, &c. which are eſtabliſhed and made ſure by this act; for example, king E. 6. granted the manor of D. which came to him by the ſtatute of chanteries to J. S. and his heirs, reſerving a fee farm or any other rent, which grant for ſome imperfection was inſufficient in law to paſs the ſaid manor, and yet is eſtabliſhed and made ſure by this act, and this proviſo makes good the fee farm or rent to the king, if he has been anſwered the ſame by the greater part of 60 years. 3 Inſt. 191. cap. 87.

Provided, that no putting in charge, ſtanding inſuper, or anſwering the rents or profits of any lands or hereditaments, by force or colour of any letters patents, grants, or concealments, They were called letters patents of concealment, becauſe either they had a clauſe before the habendum, quæ quidem mineria nuper fuerunt a nobis concelata, ſubtracta, vel injuſte detenta, or to the like effect, or elſe a proviſo after the habendum, to the like effect; letters patents of concealment were granted in Queen Mary's time, and the firſt, that I find, were granted to Sir George Howard; and in all ſucceeding acts of parliament of confirmation of letters patents, letters patents of concealments are excepted. 3 Inſt. 189. cap. 87.

Or defective titles, By letters patents paſſed by the warrant of certain commiſſioners under the great ſeal for compoſitions of defective titles, pretending the ſame to be for the king's benefit, and ſafety of the ſubject, in which letters patents no words of concealment, &c. are mentioned, but yet upon the matter they were ſuppoſed to be concealed, &c. from the crown. 3 Inſt. 189. cap. 87.

Or of lands, tenements or hereditaments, out of charge, This was a new device to have a certificate that they were not in charge, and then to take a grant from the king for a very ſmall compoſition, &c. and theſe were but inventions and ſubtle devices to deceive the king; to rob him of his tenures, and to the infinite vexation and trouble of the ſubject, all which miſchiefs are now remedied by this act. 3 Inſt. 189. cap. 87.

Or by force or colour of any inquiſitions, preſentments upon any commiſſion, or other authority to find out concealments, defective titles, or lands, tenements, or hereditaments, out of charge, ſhall be deemed or taken to be a putting in charge, ſtanding inſuper, or anſwering the rents or profits to the king or his predeceſſors, unleſs thereupon ſuch lands, tenements, or hereditaments, have been upon any information or ſuit, (on the behalf of the king or his predeceſſors,) upon any lawful verdict given, or demurrer in law, adjudged, and upon hearing ordered or decreed to the king or his predeceſſors, within the ſaid time of 60 years. This was a neceſſary clauſe to be added; for of this kind there were infinite numbers. 3 Inſt. 189. cap. 87.

This act ſhall not extend to lands for which compoſition is or ſhall be made before the end of this parliament.

(I. e) *Eccleſiaſtical Laws.* The *Antiquity.* [224]

[1.] *BEFORE* the time of king *William the Conqueror, all matters,* as well ſpiritual as temporal, *were determined in the court of the hundred,* where were wont to ſit a temporal judge, By the grant of W. the Conqueror, the biſhop's

Originally he had an entire jurisdiction to judge all causes relating to religion; for before that time the bishop and the sheriff kept their court together. So

called *aldermannus, and a bishop*, the one for temporal, the other for divine right; but this was altered by king William; (and it seems by parliament; for this was by the assent of the bishops, abbots, and all the princes of the realm;) for he ordained, that the bishop or archdeacon should not hold plea of episcopal laws, and quæ ad regimen animarum pertinent in the hundred but by himself, and there right should be done, not according to the hundred, but according to the episcopal laws and canons. All this appears by the charter of king William. Irrot. 2 R. 2. Pro Decano & Cap. Eccles. Lincolne. Jan. Angl. 76, 77.]

that before the Conquest there were no such courts in England as we now call courts ecclesiastical or spiritual; for anciently the bishops sat in judgment together with the secular judges and sheriffs on the same tribunal, especially about Easter and Michaelmas, as appears by Mr. Selden in his Notes on Eadmer, pag. 167, as also by the laws of king Athelstan. And long after the Conquest, in the reign of H. 2. 1164, by his laws made at Clarendon, the bishops might interest themselves with the king's secular judges where the matter in judgments extended not to the diminution of members, or were capital. Notwithstanding, at the same time, the bishop's ecclesiastical courts, as also the archdeacon's courts, were established in this kingdom, and further ratified and confirmed by these very laws of H. 2. made at Clarendon. In the 1 E. 6. it was enacted, that all process out of the ecclesiastical courts should from thenceforth be issued in the king's name only, and under the king's seal of arms, contrary to the usage of former times. But this statute being repealed by queen Mary, and not revived by queen Eliz. the bishops and their chancellors, commissaries, and officials, have ever since exercised all manner of ecclesiastical jurisdiction in their own names, and under the distinct seals of their several offices respectively. Also by the statute 25 H. 8. cap. 19. it being enacted, that all former canons and constitutions not contrary to the word of God, the king's prerogative, or the laws and statutes of this realm, should remain in force till reviewed by 32 commissioners to be appointed by the king, and that review not being made in that king's time, nor any thing done therein by E. 6. (though he had also an act of parliament to the same effect) the said ancient canons and constitutions remained in force as before they were, whereby all causes testamentary, matrimonial, tithes, incontinency, notorious crimes of public scandal, wilful absence from divine service, irreverence, and other misdemeanors in or relating to the church, &c not punishable by the temporal laws of this realm, were still reserved unto the ecclesiastical courts as a standing rule whereby they were to proceed and regulate the exercise of their jurisdiction. Godolph. Rep. Introduction, pag. 22, 23, 24. ——— But though the bishop and a temporal judge, called aldermannus, were wont to sit together, yet the one sat for matters of spiritual, and the other of temporal cognizance. But that was altered by king W. by assent of the bishops, abbots, and all the chief persons of the realm; for he ordained, that the bishop or archdeacon should not hold plea of the episcopal laws, & quæ ad regimen animarum pertinent, in the hundred but by themselves, and there administer justice, not according to the law of the hundred, but according to the ecclesiastical laws and canons, as appears by king William's charter inrolled 2 R. 2. Pro Decano & Capitulo Lincoln. Godolph. Rep. 96. cap. 11. cites Jan. Ang. 26, 27.

(K. e) *Commutation. Penance.*

*[225]

Prynne's Cott. Rec. Abr. 536. No 24.— Redemption or commutation of penance being a liberty liable to be abused on many accounts, and having in all times been very much abused, the church has made many

[1. THE commons pray, that where the ordinaries put to a pain pecuniary all those who are found guilty of the great sin of *adultery* and lechery, scilicet, sometimes 40s. and sometimes more or less, by which the lieges are greatly impoverished, and such sins the more sustained and used, where, by the law of God, such sinners *ought to be chastised by corporal penance*, to the effect that such sin should be rather taken away from among the people; they pray, that it may be ordained, that no ordinary * put any one to pecuniary pain for such offences, upon pain of forfeiture of ten times as much as they shall levy. Answer; The king has charged the lords spiritual thereof to ordain due remedy, and if they do not, the king will have it well in memory, and cause to amend it in time to come. Rot. Parl. 1 H. 5. N. 24.]

wholesome orders concerning it. (1.) That there be *no commutation* at all, *but for very weighty reasons, and in cases very particular.* (2.) That when commutation is made, it be *with the privity*

vity *and advice of the biſhop, under his hand and ſeal*; and not by the chancellor, commiſſary, or official; or (if in any caſe it be done by him) that he give a juſt account yearly to the biſhop of all commutation monies in that year, on pain of one year's ſuſpenſion. (3.) That the *money be applied to pious and charitable uſes.* (4.) That if the crime be public and notorious, the *ſatisfaction made* to the church ſhall be *ſignified to the congregation* where the offender lives, with public profeſſions of his ſubmiſſion and repentance. (5.) That the favour of commutation be *not granted a ſecond time* to the ſame perſon for the ſame fault. Indeed none of theſe regulations are in force at this day; but yet they may be uſeful rules to go by till ſomewhat more authentic be framed upon this head. Gibſ. Cod. 1092.

Inſtead of regulating commutations, and the abuſes of them, the commons in parliament petitioned (1 R. 2. & 1 H. 5.) that there might be no commutations at all. Gibſ. Cod. 1093.

[2. Rot. Parl. 45 E. 3. N. 24. Complaint of the ordinaries, becauſe they do not juſtice treſpaſſers by *pain corporal*, but only pecuniary, and ſimile 44 E. 3. N. 41. but vacat.]

[3. Rot. Parl. 45 E. 3. N. 24. Complaint of the ordinaries for giving *acquittances to* the *executors before full account made*, &c.]

4. In caſe of commutation of penance it *muſt be after ſentence.* 3 Inſt. 150.

See 2 Roll. Rep. 387. Mich. 21 Jac. in the Star-chamber, Dr. Barker and Mr. Auditor Jones Regiſter's caſe, wherein 6 rules were laid down for commutation: 1ſt, That penance ought to be injoined before the party ſhall be admitted to make commutation. 2dly, That it ought to be in open court. 3dly, That it ought to be injoined in the preſence of the public regiſter. 4thly, That the act in the regiſter-book ought to be entered. 5thly, That it ought not to be granted to perſons relapſed. 6thly, That the commutation money ought to be employed to pious uſes. But Hobart Ch. J. that as to commutation with perſons relapſed, though in general it may not be, yet there may be ſome circumſtances in a particular caſe which may make it reaſonable. And Ld. Maundeville held the firſt rule true, that penance ought to be precedent; for that there cannot be commutation for penance where none is injoined. 2dly, That commutation may be out of open court, and therein the difference is this, that ſuch things as are contentioſæ juriſdictionis ought to be determined in foro publico; but that ſuch as are voluntariæ juriſdictionis, where the inquiry is ex officio, commutation may be out of court, even in foro alieno in another dioceſe. 3dly, That it cannot be of neceſſity, that there be any public regiſter preſent; for till H. 3d.'s time there were no public regiſters, and that it is ſufficient if it be in the preſence of a public notary. 4thly, The entry belongs to the clerk, and not to the judge, and the party ought to ſee it done for his own advantage. 5thly, As for perſons relapſed, the text is, that there ſhall not be notary recidivo. 6thly, As for the laſt that it is a good, certain, and true rule; and he thought clearly, that chancellors are chargeable to inquire upon the ſtatute of 43 & 49 Eliz. of charitable uſes.

5. Public penance *is* a *puniſhment impoſed for a crime*, by ſtanding in ſome public place, and making an acknowledgment of it, to ſatisfy the church for the ſcandal given by an evil example. In the caſe of inceſt, adultery, &c. the ſinner is uſually enjoined to do public penance in the cathedral or pariſh church, or public market, bare-footed and bare-headed, in a white ſheet, and to make an open confeſſion of his crime in a preſcribed form of words, &c. For ſmaller faults a public ſatisfaction or penance is to be made in the court, or before the miniſter and church-wardens, or ſome of the pariſhioners, as in caſes of defamation, &c. Wood's Inſt. 507.

6. *Penance* may be *changed into a fine* or ſum of money to be given to pious uſes, which *is called commuting*. But the judge ought not directly or indirectly to take any thing hereof to his own uſe, or for the aſſeſſment thereof, or entering the public act. If he doth, it is extortion. Quære, If he takes only his cuſtomary fees? Wood's Inſt. 508.

Fol. 217.

See Prohibition (A).

(L. e) *Prohibition. Eccleſiaſtical Juriſdiction.* The *Antiquity* of their Juriſdiction.

[1. 1 R. 2. cap. 14. THE clergy greatly complain for that the people of holy church purſuing in the ſpiritual court for the *tithes* and their *other cauſes* which of right ought, and of old times were wont, to pertain to the ſame ſpiritual court, are *indicted* for this cauſe, &c.]

(M. e) *Adminiſtration.* The *Antiquity* of Eccleſiaſtical Juriſdiction thereof.

The books of common law obſerve that the foundation of this right which the church has, was by *ſpecial conceſſion from the ſecular power*; which is ſo far from being denied, that it is in no other doctrine than what Lyndwood himſelf has laid down.—Sed hic poſſet quæri, unde proveait hæc libertas; videtur namque quoad primum, quod eccleſia non haberet ſe intromittere de tali approbatione teſtamentorum, ſed potius, pertineret ad judices laicos. Dic, quod hæc libertas, quoad approbationem hujuſmodi, fundatur ſuper conſenſu regio, & ſuorum procerum, in talibus ab antiquo conceſſo. ——— And again,—De conſuetudine tamen hæc approbatio in Anglia pertinet ad judices eccleſiaſticos, epiſcopos, videlicet et eorum officiales. Gibſ. Cod. 560.

[1. THE granting of adminiſtration anciently and at the common law, did not appertain to the eccleſiaſtical courts, but *to the temporal courts.*]

[2. But the granting of adminiſtration *was given to the eccleſiaſtical courts by parliament.* Among the Conſtitutions of Othobon, in cap. De Bonis Inteſtatorum, fol. 52. it is ſaid, that this was *heretofore* provided ſo by the prelates of the realm with the approbation of the king and his barons.]

[3. And in a provincial conſtitution, as appears in Linwood, 190. which was made by John Stratford, archbiſhop of Canterbury, anno Dom. 1380. it appears that it was *heretofore ordained conſenſu regio & magnatum* regni. It appears in Linwood, cap. De Teſtamentis, fo. 92. by the † conſtitution of John Stratford, which was anno Dom. 1380, that then probate of teſtaments belonged to the eccleſiaſtical court of all things deviſed by teſtament, *except of lay fees, but not of them.*]

Lord Coke ſays, it is held in 2 R. 3. tit. Teſtament, 4. that it is only of late time that the church had the probate of teſtaments in this land, till it was by an act, &c. For the people have probate of teſtaments in all other places except England; and in ſeveral places within England the lords of ſeignories have probate of teſtaments at this day in their temporal courts. And Tremaile there ſaid, that he is ſteward in his country, and both free and bond tenants prove their teſtaments before him in the court baron, and ſo it has been uſed time out of mind. And ſo Fineux and all the Juſtices in 11 H. 7. 12. b. agreed, that the probate of teſtaments did not belong to the ſpiritual court, but of late, &c. that they have not this by the law ſpiritual. And Linwood, who was dean of the arches, and wrote anno Dom. 1422. in the reign of H. 6. lib. 3. tit. De Teſtamentis, f. 124. confeſſes, that probate of teſtaments belongs to the ordinaries de conſuetudine Angliæ et non de communi jure, and that in other realms the ordinaries have it not: and in another place he affirms the power of the biſhop in probate of teſtaments, per conſenſum regni & ſuorum procerum ab antiquo. And Lord Coke ſays, he has a book publiſhed in Latin, anno Dom. 1573, by the right revd. prelate Matthew Parker, archbiſhop of Canterbury, who was very expert in matter of antiquity; in which it is affirmed in theſe words, rex Angliæ olim erat conciliorum eccleſiaſticorum præſes, vindex temeritatis Romanæ, propugnator religionis, nec ullam habeant epiſcopi authoritatem præter eam quam a rege acceptam referebant, jus teſtamenta probandi non habeant, adminiſtrationis poteſtatem cuique delegare non poterant. So that originally the eccleſiaſtical judge could not commit adminiſtration to any, who might ſue or be ſued as adminiſtrator, but it was given to the ordinary by an act; that is to ſay, by the act of 31 E. 3. cap. 11. And in ancient time before this ſtatute, it appears by record, that when a man died inteſtate, and had made no diſpoſition of his goods,

nor

nor committed his truſt to any; in ſuch caſe, the king (who is parens patriæ) was wont by his miniſters to ſeiſe the goods of the inteſtate, to the intent that they ſhould be preſerved and diſpoſed for the burial of the deceaſed, for payment of his debts, for advancement of his wife and children, if he has any, and if none, thoſe of his blood. And it appears in Rot. Clauſ. de 7 H. 3. M. 16. bona inteſtatorum capi * ſolebant in manus regis, &c. And afterwards this care and truſt was committed to the ordinaries; for none could be found more apt to have ſuch care and charge of his tranſitory goods after the death of the inteſtate than the ordinary, who all his life had the cure and charge of his immortal ſoul, as it is ſaid, Plowd. Com. 280. in GRIESBROOK's caſe, and therefore he was to this purpoſe conſtituted in loco parentis, 9 Rep. 37. b. &c. Trin. 42 Eliz. in Henſloe's caſe.—But † Windham J. affirmed, that the juriſdiction of teſtamentary cauſes belong originally to the ſpiritual court, and not to the king; for a man by our law cannot make a gift after he is dead, but the ſpiritual law will inforce the executor to do it. And where Lord Co. 9. 37. b. in Henſloe's caſe; and Co. 5. 16. b. de jur. reg. eccleſ. holds, that they did not originally belong to the ordinary, and cites a record that bona teſtatoris capi ſolebant, &c. he thought that this record proves only, that if one dies debtor to the king, thoſe of the Exchequer will iſſue writ of prerogative to ſeiſe all his goods, &c. until he has ſatisfied the king; and this matter is now in uſe, but the word (ſolebant) is not in the record. But Twiſden J. e contra, that teſtamentary cauſes belong not originally to the ſpiritual court, but to the temporal courts and common law, and were proved before lords of manors. Co. 9. 37. b. as they now are in ſome places. And there are ſeveral precedents in our books, eſpecially in the Old Books of Entries, where actions upon the caſe, and ſome actions for debt, were brought for legacies in the hundred court, but this is now antiquated. But in my time I know that it was adjudged here, that if one by his teſtament deviſes a legacy to be paid out of his land (as out of the profits thereof) that for ſuch, action upon the caſe lies in this court. And Lord Dyer ſaid, that the proper remedy for it is to ſue in Chancery, which proves that it does not belong to the ſpiritual court; quod fuit conceſſum. Sid. 46. Mich. 13 Car. 2. B. R. in the caſe of Nicholſon v. Shirman.—† S. P. per Windham J. 1 Lev. 158. Hill. 16 & 17 Car. 2. B. R. in the caſe of Price v. Parker. ——— Wills are proved by preſcription in ſome manors before the ſteward, though no lands paſs by it as in the manor of Mansfield, and in Cowley and Caverſham manors in Oxfordſhire; and its being proved in the ſpiritual court is but of later time, and belongs not to it of common right, as Linwood owns, nor is it ſo in other kingdoms.—Went. Off. Ex. 43.———But Noy affirmed, that the ordinary might commit adminiſtration *at the common law before the ſtatute* 31 *E.* 3. which is but an affirmance of the common law. Arg. Lat. 68. Paſch. 1 Car. in Mayow's caſe. ——The Court held, that adminiſtrations originally belonged to the biſhops, and the inſtance of ſome lords is not a proof to the contrary; and denied the opinion in 9 Rep. Henſloe's caſe. 1 Salk. 37. Trin. W. & M. B. R. Manning v. Napp.

‡ 2 Inſt. 488. cites this conſtitution of John Stratford as made at a ſynod in London, 1280. but in 9 Rep. 39. in Henſloe's caſe it is 1380, as here; but in Cart. 131. Trin. 18 Car. 2. C. B. in the caſe of Hughes v. Hughes, Dr. Walker, a civilian, who argued in that caſe, ſaid, he admitted that John Stratford was archbiſhop of Canterbury, and held a ſynod in London, but not in 1380, but was dead 30 years before.——And it appears in Chronica W. Thorn, (among the decem ſcriptores) pag. 2066. that John Stratford, biſhop of Wincheſter, was made archbiſhop in 1333. And Ibid. pag. 2118. it is ſaid, that he died in 1348.

[4. By the law of *Scotland*, in time of king David the firſt, who lived in the time of H. 1. king of England, placitum de teſtamento coram judice eccleſiaſtico tractari debuit & placitum de teſtamentis ad forum eccleſiaſticum pertinuit. Skene Regiam Majeſtatem, lib. 1. cap. 2. lib. 2. cap. 38.]

[5. Si teſtator nullos executores nominaverit poſſunt propinqui & ejus conſanguinei ad hoc faciendum ſe ingerere. Skene Regiam Majeſtatem, lib. 2. cap. 38. verſus 4. Ita quod ſi aliquem hæredem vel alium *rerum defuncti detentorem* reperiunt, habebunt, *breve domini regis* direct. Vice comiti inhac forma, Rex vicecomiti ſalutem præcipimus tibi quod juſte & ſine dilatione facias ſtare rationabile teſtamentum N. ſicut rationabiliter magis ſtare poterit & ſecundum quod ille illud fecit & quod ſtare debet teſtamentum; ſi quis autem ejus brevis autoritatem convent. aliquid dixerit contra teſtament. ſcilicet, quod non fuit rite factum, vel quod res petita non fuit legata, tunc quidem placitum illud in Curia Chriſtianitatis inde audiri debet & finaliter terminari; quia placitum de teſtamentis coram judice eccleſiaſtico tractari debet, &c.]

[6. Mirror of Juſtices, fol. 27. cap. 2. ſ. 13. * Whereas he holds plea againſt the † prohibition of the king, and in prejudice of the dignity of his crown ‡ ſince to no judge eccleſiaſtical it does belong to hold any plea ſecular, but of teſtament and matrimony in prejudice of the power of the king.]

* Orig. is (de que il)
† Orig. is (defence).
‡ Fol. 218.
‡ Orig. is (deſicome).

(N. e) Eccleſiaſtical Law. Juriſdiction.

[228]
See Eccleſiaſtical Court

[1. Rot. Parl. 17 E. 3. N. 52. *COMPLAINT* made by the commons *of the deans* and officials for holding plea of things pertaining to the crown.]

[2. 6 E. 1. Rot. Patent. Memb. 5. in Dorſo. Upon great *complaint* made by the ſheriff, bailiffs, and men of the county of Cornwall, that *the biſhop of Exeter* and his miniſters trahunt in placita coram eis in curiam chriſtianam *de catallis & debitis quæ non ſunt de teſtamento vel matrimonio & etiam de laicis feodis, foſſatis, diviſis, parcis, rivariis, piſcariis, ſabulonibus, & de trangreſſionibus & diſtrictionibus* in eis factis quorum cognitio & correctio ad coronam & dignitatem noſtram & non ad forum eccleſiaſticum pertinent & etiam quoſdam eorum per ſententias excom. compulerunt & adhuc compellere non ceſſant ad redemtionis quærimoniarum graviſſimas eidem epiſcopo ex cauſis prædictis præſtandis & ad obligationes et faciendas, &c. in regiæ dignitatis & coronæ læſionem & noſtri & multorum exhæreditationem manifeſtam quæ ulterius ſuſtinere nolumus nec debere conſtituimus, &c. and therefore a commiſſion granted to certain perſons ad audiend. & terminand. thoſe grievances by oath of, &c.]

[3. 4 E. 2. lib. Parl. fol. 86. Ad *querelam* communitatum regni Angliæ conquer. de eo quod *prælati* regni *loqueſcunt nimis large in cauſis* & contentionibus *pertinentibus ad coronam* & dignitatem regiam, &c. Ita reſponſum, ſi quis ſenſerit ſe gravatum quærat *remedium ſibi in cancellaria.*]

[4. Hill. 6 E. 1. B. Rot. 13. *Inhibitum fuit* quod non proſequatur ulterius in curia chriſtianitatis *de debitis & catallis*, &c.]

For laying violent hands on a ſpiritual perſon, action lies in the ſpiritual court, but he ſhall not ſue there for damages. Per Coke Ch. J. Roll. R. 255.

[5. Statutum *de circumſpecte agatis*, 13 *E.* 1. *In Magna Charta, fol.* 89. *de violenta manuum injectione in clericum* & in cauſa *defamationis* conceſſum fuit alias quod placitum inde teneatur in curia chriſtianitatis cum *non petatur pecunia ſed agatur ad correctionem peccati.* Et ſimiliter *pro fidei læſione.*]

[6. *Prohibitio formata de ſtatuto articuli cleri in Magna Charta*, 2 *part. fol.* 70. *b.* Cum cognitiones placitorum de cauſis pecuniariis & de aliis catallis & debitis quæ non de teſtamento vel matrimonio ad coronam & dignitatem noſtram pertineant de conſuetudine ejuſdem regni approbata & hactenus obſervata, &c.]

* Proof of wills and the validity of them be-

[7. It ſeems by the ſtatute of 2 *H.* 5. *cap.* 3. quod vide 2 *H.* 5. Rot. Parl. N. 5. accordingly, that cauſes concerning * *teſtament and* † *matrimony* appertain to the conuſance of the temporal court; but

but quære the bill upon the file, if it be not miſtaken in the print.]

longs to the eccleſiaſtical court, and if they adjudge a perſon capable of making a will, B. R. will not intermeddle; for it is within their juriſdiction to adjudge when a perſon is of age to make a will. Per Cur. 2 Mod. 315. Trin. 30 Car. 2. B. R. Smallwood v. Brickhouſe.——The eccleſiaſtical court is the proper judge whether a will or no will, and howſoever they determine, it is concluſive at law. Comb. 454. Mich. 9 W. 3. B. R. Gray v. Tench.

† If any marry without proclamation of banns or licence, they are citable for this to the eccleſiaſtical court, and no prohibition lies, reſolved. Jo. 259. Matingley v. Martin. —— Wife or not wife is triable at common law, but whether lawfully married or not, is triable in the ſpiritual court. Sti. 10. Paſch. 13 Car. Betſworth v. Betſworth. —— Jenkins, 289. pl. 26. ſays, the ſpiritual court has nothing to do with the legality of the marriage, but where the temporal court commands them to inquire and certify it, and this in real actions only.

[8. Rot. Parl. 25 E. 3. 2 Part. N. 64. Upon petition of the clergy, the king anſwered, if *title of voidance* be taken in plea before juſtices, whereof the conuſance appertains to the court chriſtian, let the party have his challenge, and the juſtices do him right.] [229]

[9. Theſe pleas here enſuing are * mere ſpiritual, whereof the eccleſiaſtical court may hold plea, ſcilicet, *de correctionibus* quas prælati faciunt, *pro mortali peccato*, ſcilicet, pro † *fornicatione*, *adulterio* & ‡ *hujuſmodi*, ‖ pro quibus aliquando infligitur pæna § corporalis, aliquando pecuniaria, maxime ſi convictus fuerit de hujuſmodi liber homo. Item ſi prælatus puniat *pro cœmeterio non clauſo* ¶, *eccleſia diſcooperta*, *vel non decenter ornata*, in quibus caſibus alia *pœna* non poteſt infligi quam *pecuniaria*. Item ſi rector petat verſus parochianos ** *oblationes & decimas* debitas, vel conſuetas; vel *ſi rector agat contra rectorem de decimis majoribus*, *vel minoribus*, *dummodo non petatur quarta pars valoris eccleſiæ*. Item ſi rector petat *mortuarium* in partibus ubi mortuarium dari conſuevit. Item ſi prælatus alicujus eccleſiæ, vel advocatus petat a rectore †† *penſionem* ſibi debitam, *omnes hujuſmodi petitiones ſunt faciendæ in foro eccleſiaſtico*. ‡‡ *Statutum de circumſpecte agatis*. 14 *E.* 1. *in Magna Charta*, *fol.* 89. Rot. Parl. 25 E. 3. 2 Part. N. 62. It was prayed by the clergy that this ſtatute might be confirmed, yet it is not done.]

* Thoſe things are called mere- ‖ Fol. 219. ly ſpiritual, becauſe they have no temporal mixture, and are corrections *pro ſalute animæ*. Hereſy, ſchiſms, holy orders and the like, are mere ſpiritual things, but the power of granting adminiſtration and probate of teſtaments, do not de jure communi belong to the court chriſtian. 2 Inſt. 488.

† The conuſance of all *fornications*, adulteries, and *ſuſpicious living in adultery*, belongs to the eccleſiaſtical court. Jo. 259. Matingley v. Martin.——In ancient time the king's courts, and eſpecially the *leet*, had power to inquire of and puniſh fornication and adultery, by the name *Letherewite*, [or *Legerwite*, for which ſee Somner's Gloſſ. verbo Letherwithe,] and it appears often in Doomſday-book, that the king had the fines aſſeſſed for thoſe offences, and that they were aſſeſſed in the king's courts, and could not be inflicted in court chriſtian. 2 Inſt. 488.

‡ This extends to *ſolicitation of chaſtity* of any woman, and to *inceſt*, the firſt whereof is a leſs, and the laſt a greater offence than thoſe mentioned of fornication and adultery. 2 Inſt. 488.—Cited per Vaughan Ch. J. Vaugh. 212. in caſe of Harriſon v. Burwel.

§ Pecuniary puniſhment muſt be intended by way of commutation of penance. 2 Inſt. 489.

¶ By the words (church uncovered) is intended not only of the body of the church, which is parochial, but alſo of *any public chapel annexed* to it; but it extends *not to the private chapel* of any, *though fixed to the church*, for that muſt be repaired by him that hath the proper uſe of it; but as to the firſt the pariſhioners ought to do it per conſuetudinem notoriam & approbatam, and the conuſance thereof is allowed to them by this act, but the *chancel* is to be repaired by the parſon, &c. 2 Inſt. 489.

** Oblationes dicuntur quæcunque a piis fidelibuſque chriſtianis offeruntur Deo & eccleſiæ, ſive res ſolidæ, ſive mobiles. 2 Inſt. 489.

†† In caſe of a penſion, & pro rationabili parte bonorum, both temporal and eccleſiaſtical courts have juriſdiction. Per Twiſden, Rainsford, and Wild. 2 Lev. 128. Hill. 26 & 27 Car. 2. B. R. Trafford v. Trafford.

‡‡ This ſtatute of circumſpecte agatis was made in 13 E. 1. and is called by that name, becauſe it begins thus, viz. *The king to his judges ſendeth greeting, uſe yourſelves circumſpectly in all matters concerning the* * biſhop of Norwich *and his clergy, not puniſhing them if they* hold plea in † court chriſtian *of ſuch things as be* mere ſpiritual. —— * The biſhop of Norwich is put here only for an example, but it *extends to all biſhops* within this realm. 2 Inſt. 487. —— Pl. C. 36. b. in Platt's caſe. ——

† It is called court chriſtian, becauſe as in the ſecular courts the king's laws determine cauſes, ſo in eccleſiaſtical courts the laws of Chriſt ſhould rule and direct; and therefore the judges in thoſe courts are divines, as archbiſhops, biſhops, archdeacons, &c. And it may be found among the laws publiſhed before the Conqueſt by king Edgar thus, viz. Celeberrimus autem ex omni ſatrapia conventus bis quotannis agitor, cui quidem illius diœceſis epiſcopus & aldermannus interſunto, quorum alter jura divina, alter humana populum edoceto. 2 Inſt. 488.

Till the biſhop's juriſdiction was increaſed by act of parliament, he could hold plea only in matters teſtamentary and matrimonial, but by the ſtatute de circumſpecte agatis, and of articuli cleri, he may now hold plea in many other caſes. 2 Mod. 118. Mich. 28 Car. 2. C. B. in caſe of Waterfield v. the Biſhop of Chicheſter.—2 Inſt. 487. 537.

[230] (O. e) Eccleſiaſtical Law. *Sentence.*

S. P. per Archer J. 2 Vent. 43. Paſch. 22 Car. 2. in caſe of Grove v. Dr. Elliot.

[1. IF a ſentence be given by the ordinary or other eccleſiaſtical judge, *it is to be preſumed by the judges of the common law, that it is according to the eccleſiaſtical law, and ſo they ought to allow it.* Co. 5. CAWDRY, 7. adjudged.]

Jo. 393. S.C. and ſays, that the Ch. J. delivered the opinion of the Court, that the eccleſiaſtical commiſſioners he might well, for good cauſe, deprive an eccleſiaſtical perſon of his benefice, as well as the biſhop or ordinary; and when the jury finds that he was deprived, though the ſpecial cauſe does not appear either in the verdict or ſentence, yet it is good enough.

[2. If the *high commiſſion deprives a man* of his benefice by force of their commiſſion, and it is found by ſpecial verdict that they deprived him *virtute liter. paten.* they being authoriſed *ſecundum formam ſtatut. virtute commiſſionis*, for divers contempts to the ordinary; though the particular cauſe is not found, yet it is good, and the Court ought to preſume the ſentence to be well given, as well as if it had been given by the ordinary; becauſe the *king might before the ſtatute of* 1 *El. make commiſſioners by his letters patents to proceed according to the eccleſiaſtical law*; and here it appears that this proceeding was againſt a ſpiritual perſon, and by eccleſiaſtical cenſure, ſcil. deprivation, and not againſt a man according to the ſtatute of 1 El. and therefore the Court ought to give credit to their ſentence, without ſhewing the cauſe in particular. Trin. 11 Car. B. R. between ALLEN AND NASH, adjudged upon a ſpecial verdict. This concerned one HUNTLEY. Intratur, M. 8 Car. Rot. 508. and this agrees with CAUDREY's caſe. Co. 5. 7. and the Court vouched the Old Book of Entries, tit. Abbe, 1. where it is pleaded to be made by commiſſion generally. But nota, that the Court ſeemed that if ſuch ſentence had been *grounded merely upon the ſtatute of* 1 *El. againſt a layman*, that then the *cauſe of the ſentence ought to appear to the Court*, by which it might appear to the Court, that the matter for which the ſentence was given was *within the juriſdiction of the high commiſſion.*]

(P. e) *Of what Effect* it ſhall be in our Law.

Fol. 220.

[1. IF the clerk of J. S. be admitted and inſtituted, and after the clerk of J. D. is admitted, inſtituted, and inducted, which is void, becauſe the church was full before, and ſo this a *ſuper inſtitution*, and after *the inſtitution of the clerk of J. S. is ſentenced to be irrita & nulla*, (becauſe he was inſtituted contrary to a * *caveat* entered, admitting this to be a good cauſe,) yet it ſhall *not ſo relate to make the inſtitution* and induction *of the clerk of J. D. good ab initio, which was void before.* Hil. 15 Jac. B. R. between HITCHING AND GLOVER, adjudged; for otherwiſe by ſuch means a purchaſer may be utterly defeated of his temporal inheritance, becauſe this ſentence may be after ſix months; for then he is without remedy.]

Cro. J. 463. S. C. — Roll. R. 191 & 227. Paſch. and Trin. 13 Jac. S. C. — 2 Roll. R. 6. Hill. 15 Jac. S. C. —

* The inſtitution and induction ſtands good, though a caveat was entered, and the eccleſiaſtical court cannot meddle with it. Litt. R. 165. Stevens v. Criſp.

[2. If a layman be admitted, inſtituted, and inducted to a benefice, and *after ſix months* he is *deprived, becauſe he is a layman, and a ſentence of nullity* of his admiſſion, inſtitution, and induction, yet it ſhall *not* ſo *relate to make a title of lapſe to the ordinary*; for otherwiſe by ſuch means the temporal inheritance may be taken away. D. 3 El. 294. adjudged.]

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(Q. e) *Clergy. Privileges.*

[1. Rot. Parl. 15 E. 3. N. 19. THE *clergy prayed that they ought not to be taken nor impriſoned* without cauſe or proceſs of law by the miniſters of the king *by his commandment, againſt the law* and uſages of the land. To which the king anſwered, that his intention is not to do contrary to the law, but if any is taken by command of the king, it is done for juſt cauſe by the *ordinance made in the parliament of Northampton*, &c. Such petition by them made, 15 E. 3. N. 21. againſt impriſonments made of them by the juſtices.]

Prynne's Cott. Rec. Abr. 32. N° 19.

[2. Rot. Parl. 15 E. 3. N. 22. 30. The clergy *complain*, that when it is returned that a clerk has *no lay-fee* in his bailiwick, immediately a *capias* is awarded, *where they ought to ſend a writ to the biſhop his ordinary*, to cauſe him to come; and when any clerks are condemned before them for any ſum for any cauſe, the juſtices command to levy the ſaid ſum, without ſending to the biſhop his ordinary, by which commandment the lay miniſters enter the fee of holy church, and the goods and chattels, &c. To which the king anſwered, the proceſs aforeſaid is allowable by the law of the land, and has been time whereof memory, &c. And it is not the intention of the king, that any layman enter the fee of holy church againſt the privileges and franchiſes thereof.]

Prynne's Cott. Rec. Abr. 32. N° 22 & 33. N° 30. — If a *ſcire facias* be brought upon a recognizance, or upon a judgment in a writ of annuity, and the *ſheriff returns* that the defendant is *clericus beneficiatus nullum habens laicum feodum*, &c. the plaintiff ſhall have a writ to the biſhop

biſhop of the ſame dioceſe, to warn the defendant; and if he appears not, or ſhews no matter wherefore execution ſhould not be granted, then a writ ſhall be awarded to the biſhop to levy execution de bonis eccleſiaſticis. Gibſ. Cod. 17.

In an action of *account*, &c. the body of a *clergyman ſhall not be arreſted by capias*, but the ſheriff can only return quod clericus eſt beneficiatus, &c. Gibſ. Cod. 15. —— Nor upon ſtatute ſtaple or ſtatute merchant; for which purpoſe there is not only the clauſe in the writ, ſi alienus ſit, Regiſter, fol. 146, 147; but a ſpecial writ, forbidding the ſheriff to arreſt him; or if he be taken by ſuch proceſs, a writ is provided for his diſcharge. Gibſ. Cod. 15.

Fol. 221.

Prynne's Cott. Rec. Abr. 132. N° 15.

[3. Rot. Parl. 45 E. 3. N. 15. Becauſe in this preſent parliament it was ſhewn to the king, by all the lords and commons of England, that the government of the realm has long been made by people of holy church, which are not juſtifiable in all caſes, by which great miſchiefs and damages have happened in time paſt, and more might happen in time to come, in diſheriſon of the crown, and great prejudice of the ſaid realm, by divers cauſes which one might declare, they *pray that lay-people and no other be choſen chancellor, treaſurer, clerk of the privy-ſeal, barons of the Exchequer, chamberlains of the Exchequer, comptroller, and all other great officers and governors of the realm.* Anſwer, the king will ordain upon this point as to him ſhall ſeem beſt by the advice of his good council.]

4. Beſides the many confirmations of the great charter in parliament, (which included a confirmation of the rights and liberties of the church and clergy,) and beſides other general confirmations of the rights of the clergy, in conjunction with thoſe of the laity, there have been divers acts and clauſes, eſpecially in favour of the clergy. Accordingly divers of our kings before the Conqueſt (particularly *Edward the Elder*, *Edgar*, *Canutus*, and *Edward the Confeſſor*) begin their laws with ſpecial proviſions for the liberties of the clergy, of which therefore the uſage ſince is only a continuance. And it is obſervable, that many of the confirmations were made at the ſpecial requeſt of the commons in parliament, whoſe petitions frequently began with ſuch a general clauſe, in favour of the church and clergy. Gibſ. Cod. 5. and ſee Ibid. to pag. 22.

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(Q. e. 2) * *Ordinary*, and *Power of the Ordinary.*

* In ſome acts of parliament we find the biſhop to be called ordinary, and ſo taken at the common law, as having ordinary juriſdiction in cauſes eccleſiaſtical, albeit in the civil law, whence that word (ordinarius) is taken, it ſignifies any judge authorized to take cognizance of cauſes proprio ſuo jure, as he is a magiſtrate, and not by way of deputation or delegation. The word (ordinary) doth chiefly take place in a biſhop and other ſuperiors, who alone are univerſal in their juriſdictions; yet under this word are compriſed alſo other ordinaries, viz. ſuch as to whom ordinary juriſdiction doth of right belong, whether by privilege or by cuſtom. Godolp. Rep. 23. cap. 3.

[1. THE ordinary himſelf, without any canon or cuſtom, cannot *command any layman to obſerve any new ceremony* in the church.]

[2. *As* if the ordinary commands, that no feme after ſhe has had a child, ſhall be churched, if, when ſhe comes within the church-door, ſhe does not kneel down, and make her orizons towards

wards the Eaſt, and alſo come in a vail; this command is not lawful, becauſe there is not any cuſtom ſince the reformation, nor any canon for it; and alſo the *manner of churching* is ordained by the Book of Common Prayer, which is confirmed by the ſtatute of 1 *El.* and the ordinary of himſelf has not any ſuch power to impoſe ſuch new ceremonies upon the laity. P. 20 Ja. B. R. in one SHIPDAM's caſe, the wife of an alderman of Norwich, who was excommunicated by the chancellor there ex officio; reſolved, by Lee and Chamberlain, contra Houghton, and day given why prohibition ſhould not be granted. But it was ſtayed, becauſe it was certified by divers biſhops to be *the common cuſtom of the church of England.*]

3. It was agreed that the *ordinary* in his viſitation, *ſhall make the pariſhioners ſuſtain their bells, ornaments, &c.* Br. Depoſition, pl. 2. cites 11 H. 4. 12.

(R. e) * Depoſition. And what ſhall be *Cauſe to depoſe.*

Fol. 222.

* Deprivation *is an eccleſiaſtical cenſure*, by which a clergyman is deprived of his benefice. *Degradation is* an eccleſiaſtical cenſure, whereby a clergyman is deprived of his orders. It is otherwiſe called depoſition. A ſentence may not only be given for this purpoſe, but the clerk may be ſolemnly ſtripped of his clerical habit. Wood's Inſt.

[1. † IF an *abbot aliens his land which he has in right of the houſe*, he ſhall be ‡ depoſed as a *dilapidator* domus. 20 H. 6. 46. ‖ 9 E. 4. 34. adjudged accordingly, 29 E. 3. 16.]

† S. C. cited 9 Rep. 98. b. Trin. 13 Jac. in Bagg's caſe.—S. C. cited 11 Rep. 72. b. Paſch. 13 Jac. in MAGDALEN COLLEGE's caſe, cites 2 H. 4. 3. b. and 11 H. 6. 35 E. 1.—‡ Br. Depoſition, &c. pl. 4. cites S. C.

‖ *Dilapidation*, by the opinion of Lord Coke, 3 Inſt. 204. is a good cauſe of deprivation; but ſome think the authorities he cites in the margin do not prove it, viz. 29 E. 3. 16. where it is true there is not one word to that purpoſe. And 3 H. 4. 3. is only the opinion of Serjeant Tyrwhit, where Thirning Ch. J. is of opinion, that if a biſhop, archdeacon, &c. committed waſte in cutting wood which they had in right of the church, they were not puniſhable at common law; and then demands of the bar how the party could be puniſhed in the principal caſe? Whereto Tyrwhit anſwers, he ſhall be depoſed as a dilapidator of his houſe; and Thirning replies, let that be as it will, (i. e. by common law) yet by the law of the land he is not puniſhable. Notwithſtanding which I think clearly, that § at common law an action of waſte lay for dilapidations in eccleſiaſtical houſes and buildings; and that therein the place waſted was recoverable, which was tantamount to a deprivation. Watſ. Clerg. Law, 54, 55.

And in the 9 E. 4. 34. it is held, per Moile J. that if a *ſon gives an abbot*, &c. 10 l. *to pray for the ſoul of his father*, and *he ſpends the money*, he ſhall not be deprived, becauſe he received the gift in jure proprio (or in jure perſonæ); but if he *aliened*, &c. *any of the abbey lands*, he might be deprived, for thoſe he had in jure domus. And it ſeems to me there is the like reaſon for a deprivation, where waſte is done in houſes or lands held in jure eccleſiæ. Watſ. Clerg. Law, 55.

Though in equity deprivation may well belong to dilapidators, yet that it hath ever been inflicted, appears not by any thing that is alleged either out of the books of common or canon law, which ſpeak only of *alienations*. Gibſ. Cod. 1116.

§ [233]

[2. *Before the ſtatute* 18 *El. cap.* 7. if an incumbent had been *convicted by verdict of homicide*, and could not purge himſelf of it, this had been cauſe of deprivation. Trin. 15 Ja. B. R. between SERLE AND WILLIAMS, per Curiam; for he was *criminoſus.*]

Hob. 288 to 294. S. C. adjudged.—Cro. J. 430. S. C. by name of Searl's caſe.

[3. *But* otherwiſe it had been if he *had purged himſelf thereof*, as was agreed in the ſame caſe.]

[4. *But*

[4. *But now* though the *purgation be taken away by* 18 *El. cap.* 7. yet the crime remains, and the conviction by verdict of homicide ſhall bind him, and ſo he may be deprived for it. Tr. 15 Ja. B. R. between SERLE and WILLIAMS. Reſolved per totam Curiam, and prohibition denied. Contra, Mich. 27, 28 El. B. Rotulo, 2574. between NICHOLS and CHAFE. Prohibition denied in ſuch caſe.]

[5. If a parſon *ſpeaks againſt the Book of Common Prayer* eſtabliſhed by the ſtatute of 1 *El.* this is good cauſe of deprivation by the eccleſiaſtical law, without any aid of the ſaid ſtatute; for he who ſpeaks againſt the peace and quiet of the church, is not worthy to be a governor of the church. Co. 5. CAWDRY's caſe, 5. b. adjudged. And ſame caſe, 37 El. B. R. CAWDRY and ACTON, though it was objected that it was but *malum prohibitum*. And this power of deprivation is not taken away by the ſaid act from the ordinary for the firſt offence being in the affirmative. And alſo there is an expreſs proviſo which excepts it. Co. 5. CAWDRY, 5. adjudged.]

6. By the common law there are *two ſorts of degrading*; one *ſummary*, by word or ſentence only; and the other *ſolemn*, by diveſting the party degraded of thoſe ornaments and rights which are the enſigns of his order or degree. Gibſ. Cod. 1104.

S. P. Mo. 755. pl. 1043. 2 Jac. in the Star-chamber.

7. The *king without parliament may make orders and* conſtitutions *for the government of the clergy*, and may deprive them if they obey not. Cro. J. 37. at an aſſembly of all the judges, and of the archbiſhop of Canterbury, biſhop of London, and divers of the nobility.

* Dal. 51. pl. 19. per Bendloes.

8. * *Hereſy*, *ſchiſm*, *irreligion*, *perjury*, and *excommunication*, are good cauſes to deprive a clerk; ſo of *homicide*, if he be attainted and not pardoned; otherwiſe, if pardoned; for pardon reſtores him to the benefit of law. Jenk. 259. pl. 55. cites Hob. Searle's caſe.

9. It was reſolved, that if biſhop, archdeacon, parſon, &c. *abates all the trees*, this is good cauſe of deprivation. 11 Rep. 98. b. Trin. 13 Jac. B. R. in Bagg's caſe, and cites 2 H. 4. 3. b. accordingly.

10. Where a *ſtatute makes it a part of a biſhop's office to tender oaths* on ordination of any perſon, if the biſhop *diſobeys*, it is good cauſe of deprivation; and then the metropolitan may proceed againſt him for doing contrary to the duty of his office, but not to puniſh him as for a temporal offence. 12 Mod. 239, 240. Biſhop of St. David's v. Lucy.

11. *Miſapplying revenue* is cauſe of deprivation. 12 Mod. 240. Mich. 10 W. 3. Biſhop of St. David's v. Lucy.

(S. e) * *Guardian of the* † *Spiritualties.* The Guardian of the Spiritualties. *Who is* of Common Right.

Fol. 223.

* The power and jurisdiction of this office in the church is very ancient, and was in use before the time of E. 1. This ecclesiastical office is in being immediately upon the vacancy of an archiepiscopal see, as when a bishoprick happens to be vacant. Godolp. Rep. in the Introduction, 9.

† Spiritualties are all manner of jurisdictions of courts; as to grant administrations, to prove wills, to grant licences to marry, &c. Sav. 52. Pasch. 25 Eliz. Anon.

[1. OF common right *the dean and chapter is* guardian of the spiritualties *of the metropolitan* in time of vacation.]

[2. *Of inferior bishopricks* in time of vacation *the dean and chapter of the see* of common right is guardian of the spiritualties, and not the metropolitan. Contra, 31 H. 6. 10. admitted, Dub. 17 E. 3. 23. b. And there it is said by Stouf, that in time of R. 1. and always before, the metropolitan was guardian till the time of H. 3. and then by default composition was taken for it.]

Of common right by the common law, the dean and chapter, sede vacante of the bishoprick, is guardian of the spiritualties, as appears T. P. 17 E. 3. 23. but now the archbishops have used to have this by way of composition, as great lords will incroach all into their own hands. Per Coke Ch. J. But by Doderidge, every archbishop is guardian of the spiritualties of all the bishops within his province, but sede vacante of his own diocese, the dean and chapter thereof is guardian of the spiritualties. Coke said, that this commenced by way of composition, but that originally it was not so, but the dean and chapter was guardian. But Doderidge said, it does not appear so by our books, no mention being made of any such composition, but that the guardian of the spiritualties is to be according to the difference between a province and a diocese. 3 Bulst. 176, 177. Pasch. 14 Jac. in the case of Grange v. Denny.

[3. 5 E. 2. Quare Impedit, 165. admitted, that during the vacancy of the *bishoprick of Durham the archbishop of York is* guardian of the spiritualties.]

In a prohibition the archbishop pleaded a prescription, that he and his predecessors have time out of mind been guardian to the spiritualties of the bishoprick of Durham, sede vacante; and issue was joined thereupon, and tried at the bar this term. Hale said, de jure communi, the dean and chapter were guardians of the spiritualties during the vacancy as to matters of jurisdiction; but for ordination they are to call in the aid of a neighbouring bishop, and so is Linwood. But the usage here in England is, that the archbishop is guardian of the spiritualties in the suffragan diocese, and therefore it was proper here to join the issue upon the usage. There was much evidence given, that anciently during the vacancy of Durham, the archbishop had exercised jurisdiction, both sententious and other, as guardian of the spiritualties; but since H. 8th's time, it had been for the most part administered by the dean and chapter. And the verdict was here for the dean and chapter. 1 Vent. 225. Mich. 24 Car. 2. B. R. The Dean and Chapter of Durham v. the Lord Archbishop of York.

[4. 23 E. 1. Rot. Claus. Memb. 4. *Prior de ecclesia Christi Cantuar.* Guardian of the spiritualties in time of vacation *of the archbishoprick.*]

[5. Of the archbishoprick of Canterbury *the dean and chapter is* guardian of the spiritualties in time of vacation.]

[6. *Of the archbishoprick of York the dean and chapter is* guardian of the spiritualties in time of vacation, and not the archbishop of Canterbury, because it is a distinct province, and not subordinate to the archbishop of Canterbury. Contra, 31 H. 6. 10. Admitted; for there a parson of the province of York had aid of the metropolitan,

Where the *archbishoprick of York is void*, the *metropolitan shall have the spiritual-*

ties, and the king the temporalties metropolitan, guardian of the ſpiritualties of the archbiſhop of York in time of vacancy of the archbiſhoprick.]

as of other biſhopricks, and if aid be to be had by a parſon of the archbiſhop of York at that time, he ſhall have it of the metropolitan; and ſo ſee that Canterbury is a more high ſee than York, and it ſeems that at that time he may commit the adminiſtration. Br. Ordinary, pl. 22. cites 31 H. 6. 10.

[235] Latch. 237. S. C. 7. The *church*, when *diſdioceſaned by death*, *tranſlation*, or otherwiſe, *or* quaſi viduata, *whilſt the biſhop is employed about tranſmarine negotiations* in the ſervice of the king or kingdom, the law takes care to provide it a guardian quoad juriſdictionem ſpiritualem, during ſuch vacancy of the ſee, or remote abſence of the biſhop, to whom *preſentations* may be made, and by whom *inſtitutions*, *admiſſions*, &c. may be given; and this is that eccleſiaſtical officer, whether he be the archbiſhop, or his vicar-general, or deans and chapters, in whomſoever the office reſides, him we commonly call the guardian of the ſpiritualties. Godolph. Rep. in the Introduction, pag. 9.

See Aid of a Common Perſon (Y) pl. 3, 4, 5. (Z) pl. 1.

(T. e) Guardian of the Spiritualties. *What* Thing *he may do.*

S. P. Arg. Lat. 35. 237. in caſe of Evans v. Aſcough. [1. THE guardian of the ſpiritualties may *admit and inſtitute.* 17 E. 3. 23.]

[2. 2 E. 1. Rot. Pat. Memb. 5. *The king preſented to the guardian* of the ſpiritualties *of the archbiſhoprick of Dublin* in Ireland, ſede vacante, *for a church in Ireland.*]

Trial (U) pl. 8. and (Z) pl. 2. [3. The guardian of the ſpiritualties ſhall *try baſtardy.* 41 Aſſ. 29. adjudged.]

[4. 22 E. 1. Rot. Clauſo Memb. 11. Dorſo. *Letters* directed to all the biſhops *to make orizons for the journey of the king into France*, and in the vacancy to the guardian of the ſpiritualties.]

[5. 23 E. 1. Rot. Clauſ. Memb. 4. Prior eccleſiæ Chriſti Cantuar. guardian of the ſpiritualties, in vacancy of the ſame archbiſhoprick, *had a felon delivered to him.*]

6. *Debt lies againſt* the guardian of the ſpiritualties, *as ordinary* in the time of vacation. Br. Ordinary, pl. 24. cites 17 E. 2. and Fitzh. Brief, 822.

7. The guardian of the ſpiritualties ſhall try the iſſue of *able or not able* in quare impedit between the plaintiff and the biſhop, where the archbiſhop is dead and the ſee void, and the biſhop refuſed the clerk. 40 E. 3. 25. b. pl. 32. Daubeney v. the Biſhop of R.

Latch. 237. S. C. 8. Guardian of the ſpiritualties *cannot confirm a leaſe.* Per Noy, Arg. Palm. 461. Trin. 3 Car. B. R. in caſe of Evans v. Aſcough, cites 7 H. 4. 97.

The guardians of the 9. 25 *H.* 8. *cap.* 21. *ſ.* 16. enacts, That *if the archbiſhoprick of Canterbury be void, then ſuch manner of* licences, diſpenſations, faculties,

faculties, *inſtruments, reſcripts, and other writings, which may be granted by virtue and authority of this act, ſhall (during the vacation of the ſame ſee) be had, done, and granted* under the *name and* ſeal of the guardian of the ſpiritualties *of the ſaid archbiſhop for the time being, and ſhall be of like force and effect as if they had been granted under the name and ſeal of the archbiſhop.*

ſpiritualties have all manner of juriſdiction of the courts, as the *power of granting licences* and *diſpenſations, probate of wills, adminiſtrations,* &c. during ſuch vacancy, and of admitting and *inſtituting clerks* preſented to them; but they *cannot* (as ſuch) *conſecrate* or *ordain, or preſent to vacant benefices.* Wood's Inſt. 27. —S. P. Godolph. Rep. in the Introduction, 9, 10. —S. P. Godolp. Rep. 39, 40. c2p. 4. ſ. 1, 2, 3.

S. 17. *And if he ſhall refuſe to grant ſuch licences, &c. where by law they ought to be granted, in every ſuch caſe the Lord Chancellor of England, or Lord Keeper of the great ſeal, upon petition and complaint thereof to him made, may iſſue his majeſty's* writ, *directed* to ſuch guardian *of the ſpiritualties*, requiring him *by virtue of the ſaid writ*, under a certain penalty *therein limited by the ſaid Lord Chancellor or Lord Keeper*, to grant *the ſame in due form of law;* otherwiſe *(and no juſt and reaſonable cauſe ſhewn for ſuch refuſal) the ſaid penalty may be incurred to his majeſty, and* a commiſſion *under the great ſeal iſſued* to two *ſuch prelates or* ſpiritual perſons as ſhall be nominated *by his majeſty*, impowering them *by virtue of the ſaid act* to grant ſuch licences, *&c.* as were *ſo* refuſed to be granted by the guardian, *&c. as aforeſaid.* [236]

10. The *king preſented to a prebend then void, the temporalties being in his hands ſede vacante*, and *before inſtitution the king repeals his preſentation;* notwithſtanding which the dean and chapter being *guardians of the ſpiritualties* ſede vacante, *inſtitute and inſtal the preſentee.* Afterwards the king, reciting that the preſentee was canonice inſtitutus ex ſua præſentatione, *ratified and confirmed him.* He died incumbent; in the mean time *a biſhop is created.* The king ſhall have the preſentation again; for he was not in ex præſentatione regis, and conſequently the confirmation void; and judgment was given (ut dicitur) for the king. But the reporter ſays, quære, if it be neceſſary to allege that the repeal was ſhewn to the guardians of the ſpiritualties before the inſtitution, &c. ſo as they might have notice thereof, as of a new commiſſion, &c. D. 292. pl. 70. Trin. 12 Eliz. Anon.

11. In a quare impedit the plaintiff recovered, and had *writ to admit his clerk directed to the dean and chapter, guardians of the ſpiritualties*, the ſee of the biſhoprick being then vacant, which is not returnable; and *before execution of the writ a biſhop is created.* It was doubted whether the authority to execute the writ be ceaſed in the dean and chapter; and it ſeems that upon a ſuggeſtion made to the Court of this matter, eo quod nihil actum fuit in breve prædicto, *another writ may be awarded to the biſhop*, and may be returnable if it pleaſe the party, &c. D. 350. pl. 19. Paſch. 18 Eliz. Anon.

12. In caſe of *deprivation for not reading the Articles of Religion*, as required by ſtatute, the notice to the patron in caſe of the ſee's being vacant, ought to be given by the guardian of the

ſpiritualties, to make a lapſe accrue. D. 379. b. pl. 54 Paſch. 22 Eliz. Anon.

13. It was a great queſtion upon a demurrer in law, if a *lapſe devolves* to the ordinary, and within thoſe ſix months the *ordinary is tranſlated* to another biſhoprick, if the king, or his metropolitan, ſhall preſent to that lapſe, in default that the patron does not preſent. Noy, Attorney, ſaid, that the warden of the ſpiritualties ſhall preſent, whoſoever he be. Noy, 69. Anon. cites Dyer, 78. pl. 103.

It ceaſes after he is choſen by the *congé d'eſlire.*

14. When the biſhop is *confirmed*, then the power of the *guardian of the ſpiritualties* ceaſes, and he may conſecrate elects, confer orders, &c. Lat. 246. in caſe of Evans v. Aſcough.

8 Rep. 69. in Trollop's caſe ——The books of common law differ much concerning the *time when the power of the guardian* of the ſpiritualties *ceaſes*, and that of the biſhop commences. Some ſay, upon the election of the biſhop, others not till confirmation. And again, others, as to all miniſterial acts, upon election; and as to judicial, upon confirmation. But as the matter is underſtood and practiſed at this day, the power of the guardian of the ſpiritualties ceaſes *not till confirmation.* Gibſ. Cod. 132, 133.——Godolp. Rep. in the Introduction, pag. 9. ſays, it ceaſes as *ſoon as a* new *biſhop is conſecrated* to that ſee that was vacant, *or* otherwiſe *tranſlated*, who needs no new conſecration.

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(U. e) Eccleſiaſtical Courts. High Commiſſion.

[1. IN the dioceſe of Sarum, within the hamlet of Safferton, is a *chapel of eaſe*, which is *within the pariſh of Trowbridge*, and in which chapel *the parſon of Trowbridge had uſed to find a chaplain* to ſay divine ſervice for the inhabitants of the hamlet. The parſon of Trowbridge *refuſed to find one* to ſay divine ſervice accordingly; he may be ſued for this before the high commiſſion; for though it be not any of the great exorbitant offences, yet this offence is public, and not private; for he refuſed to celebrate divine ſervice. P. 6 Ja. B. between SIR J. UNIEUX AND PALLER. Contra, P. 6 Ja. B.]

[237] [2. A parſon may be ſued in the high commiſſion court for *preaching againſt the Book of Common Prayer, and refuſing to celebrate divine ſervice according to it;* for it is a public offence. B. R. CHEYNEY AND FRANKLIN'S caſe adjudged, M. 7 Ja. B. Parſon MUNFIELD'S CASE. Per Curiam adjudged.]

[3. A man cannot ſue *a contract of marriage* before the high commiſſioners; becauſe this *is a civil cauſe*, and from their ſentence no appeal lies. H. 8 Ja. B. between CLIFFORD AND HUNTLEY. Reſolved, and prohibition granted.]

[4. A *divorce* cannot be ſued before the high commiſſioners, becauſe it is a *civil matter*, and not criminal, and therefore a divorce cannot be ſued before them; becauſe *no appeal* can be ſued thereupon, they being the higheſt court; but ought to be before the ordinary. M. 8 J. B. per Curiam, and prohibition granted accordingly.]

[5. A man cannot be ſued in the high commiſſion for the *profanation of the ſabbath*, but ought to be ſued for it before the ordinary. M. 8 J. B. per Curiam.]

[6. So

[6. So a man cannot be ſued there for *carrying of wood upon a holyday*, as St. Luke's day; but ought to be ſued before the ordinary. M. 8 Ja. B. AILMER's caſe, per Cook.]

In Atmere's caſe in 2 Eliz. reign, the whole court of Exchequer, judicially, reſolved that the high commiſſioners could not puniſh any man for *working on a holyday*, albeit it be a matter of eccleſiaſtical conuſance, but ought by the true meaning of the ſtatute of 1 Eliz. to be puniſhed by the diocеſan, 4 Inſt. 332.

[7. *So* a man ſhall not be ſued there for *keeping of open ſhop* upon a holyday. M. 8 Ja. B.]

[8. The *vicar of the church of D.* cannot *ſue the parſon of the ſame church* (who has the *advowſon appropriate*) before the high commiſſioners *for a penſion* iſſuing out of the parſonage, the parſonage being late parcel of the poſſeſſions of a monaſtery, becauſe this court was appointed for exorbitant offences, and not for *meum & tuum*, between party and party, and the ſtatute of 34 *H.* 8. has ordained that ſuits may be for ſuch penſions in the court of the ordinary. M. 5. 5 Ja. B. between ROPER AND BULBROKE. Adjudged, per Curiam.]

Noy, 140. S. C. S. C. cited Mo. 917. pl. 1306, in *Babington's* caſe, by name of Bulwark v. Roper — 12 Rep. 45. S. C. By name of Sir Anthony Roper's caſe, ſays, it was reſolved, that the ſaid commiſſioners had no authority, nor commiſſion in the ſaid caſe.

[9. If one ſues another in the high commiſſion, for *not ſtanding at the rehearſal of the creed*, but ſitting *and ſaying that the conſtitutions of the biſhop were not lege divina* [a prohibition will be granted], becauſe it is not any enormous offence. M. 8 Ja. B. JENNER's caſe, per Curiam.]

Fol. 225.

[10. If a feme ſues for *alimony* againſt her baron in the high commiſſion a prohibition lies, becauſe it is not an enormous crime within the words of the ſtatute of 1 El. but a *civil cauſe*, which belongs to the ordinary of the place where, &c. M. 17 Car. B. per Curiam, between * SIR EDWARD POWELL and his wife, a prohibition granted. Between CLOBERRY and his wife, a prohibition granted. Between Sir EDMOND PLOWDEN and his wife, M. 8 Ja. Rot. 912. LANGTON's caſe, P. 8 Ja. Rot. 109. MULTON's caſe, Hill. 8 Ja. Rot.—EURYE's caſe, M. 4 Car. Rot. 1603.—STANLYE's caſe, Mich. 4 Car. Mayle's office, LUCK's caſe. And therefore in king James's time, it was reſolved by all the twelve judges, that they ought not to hold plea of alimony; and upon that, alimony was left out of their commiſſion for five years after. 7 Ja. Rot. 1154. † LANGDALE's caſe. Prohibition granted. And in B. R. divers impriſoned for alimony, at leaſt 20 [were] bailed.]

* Mar. 80. Paſch. 17 Car. S. C. and Banks Ch. J. ſaid, although there are precedents that the high commiſſion have held plea of alimony, and granted the ſame, yet it was not law. And altho' alimony be expreſſed in their commiſſion, that it does not make it law if it be not within the ſtatute of 1 Eliz. to which Crawley, Reeve, and Foſter J. agreed; and they all agreed, that they may as well charge my land with a rent-charge, as grant alimony out of it. —— † 12 Rep. 58, 59, 60. Mich. 6 Jac. S. C.

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11. The high commiſſion court, which was erected in virtue of 1 El. cap. 18. being aboliſhed by ſtat. 16 Car. 1. cap. 11. the extent and exerciſe of that authority *are now matters of mere ſpeculation*, and curioſity; and therefore it may only be obſerved, in general, that, *while that court ſtood, there were many and great conteſts between it and the courts of Weſtminſter-hall, concerning the*

The high commiſſion court in cauſes eccleſiaſtical, was by letters patents and that by

force and virtue of the ſtatute of 1 Eliz. cap. 1. the title whereof, is an act reſtoring to the crown the ancient juriſdiction eccleſiaſtical, &c. the high commiſſioners might, if they were competent, that is, if they were ſpiritual perſons, proceed to ſentence of excommunication,

extent of the juriſdiction aſſigned and limited by this act; the commiſſioners, on one hand, not confining themſelves to ſuch crimes as might properly be called enormous (hereſy, ſchiſm, polygamy, inceſt, and recuſancy); but taking cognizance of adultery, alimony, defamation, laying violent hands on a clerk, miſbehaviour of clergymen in their functions, and the like, the cognizance of which, the judges affirmed to belong, of right, to the ſtanding eccleſiaſtical courts, and not to be enormities within the meaning of this ſtatute; alleging further, that the exerciſe of juriſdiction, in theſe and the like caſes, by the high commiſſioners, would not only prejudice all the biſhops of England in their eccleſiaſtical juriſdiction, but would be alſo grievous to the ſubject, who muſt be drawn up from all the remote parts of the realm, when, before their own dioceſan, they might receive juſtice at their own doors. Much of this kind is to be met with in the reports of that time, particularly in my * Lord Coke; who ſtrenuouſly reſiſted the encroachments of the high commiſſion; and he, and the other judges, reſtrained them, in many inſtances, by prohibitions. Gibſ. Cod. 50.

what the power of this court was, and whether they might in cauſes eccleſiaſtical, proceed to fine and impriſonment, is at large examined by the Lord Coke in the 4th part of his Inſtitutes, where he reports the judgment and reſolutions of the whole court of Common Pleas thereon, Paſch. 9 Jac. Reg. upon frequent conferences and mature deliberation, ſet down in writing by the order and command of king James, likewiſe whom, and in what caſes the eccleſiaſtical court may examine one upon oath, or not (there being a penal law in the caſe), and whether the ſaying, quod nemo tenetur ſeipſum prodere, be applicable thereunto. Godolph. Rep. 118. cap. 11. ſ. 14. cites Trin. 13 Jac. B. R. Burroughs, Cox, &c. againſt the high commiſſioners.—3 Bulſt. 48 to 54.——* See the 12 and 13 Reports throughout, & 4th Inſt. 324 to 335.

(X. e) *Convocation* of the Clergy. [*Power* of Convening].

Reſolved, Tr. 8 J. that a convocation cannot *aſſemble* at their convocation without *aſſent of the king.* 2. Nor after their aſſembly *confer to conſtitute any canons* without

[1. THE archbiſhop of Canterbury cannot hold a council for his province without the *king's licence;* for ſuch council held by Hubert archbiſhop of Canterbury, was prohibited by Fitz Peter Chief Juſtice, becauſe he had not the king's licence; but he would not obey it. Speed. 487.]

[2. 13 El. 3. Rot. Parl. M. 1. There is a writ for a convocation of the clergy of the province of Canterbury † at Paul's, and another for the other of York. Vide ſtatute 25 *H.* 8. *cap.* 19. *where the clergy of England acknowledge, that the convocation of the ſame clergy is, and always hath been, and ought to be aſſembled only by the king's writ.*]

licence. 3. Nor *execute any*, which, upon conference, they ſhall conclude upon without royal aſſent. 4. *Nor after royal aſſent, but with* theſe *four limitations*:—1. That they be *not againſt the king's prerogative*; 2. *Nor* againſt *the common law*; 3. Nor againſt any ſtatute law; 4. *Nor* againſt any *cuſtom* of the realm. And all this appears by the ſtatute 25 *H.* 8. 19. and this was but an affirmance of what was before the ſaid ſtatute, 12 Rep. 72. Trin. 8 Ja.——† Orig. is (et).

[3. The convocation *is under the power* and authority *of the king.* 21 E. 4. 45. b.]

[4. 23

[4. 23 *H.* 8. *cap.* 19. enacts, That the convocation ſhall be aſſembled by the king's writs.]

5. The high court of convocation is called the convocation of the clergy, and *is the higheſt court eccleſiaſtical*, where the whole clergy of both provinces are either preſent in perſon, or by their repreſentatives. They commonly meet and ſit in parliament-time, *conſiſting of two parts*, viz. the *upper-houſe*, where the archbiſhops and biſhops do ſit; *and the lower-houſe*, where the inferior clergy do ſit. This court has the *legiſlative power* of making eccleſiaſtical laws, is commonly called a national ſynod, *convened by the king's writ* directed to the archbiſhop of each province for ſummoning all biſhops, deans, archdeacons, cathedrals, and collegiate churches, aſſigning them the time and place in the ſaid writ; but one proctor ſent for each cathedral and collegiate church, and two for the body of the inferior clergy of each dioceſe may ſuffice. The *higher-houſe* of convocation, or the houſe of lords ſpiritual, for the province of Canterbury *conſiſts of* 22 *biſhops*, whereof the *archbiſhop is preſident*; the *lower-houſe*, or houſe of commons ſpiritual, *conſiſting of all the deans, archdeacons, one proctor for every chapter, and two for the clergy of each dioceſe, in all* 166 *perſons, viz.* 22 *deans*, 24 *prebendaries*, 54 *archdeacons, and* 44 *clerks*, repreſenting the dioceſan clergy. Both houſes debate and *tranſact only ſuch matters as his majeſty by commiſſion allows*, concerning religion and the church. The archbiſhop of York at the ſame time, and in the like manner, holds a convocation of all his province at York, conſtantly correſponding, debating, and concluding the ſame matters with the provincial ſynod of Canterbury. The *antiquity of this court* of convocation *is very great*, for (according to Beda) St. Auguſtin, An. 686, aſſembled in council the Britain biſhops, and held a great ſynod. The clergy was never aſſembled or called together at a convocation by other authority than by the king's writ. Vid. Parl. 18 E. 3. Nu. 1. Inter Leges Inæ, An. Dom. 727. Godolph. Rep. 98, 99. cap. 11. ſ. 2.

[239] S. P. Ibid. 586. cap. 41. and ſays, that among the laws of H. 1. cap. 8. it was anciently called *church-gemote*.—— S. P. Wood's Inſt. 500.— In the *province of York* two proctors are ſent to the convocation for every archdeaconry; but in the province *of Canterbury*, two only for every dioceſe. As there are two houſes of convocation, ſo there are *two prolocutors* or ſpeakers; one of the biſhops ſometimes in the upper-houſe, choſen by that houſe; another in the lower-houſe, choſen there and preſented to the upper-houſe. The *archbiſhop is the preſident*, and *proregues and diſſolves it* at the direction of the king. For the convocation is under the power and authority of the king. Wood's Inſt. 500.

See (X. e) pl. 1, 2, in Marg.——

Fol. 226.

(Y. e) The Power of the Convocation.

See Canons.

[1. THE convocation has not any power to do any thing *to bind the temporalty*. 20 H. 6. 13.]

A convocation (ſays Ld. Coke, 12 Rep. 72.) may make conſtitutions by which thoſe of the ſpiritualty ſhall be bound, (becauſe they all, by repreſentation, or in perſon, are preſent,) but not the temporalty. By which it is to be hoped, he did not mean, that when canons and conſtitutions are framed by the eccleſiaſtical legiſlature about matters merely ſpiritual, and being inforced by eccleſiaſtical cenſures for the improvement of the diſcipline of the church, and confirmed by the king as ſupreme head of the church, that ſuch confirmation has not power enough to bind the laity. This would look as if the laity had nothing to be ſaved but their eſtates, nor the clergy any thing to do, but to ſave themſelves. Much truer, undoubtedly, is the doctrine delivered by Vaughan in the caſe of GROVE AND ELLIOT. The convocation, with the licence and aſſent of the king, under the great ſeal, *may make canons for regulation of the church*, and that *as well concerning laicks as eccleſiaſticks*. All that is required of them in making new canons is, that they

confine themſelves to church matters. Upon the ſame foundation he declares in the caſe of HILL AND GOOD, that a canon ſo made is the law of the kingdom as well as an act of parliament. Gibſ. Cod. 974.

Br. Ordinary, pl. 1. cites S. C.

[2. The convocation has no power *to allow or diſallow the patents of the king.* 20 H. 6. 13.]

[3. 2 H. 4. Rot. Parl. N. 24. *a writ* is granted by the advice of the lords temporal in parliament *to the ſheriffs of London*, and this is ſubſcribed *per ipſum regem & concilium in parliamento*, by which the ſheriffs are commanded *to burn William Sautre*, who was before *condemned for a relapſed heretick by the archbiſhop of Canterbury, apoſtolicæ ſedis legatum, and the other ſuffragans, and all the clergy of the ſaid province in concilio ſuo provinciali congregat. juris ordine.*]

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[4. 31 *H.* 8. *cap.* 14. *the ſix articles are reſolved and agreed (being matter of religion) by the aſſent of the king, the lords ſpiritual and temporal, and other learned men of his clergy in their convocation, and by the aſſent of the commons; but* afterwards they are enacted by the king, lords ſpiritual and temporal, and commons in parliament, and *no mention of the convocation.*]

[5. 21 *R.* 2. *cap.* 2. 12. enacted *by aſſent of the lords ſpiritual and proctors of the clergy, &c.*]

See Hereſy, &c.

[6. 1 *El. cap.* 1. *proviſo*, that thoſe who ſhall have juriſdiction by letters patents ſhall not have power *to adjudge hereſy* but in ſuch caſes which have been before adjudged, &c. or *ſuch as hereafter ſhall be ordered, judged, and determined to be hereſy by the high court of parliament of this realm, with the aſſent of the clergy in their convocation.*]

[7. The convocation hath power *to make holydays or faſting days.* 20 H. 6. 13.]

S. P. per Coke Ch. J. but they

[8. The convocation hath power *to make conſtitutions provincial, by which thoſe of holy church ſhall be bound.* 20 H. 6. 13.]

ought to be according to the law and cuſtom of the realm. Noy, 139. cites 20 H. 6. 14. and 21 E. 4. 46.

See Preſentation (M. a).

[9. 13 *El. cap.* 12. ordains, *that the articles agreed by the archbiſhops and biſhops of both provinces and all the clergy in the convocation held at London*, &c. *ſhall be read by the incumbent, or otherwiſe he ſhall be* ipſo facto *deprived.*]

[10. 18 E. 1. Rot. Pat. Mem. 24. Rex *miſit Rogerum* extrancum & Hugonem fil. Ottonis ſeneſcal. hoſpitii regis archiepiſcopo Cantuar. & omnibus epiſcopis & aliis prælatis apud London convocatis *ad appellandum pro rege, ne in concilio* & congregatione illa *contra coronam* & dignitatem noſtram *aliquid ſtatuere præſumant*; mandantes eis quod ſicut baronias veſtras (quas de novis tenetis) diligitis, nullo modo præſumant concilium tenere de aliquibus, quæ ad coronam vel perſonam noſtram vel ſtatum conſilii noſtri pertinent; & ſciatis pro certo, quod ſi feceritis, nos inde ad vos & baronias veſtras capiemus; alſo he commands them ad exhortandum & movendum vos & clerum veſtrum, ut nobis, &c. ſubventionem faciatis liberalem.]

[11. 9 E.

[11. 9 E. 1. Rot. Pat. Memb. 6. *inhibitio* archiepiſcopo & omnibus epiſcopis & aliis prælatis apud Lambeth conventuris, *ne* * *aliquid ſtatuant in præjudicium regis*, coronæ vel dignitatis ſuæ.]

Their jurisdiction was to deal with *hereſies, ſchiſms, and other mere ſpiritual and eccleſiaſtical cauſes* and therein they did proceed *juxta legem divinam & canones* ſanctæ eccleſiæ; and as they could never aſſemble together of themſelves, but were always *called together by the king's writ*, ſo were they oftentimes commanded by the king's writ to deal with nothing that concerned the king's laws of the land, his crown and dignity, his perſon, or his ſtate, or the rate of his council or kingdom. 4 Inſt. 322. cap. 74.

* Fol. 227.

[12. Rot. Pat. 25 E. 1. Part 1. Memb. 9. *Hugh le Diſpenſer (was) aſſigned to forbid* in the name of the king to all the clergy aſſembled at London *at this time, that they do not make* nor ordain *any ordinance which may turn in prejudice of the king or his miniſters, or thoſe of his peace.*]

[13. In 44 E. 3. in a ſynod, a *canon* was made, *that the parſon of every church* in England *ſhould appoint the clerk of the pariſh.*]

Pariſh clerks were heretofore real clerks; of whom every miniſter had at leaſt one to aſſiſt under him, in the celebration of divine offices; and notwithſtanding he was maintained by the pariſhioners, he was appointed to the office by the miniſter, as † well according to the conſtitution of archbiſhop Boniface, 45 H. 3. in the year 1261, as by the cuſtom of the realm. Gibſ. Cod. 240.

†[241]

[14. In another ſynod, held 1603, a *canon* was made *to the ſame effect*, and yet this does *not take away any cuſtom* where the pariſhioners or churchwardens have uſed to appoint the clerk; becauſe it is temporal, which cannot be altered by a canon. Mich. 24 Ja. B. R. WALPOLE v. GALE, per Curiam, and by the counſel agreed, and prohibition granted by conſent to try the cuſtom.]

Since the making of this canon, the right of putting in the pariſh clerk has often been conteſted between incumbents and pariſhioners for maintaining the authority of the canon, in favour of the incumbent, againſt the plea of cuſtom in behalf of the pariſhioners; and prohibitions have been prayed and always obtained. Gibſ. Cod. 240, 241.

[For more as to Clerks of Pariſhes, ſee Clerk of a Pariſh].

[15. Rot. Parl. 18 E. 3. N. 12. the commons pray, that no petition made by the clergy, which may be in ‡ decreaſe or damage of the people, or of the commonalty, be granted till it be tried by the king and all the council, that without damage of the ‖ great men, or of the commons, § it may be well obſerved. Anſwer, it pleaſes the king and his council that ſo it ſhall be.]

‡ Orig. is (decres).
‖ Orig. is (grants).
§ Orig. is (bonement ſe puis tener).

[16. Rot. Parl. 18 E. 3. N. 23. the petitions of the clergy, and anſwer of the king, and granted by him under his ſeal.]

[17. 2 *H.* 4. *cap.* 5. it is recited that the *Lollards preach, &c. to the great peril of the ſouls of the people*, and of all the realm of England, *as now plainly is found and ſufficiently proved before the reverend father in God the archbiſhop of Canterbury, the biſhops and other prelates, maſters of divinity, and doctors of canon and civil laws, and a great part of the clergy of the ſaid realm, eſpecially aſſembled for this cauſe.* (It ſeems it was a convocation in which the civilians were, who are laymen.)]

18. The juriſdiction of the convocation is only touching *matters merely ſpiritual and eccleſiaſtical*, wherein they proceed juxta legem divinam & canones ſanctæ *eccleſiæ*. Godolph. Rep. 99. cap. 11. ſ. 2.

The juriſdiction of the convocation may be exerciſed, in making canons with the king's licence and aſſent, in examining and cenſuring heretical or ſchiſmatical

matical books or perſons. But then an *appeal lies to the king in Chancery, or to his delegates*, as hath been lately reſolved. It is the legiſlative power in the church, and the canons that are made concerning the church with the royal aſſent, bind the clergy, but not the laity. Wood's Inſt. 500.

19. Serjeant Hawkins ſays, it is certain that the convocation *may declare what opinions are heretical*; but that it has been queſtioned of late, whether they have power at this day to *convene and convict the heretick*. Hawk. Pl. C. 4. cap. 2. ſ. 3.

(Z. e) The *Privileges* of the Convocation.

In the Journals of the Houſe of Lords we find ſeveral applications to their lordſhips for redreſs, in caſes where this liberty of the convocation-clergy hath been invaded, which their lordſhips have accordingly granted. Gibſ. Cod. 975.

[1. 8 *H.* 6. cap. 1. *ALL the clergy from henceforth to be called to the convocation by the king's writ, and their* * ſervants *and familiars ſhall for ever hereafter uſe and enjoy ſuch liberty and* immunity in coming, tarrying, and returning, *as the great men and commonalty of the realm of England, called or to be called to the king's parliament, have uſed, or ought to have and enjoy.*]

—* S. P. Godolph. Rep. 99. cap. 11. ſ. 2.

[242] Fol. 228.

(A. f) Biſhop and † *Temporalties*. For what Cauſes the Temporalties ſhall be *ſeiſed*.

†Temporalties are all thoſe things which biſhops have by livery of the king, as caſtles, manors, lands, tenements, parſonages, tithes, and all other certainties of which the king is anſwered during the vacation. Savil, 52. Paſch. 25 Eliz. Anon.

[1. ‡ IF a biſhop *incumber the church after* a prohibition of *ne admittas* delivered to him, and thereof found *guilty in quare incumbravit*, yet his temporalties ſhall not be ſeiſed for this. 21 E. 3. 13. Curia. But quære.]

‡ S. P. Br. Reſeiſer, pl. 9. cites 21 E. 3. 3.

Br. Contempts, pl. 18. cites 38 Aſſ. 22. S. C.

[2. If a *prior* be *attainted in an attachment upon contempt, for not admitting a varlet to his corody*, his temporalties ſhall be ſeiſed. 38 Aſſ. adjudged.]

Br. Contempts, pl. 19. cites S. C.

[3. If a *biſhop* be *attainted in an attachment upon a prohibition*, his temporalties ſhall be ſeiſed. 21 E. 3. 3. 60. b. adjudged.]

S. C.—Br. Quare Incumbravit, pl. 1. cites S. C.—Br. Reſeiſer, pl. 9. cites S. C.

S. P. Br. Reſeiſer, pl. 21. cites 24 E. 3. 23.

[4. If a *biſhop* be *found a diſturber in a quare non admiſit brought by the king*, his temporalties ſhall be ſeiſed. 23 E. 3. 22.]

—S. P. Br. Quare Impedit, pl. 97. cites 24 E. 3. 55.—Br. Forfeiture de Terre, pl. 106. cites S. C. *And* the king ſhall have the profits till he reſtore to him the temporalties, as it ſeems in a quare impedit.

[5. 10 E. 1. Rot. Pat. Memb. 3. Mandatur quod omnes terræ & tenementa epiſcopi London capiantur in manus regis & inde faciend' prout rex injunxerit occaſione cujuſdam *tranſgreſſionis enormis nobis* per ipſum epiſcopum *factæ*.]

[6. If

[6. If a biſhop be *attainted in a treſpaſs againſt the peace*, his temporalties ſhall be ſeiſed; for he ſhall not be taken as another man, becauſe he is a prelate. 29 E. 3. 42.]

[7. M. 19 E. 3. Rot. 114. Epiſcopus Norwich implacitatur per regem for *proceeding in the eccleſiaſtical court againſt the abbot of St. Egid, againſt the privilege of the ſaid abbey, granted by the king before the conqueſt, &c.* and the defendant *found guilty by jury*, it is adjudged that the temporalties of the biſhop ſhall be ſeiſed; and that in ſuch caſes for contempt to the king, the bodies of the biſhops caperentur prout per diverſa recorda progenitorum regis liquet. Tamen quoad hoc dies data eſt.]

See (E. f) pl. 7. the caſe of the Abbey of St Edmondſbury, 21 E. 3. 60.

8. In *eſcape againſt the abbot of Weſtminſter of a clerk attaint*, it was prayed that the temporalties ſhould be ſeiſed; to which it was not anſwered, therefore quære. Br. Reſeiſer, pl. 17. cites 21 Aſſ. 12.

9. 25 *Ed.* 3. 6. enacts, That *the biſhops temporalties ſhall not be ſeized into the king's hands for a contempt, but they ſhall pay a reaſonable fine.*

If the ordinary *challenges a clerk who cannot read*, he ſhall make fine, and if he * *refuſes a clerk who can read*, he ſhall make fine; and if he *ſuffers purgation* to be made by a clerk *contrary to the common law*, this is an eſcape; but the temporalties of the ordinary ſhall not be ſeiſed in ſuch caſes, becauſe by this ſtatute the juſtices ſhall aſſeſs a fine without ſeiſing. Br. Ordinary, pl. 12. cites 9 E. 4. 28.——S. P. Br. Clergy, pl. 2. cites 7 H. 4. 41.—— * S. P. And he *is not judge* of the *priſoner*, nor of his reading, *but* is [only] *miniſter*, and the juſtices are as judges. Br. Ordinary, pl. 10. cites 7 E. 4. 29.——Ibid. pl. 20. cites 7 H. 4. 41. S. P. But per Gaſcoign, if the ordinary *challenges one for a clerk who is no clerk*, the Court ſhall ſeiſe his temporalties.——And 2 Inſt. 161. ſays, that anciently his temporalties were liable to be ſeiſed for ſuch contempt. But ſince this ſtatute it is held to be fineable only.—And 2 Hawk. Pl. C. 360. cap. 33. ſ. 116. ſays, it ſeems to be generally agreed that he ſhall now be only fined in ſuch caſe and the like, for *obſtinately perſiſting to return that a priſoner reads as a clerk*, or the contrary, &c. *againſt the declared ſenſe of the Court.*

10. Iſſue was taken in caſe of a corody, if the *king* was *patron of a priory*, (where he had preſented one to the corody, by reaſon that his progenitor founded a chapel there before any priory was there,) or if the biſhop of E. and his predeceſſors de tempore have been patrons there? And the jury found for the king; for which cauſe, and becauſe the priors had *made elections of priors there without licence of the king, to the diſinheriſon of the king* and his crown, it was agreed, that the king recover the patronage, and that the temporalties be ſeiſed into the hands of the king for the diſinheriſon and contempt, until he had made ſatisfaction to the king. Br. Preſentation, pl. 39. cites 38 Aſſ. 22. [243]

11. If the *king preſents and his clerk is in, and after* the king *revokes his preſentation*, if *the biſhop does not remove the incumbent*, the king ſhall ſeiſe the temporalties. Per Thorp. Br. Ordinary, pl. 23. cites 44 E. 3. 35, 36.

Br. Preſentation, pl. 6. cites S. C.

12. Where the *king writes to the biſhop to aſſoil a man excommunicated* for a cauſe which does not appear to the biſhop, *and he does not do it*, the king ſhall ſeiſe his temporalties. Br. Reſeiſer, pl. 8. cites 14 H. 4.

Br. Excommengement, pl. 5. cites 14 H. 4. 14. S. C.

13. An archbiſhop is *attainted of treaſon*, the king ſhall have the temporalties *in jure coronæ, not* in jure *vacationis*; for he remains

mains archbiſhop until degradation and deprivation. Jenk. 210. pl. 44. cites D. 108.

(B. f) What *Profit* the King ſhall have *thereby.*

Br. Reſeiſer, pl. [illegible] cites S. C. Brooke ſays, and ſo it appears, that by ſuch ſeiſin the king has poſſeſſion, and not only the profits.—Br. Scire Facias, pl. 101. cites S. C.—Br. Seiſin, pl. 9. cites S. C.

[1. IF the king has judgment to ſeize the temporalties of the biſhop for contempt, he ſhall have *the preſentation to the prebend annexed* to the temporalties which ſhall become void after. 21 E. 3. 29. adjudged. Though the *king has the temporalties as a diſtreſs till a fine made to him* by the biſhop. 21 E. 3. 29, 30. adjudged.]

2. Quare impedit by the king of the advowſon of B. and made title by the poſſeſſions of the abbot of Reading in his hands; and the defendant ſaid, that *king H.* great grandfather of king J. *granted to the abbot and his monks, that he and his heirs ſhould not meddle with the poſſeſſion of the houſe in the time of vacation, but that the prior and monks ſhould have the diſpoſition* of them *for their ſuſtenance;* and ſaid, that they had *enjoyed it accordingly.* And the beſt opinion was, that the grant is good, and that this word *(poſſeſſions) ſhall be taken to be all which they ſhall have in poſſeſſion.* And per Cheir. where a man demands franchiſe by charters of the king before time of preſcription, he ſhall not have it otherwiſe than it has been uſed, quod non negatur; and quære the reaſon of thoſe words (for their ſuſtenance); for *preſentation to advowſon is not ſuſtenance to them.* Br. Patents, pl. 22. cites 39 E. 3. 21.

Ibid. in Marg. ſays, that in 18 Eliz. it was awarded, that it belonged to the guardian of the ſpiritualties. It ſeems that it is becauſe that it comes by reaſon of the ſpiritualties.

3. The maſter and fellows of Merton College in Oxford were patrons of a benefice within the biſhoprick of Durham, and the incumbent died, and the *church remained void* by *ſix months;* and afterwards the *biſhop* was *deprived.* Whether the collation belonged to the *king or* to the archbiſhop of York, *metropolitan,* or not? Quære. D. 87. b. pl. 103. Paſch. 7 E. 6. The Maſter and Fellows of Merton College's caſe.

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Fol. 229.

(C. f) *Viſitations. What Perſons* may be *viſited.*

[1. *EVERY ſpiritual perſon* is viſitable by the ordinary. Davis, 1. Commend. 72. b]

If to a *priory, or a dean and chapter,* the Court ſeemed of opinion, that the biſhop, notwithſtanding the appropriation of the benefice, might viſit to ſee how the church was ſerved, ſacraments adminiſtered, &c. and might *proceed to ſuſpenſion*; but it was clear he could *not deprive* him. 10 Mod. 68. Mich. 10 Annæ, B. R. Dr. Harriſon v. Archbiſhop of Dublin.

[2. If a *rectory* has been *appropriated to an abbey,* the viſitation ſhould ceaſe as to the *rector;* for the abbot was not viſitable as rector for his doctrine. Davis, 1. Proxyes, 3. b. 73.]

[3. But

[3. But *all abbies and priories* of common right, *if* they were *not lawfully exempt*, were viſitable as to their rule and order. Davis, Proxies, 3. b. for they were religious.]

(D. f) Biſhop. Viſitation.

[1. *DEAN* is viſitable de mero jure *by the ordinary*, for he is ſpiritual. D. 10 El. 273.]

[2. If the *patronage of a deanery be appointed to the king by a ſtatute, and that he and his ſucceſſors ſhall nominate him* with a *ſaving of all rights, &c. to ſtrangers, except the biſhop*, and after the king nominates a dean, he is viſitable by the ordinary notwithſtanding the ſaving; for this goes to the poſſeſſions, and the deanery is ſpiritual. D. 10 El. 273. 38.]

[3. The ordinary has *power of correction of a parſon.* 20 H. 6. 46.] The ordinary hath in ſome caſes a power as to the perſon, though not to the place; for if the *parſon of a donative marries without a licence or commits any miſdemeanor*, the ordinary may puniſh him. Watſ. Clerg. Law, 173, 174. ——Cites 3 Salk. 140.

[4. *But not of an abbot.* 20 H. 6. 46.]

[5. *Every hoſpital*, be it lay or ſpiritual, *is viſitable.* Cook, 10. Sutton's Hoſp. 31.]

[6. When the *hoſpital of St. John of Jeruſalem* was ſurrendered and diſſolved, and *ſuppreſſed by the* act of 33 *H.* 8. *and their poſſeſſions veſted in the crown* by the act, yet *the viſitation of them did not ceaſe thereby*, becauſe their corporation was not diſſolved by it; *but when they were deraigned, and* left their habit, rule, and order, for which they were viſitable, then the corporation was utterly diſſolved, and upon this the *viſitation ceaſed.* Davis, Proxies, 1. b. Agreed.]

(E. f) What * Perſon ſhall viſit.

Fol. 230.

[1. BY the ancient law of the realm, *the king* has power to viſit, reform, and correct all abuſes and *enormities in the church.* Davis, 1. Proxies, 4.]

* Wherever there is a cure of ſouls, the church is viſitable either by the biſhop, if it belongs to him; if to a *layman*, he *muſt make delegates*; if to the king, the *lord-keeper* does it. Per Twiſden J. Mod. 12. pl. 34. Mich. 21 Car. 2. B. R. in the caſe of Clerke v. Heath.

[2. *By the ſtatute in time of H.* 8. *the crown was but* remitted and *reſtored* to its ancient juriſdiction, which was uſurped by the biſhop of Rome. Davis, 1. Proxies, 4.]

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[3. H. 8 E. 3. B. R. Rot. 97. *Epiſcopus Exon. attachiat. ad reſpondendum domino regi quare exerceret juriſdictionem in capella regia Sanctæ Burianæ in Cornub. &c.* bene placitat. ibidem. And Tr. 17 E. 3. Rot. 97. B. R.] Gibſ. Cod. 237. cites S. C. but cites it as in time of E. 1.

[4. The *king* himſelf ſhall viſit *his free chapels and hoſpitals*, and not the ordinary. Davis, 1. Proxies, 4. 27 E. 3. 85. F. N. B. 42. a. The Lord Chancellor ſhall execute it for the king.] Free chapels may continue ſuch, in point of exemption from ordinary viſitation, though the head or members receive inſtitution from the ordinary. This appears

pears beyond exception from the king's *preſentation* of a prebendary of the *free chapel of Haſtings*, made to the biſhop of Chicheſter, and a *royal mandate for inſtalment*, reciting the admiſſion and inſtitution of the perſon preſented; both which we find in the Regiſter. Gibſ. Cod. 237.

If the biſhop attempt to viſit an hoſpital of royal foundation, a *prohibition is provided* in the Regiſter, fol. 40. b. By the tenor of which it appears, that de jure communi, the Chancellor of England for the time being had the right of viſiting all ſuch hoſpitals in the name of the king. Gibſ. Cod. 1147.

An incumbent of a donative of the king's, as he comes to it merely by the king's letters patents, he

[5. The *donatives of the king* are not viſitable by the ordinary. Davis, 1. D. & C. of FERNS, 46. temp. E. 6. Br. Premunire, 21. 21 Aſſ. 29. 8 E. 3. Aſſ. 150.]

[6. The donatives of the king *are properly viſitable by the Chancellor*. Davis, 1. 46. F. N. B. 42. A. And the king may make a *ſpecial commiſſion* to this purpoſe. D. 1. 46.]

ſhall not be viſitable, nor deprivable, by any eccleſiaſtical authority, but by the Lord Chancellor, or by commiſſioners under the great ſeal. 12 Rep. 41. in Nicholas Fuller's caſe.

[7. The *abbey of St. Edmond's-bury* was of the *foundation of the king, and exempt from every juriſdiction of the ordinary*, that no ordinary ſhall viſit there, *and after ordained in parliament, that if the biſhop, or his ſucceſſors, viſit againſt the ordinance and foundation, they ſhall forfeit* 30 talents, and after the biſhop is ſued upon a *contempt for viſiting* contrary to this, and againſt the prohibition of the king not to viſit, and for this his temporalties ſeiſed, and he forfeited the talents. 21 E. 3. 60.]

[8. 8 E. 1. Rot. Clauſ. Memb. 8. Rex vic. Glouc. *præcipimus tibi quod non permittas* Wigorn. *epiſcopum* vel offic. aut alios miniſtros ſuos capellanos, clericos, aut alios *miniſtros liberæ capellæ de, &c. quæ eſt de hæreditate J. S. infra ætatem, & in cuſtodia noſtra exiſtentis viſitare* vel juriſdictionem ordinariam in eadem libera capella exercere, aut in ea aliquid contra tenorem inquiſitionis, nuper de præcepto noſtro ſuper hoc, &c. attemptare, &c. ſed in eodem ſtatu in quo fuit die obitus patris prædicti J. S. manuteneas, protegas & defendas durante cuſtod. & hoc nullo modo omittas, &c.]

[9. 23 E. 1. Rot. Clauſ. Memb. 7. Becauſe *the free chapels of the king* are exempt from the ordinary juriſdiction, which the *dean and official of London* compels them to pay, &c. *Prohibition*, 6 E. 1. Rot. Pat. M. 17. in ſchedula annexa. The king recites, quod cum eccleſia Omnium Sanctorum de Derby cum præbendis & aliis pertinent. ſuis ſint libera capella regis, & ab omni ordinaria juriſdictione exempta & domino *papæ immediate ſubjecta, &c.* & *archidiaconus Derby* juriſdictionem ibi vindicat. Rex mandat quod præfato archiadiacono talem juriſdictionem vindicanti in nullo obtemperent.]

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[So of *colleges*] Every college has a viſitor, either by appointment of the founder, or of the law.

[10. If a *hoſpital* be *ſpiritual*, the biſhop ſhall viſit. Co. 10. Sutton's, 31. 8 Aſſ. 29. 8 E. 3. Aſſ. 150.]

[11. If a hoſpital be *lay*, *the patron* ſhall viſit it. Co. 10. SUTTON'S, 31. 8 Aſſ. 29. 8 E. 3. Aſſ. 150.]

If it be a * lay one, the founder, or his heirs; but if an eccleſiaſtical one, then the biſhop of the dioceſe is. Per Holt Ch. J. Show. 74. Mich. 1 W. & M. Perkins v. .... —— * S. P. Jenk. 270. pl. 88. —— It is ſaid, in the Journal of Parliament, 3 H. 8. that † *abuſes relating to hoſpitals* ought to be *reformed in convocation*; but though the rule of the canon is that hoſpitals, de jure communi, were under the inſpection of the biſhop; and though alſo the order of the lords in parliament implies plainly, that they underſtood the ſtatute 2 H. 5. cap. 1. to be an affirmance of that general right, without any exception, but to thoſe of royal foundation, ſince the ſtatute neither mentions nor implies

plies any other, yet Lord Coke diſtinguiſhes between *ſpiritual and lay* hoſpitals; and ſaid, the exemption from the ordinary, in the caſe of Sutton's Hoſpital, was but declaratory; for being a lay incorporation, he neither could, nor ought to viſit it. Gibſ. Cod. 1147, 1148.

Holt Ch. J. held, that in defect of a particular appointment of a viſitor by the founder, the common law makes the founder viſitor, and it is not at his pleaſure, whether there ſhall be a viſitor or not; but if he is ſilent *during his own time*, the right will *deſcend on his heirs*. And his lordſhip ſaid, that it ſo appears by the caſe in Yelv. 75. and 2 Cro. 60. where it is admitted on all hands, that the founder is patron, and as founder is viſitor, if no particular viſitor be appointed, and that ſo is 8 H. 3. 70. & 8 Aſſ. 29. ſo that patronage and viſitation are neceſſary conſequents of each other; for this viſitatorial power was not introduced by any canons or conſtitutions eccleſiaſtical; it ariſes from the property which the founder had in the lands aſſigned to ſupport the charity. Skin. 483. Trin. 6 W. & M. B. R. in caſe of Philips v. Bury —— Show. Parl. Caſes, 45, 46. Accordingly, and there it was further argued, that in our old books *(deprived by patron)* and *(deprived by viſitor)* are *all one*; for this authority to viſit is a benefit that naturally ſprings out of the foundation, and it was in his power if he pleaſed to transfer it to another, and where he had ſo done, the other would have the ſame right and authority as the founder had; that there is *no manner of difference between an hoſpital and a college except only in degree*: an hoſpital is for thoſe that are poor and mean, or ſick, &c. A college is for another ſort of perſons, and to another intent; the former is to maintain and ſupport them; this is to educate them in learning, that have not otherwiſe wherewithal to do it; but ſtill it is much within the ſame reaſon of that of an hoſpital; and if in an hoſpital the maſter and poor are incorporated, it is a college, having a common ſeal to act by, though it bears not that name, becauſe it is of an inferior degree; and in both caſes there muſt be a viſitor, as both are eleemoſinary.——And 5 Mod. 404. Paſch. 10 W. 3. the KING v. BLYTHE, it was held per Cur. that all eleemoſinary corporations, who are to receive the charity of the founder, whereof a particular viſitor is not appointed, if they are eccleſiaſtical, then the ordinary of the place is viſitor; but if they are lay corporations, then the founder and his heirs are perpetual viſitors.——12 Mod. 232. Mich. 10 W. 3. Anon. Holt Ch. J. ſaid, he took it that the corporation of a college being lay, the viſitation belongs to the founder and his heirs, and if the *founder dies without heir*, that the *viſitation ſhall go to the king*; for which ſee 5 E. 4. SIMON DE MONFORD'S CASE, and ſaid, that this was his private opinion; and that whether a right of viſitation ſhould eſcheat was a point which divided the Court in DR. PATRICK'S CASE; and ſaid, that there is a great diverſity between abbot and convent, and maſter and fellows, mayor and commonalty, &c.; for, in caſe of abbot and convent, there muſt be the major part, and the abbot beſides, becauſe he acts only cum conſenſu of the major part of the reſt; but in caſe of maſter and fellows, &c. the maſter himſelf is but part of the acting part, and he is one of the grantors as well as the reſt; and he ſaid, that in caſe it be *a donative and a private corporation, though it be ſpiritual*, yet he is of opinion that the viſitation belongs to the founder, though he does not, by expreſs words, reſerve it to himſelf; for why ſhould it of common right belong to the ordinary? And whether the king may grant the inheritance of a viſitation may be a queſtion; for it may be ſaid to be privy to his perſon; but without doubt he may grant to whom he pleaſe to be viſitor for a time.

[12. If a *lay* hoſpital be erected, *and no viſitor named, but governors appointed*, the governors ſhall viſit. Co. 10. SUTTON, 31.] Fol. 231.

If the *founder limits not who ſhall viſit* (ſays my Lord Coke) the biſhop of the dioceſe ſhall, for which he refers to the ſtatute of 2 H. 5. cap. 1. and ſays nothing of his diſtinction between ſpiritual and lay hoſpitals. Gibſ. Cod 1151.——Gilbert Ch. B. ſaid, the meaning muſt be, that when an hoſpital is incorporated as a diſtinct corporate body, and governors appointed; that (in point of conſtruction) is then a parting with the viſitatorial power; for there can be no end in erecting the governors, but to make them viſitors where the poor are the corporation, and the revenues are lodged in them as a corporate body. Hill. 12 Geo. 1. G. Equ. R. 180. Caſe of Birmingham School.——S. C. 2 Wms.'s Rep. 325. Eden v. Foſter.

[13. *All abbies and priories* were viſitable *by the ordinary as to their rule and order* of common right, *if they had no exemption.* Davis, Proxies, 3.]

[14. The *hoſpital of St. John of Jeruſalem* was viſitable *by the ordinary* of common right. Dav. Proxies, 1. admitted. For they were religious.]

[15. In the *ſtatute of* 25 *H.* 8. which takes away the pope's ſupremacy, there is a *proviſo*, (viz.) *That the archbiſhop of Canterbury, or any other perſon or perſons, ſhall have no power or authority, by reaſon of this act, to viſit or vex any monaſteries, abbies, priories, colleges, hoſpitals, houſes, or other places religious, which be, or were exempted before the making of this act, any thing in this act to the contrary thereof notwithſtanding:*

*withſtanding; but that redreſs, viſitation, and confirmation, ſhall be had by the king's highneſs, his * heirs and ſucceſſors, by commiſſion under the great ſeal to be directed to ſuch perſons as ſhall be appointed requiſite for the ſame, in ſuch monaſteries, colleges, hoſpitals, priories, houſes, and places religious exempt, ſo that no viſitation or confirmation ſhall be from henceforth had or made in, or at any ſuch monaſteries, colleges, hoſpitals, priories, houſes, and places religious exempt by the ſaid biſhop of Rome, nor by any of his authority, nor by any out of the king's dominions, &c.*]

So that now there are no places totally exempt from ordinary juriſdiction, but either ſuch as enjoy their exemption upon the foot of common law, as free chapels and donatives, (the firſt viſitable only by commiſſion from the king, and the ſecond by commiſſion from the donor,) or ſuch as the crown may have exempted or ſhall exempt, purſuant to the powers granted by this ſtatute. Gibſ. Cod. 1018.

[16. In the *ſtatute of* 31 *H.* 8. *cap.* 13. of the diſſolution of monaſteries, there is this *proviſo*, (viz.) *That ſuch of the late monaſteries, abbies, priories, nunneries, colleges, hoſpitals, houſes of friars, and other religious and eccleſiaſtical houſes and places, and all churches and chapels to them, or any of them belonging, which before the diſſolution, ſuppreſſion, renouncing, relinquiſhing, forfeiting, giving up, or coming unto the king's highneſs, were exempted from the viſitation or viſitations, and all other juriſdiction of the ordinary or ordinaries, within whoſe dioceſe they were ſituate or ſet, ſhall from henceforth be within the juriſdiction and viſitation of the ordinary or ordinaries within whoſe dioceſe they, or any of them, be ſituate and ſet, or within the juriſdiction and viſitation of ſuch perſon or perſons as by the king's highneſs ſhall be limited or appointed, this act or any other exempt liberty or juriſdiction to the contrary notwithſtanding.*]

[17. In the *ſtatute of* 1 *&* 2 *P. & Mar. cap.* 8. (which repeals the ſtatute of 25 H. 8. before-mentioned here) there is this *proviſo* (viz.) *Whereas by the diſſolution of monaſteries and other religious houſes, certain pariſh churches and chapels were before exempt from the juriſdiction of the archbiſhops and biſhop of the dioceſe, and by ſpecial exemption and privilege from Rome, were under the government and order of the abbots and priors of thoſe religious houſes, which ſaid churches, by colour of the ſaid exemptions, be now of ſpecial grant from king H. 8. and king Edward, under the rule and government and juriſdiction of laymen, who can no more enjoy that ſupremacy over theſe particular churches, than the king might over the whole realm, be it enacted, that all ſuch archbiſhops and biſhops in their dioceſe, and all other ſpiritual perſons having juriſdiction, and their miniſters and officers, and no lay perſon or perſons, in every church and place within the precinct of the ſame, being exempt or not exempt, may freely and without impediment execute their ſpiritual juriſdiction in all points and articles, as though no ſuch exemption or grant had ever been made.* But after there is a *proviſo*, that this ſhall not extend to toll or diminiſh the privilege of the univerſity of *Cambridge* or *Oxford*, nor the *privileges* or *prerogatives* granted before to the churches of *Weſtminſter* and *Windſor*,* *nor the* Tower of *London*, nor be prejudicial to ſuch temporal lords and poſſeſſioners within the realm, who by ancient cuſtom have enjoyed probates of teſtaments of their tenants and others; but this act is repealed by the ſtatute of 1 Eliz. cap. 1.]

* Fol. 232.

[18. In the *ſtatute of* 1 *Eliz. cap.* 2. (which is an act for uniformity of common prayer) there is a *proviſo*, (viz.) *that all and ſingular*

gular archbiſhops and biſhops, and every of their chancellors, commiſſaries, archdeacons, and other ordinaries, having any peculiar eccleſiaſtical juriſdiction, ſhall have full power and authority by virtue of this act, as well to inquire in their viſitations, ſynods, and elſewhere within their juriſdiction, at any other time or place, to take occaſions and informations of all and every the things above-mentioned, done, committed, or perpetrated within the limits of their juriſdiction or authority, and to puniſh the ſame by admonition, excommunication, ſequeſtration, or deprivation, and other cenſures and proceſs, in like manner as heretofore hath been uſed by the queen's eccleſiaſtical laws.] [248]

[19. In the ſaid ſtatute 1 *Eliz. cap.* 2. it is enacted, *That ſuch privileges, juriſdictions, ſuperiorities, and pre-eminences, eccleſiaſtical and ſpiritual, as have been by any ſpiritual and eccleſiaſtical power or authority exerciſed, or may lawfully be exerciſed or uſed for the viſitation of the eccleſiaſtical ſtate and perſons, and for reformation, order, and correction of the ſame, and of all manner of errors, ſchiſms, abuſes, offences, contempts, and enormities, ſhall for ever, by authority of this preſent parliament, be united and annexed to the imperial crown of this realm; and that the king, his heirs and ſucceſſors, ſhall have full power and authority by virtue of this act, by letters patents under the great ſeal of England, to aſſign, &c. to uſe, exerciſe, &c. under the king, his heirs and ſucceſſors, all manner of juriſdiction, &c.*]

20. The *ſame place* may well be viſitable *by two different powers.* So it is in the *caſe of every cathedral and* every *dioceſe*, which are viſitable as well by the metropolitan as by the biſhop.——— Gibſ. Cod. 1151.

21. The archbiſhop of D. libelled in the ſpiritual court againſt the dean and chapter there for denying to admit him to viſit them. The defendant ſuggeſted for a prohibition, that the *chapel was of royal foundation, being firſt a monaſtery of royal foundation, and afterwards tranſlated into dean and chapter;* and being a donative, was exempted from the viſitation of the ordinary. Upon a prohibition the plaintiff *declared*, that this chapel was of royal foundation, and *that the ordinary had no viſitatorial power there, but* what he had *by the letters patents of creation* 33 H. 8. *which expreſsly provide, that the archbiſhop ſhall have no power over the deanery, but ſuch as he had over the prior and convent of the Holy Trinity time out of mind*, which priory was of royal foundation, and had time out of mind been viſited by the king or his chancellor. The archbiſhop, after oyer, *pleaded*, that *the king did further order and declare in the ſaid letters patents, that the church of the Holy Trinity ſhould be the archiepiſcopal ſeat of D. as it was before, and as it uſed to be; and the archbiſhop ſhould exerciſe no juriſdiction there, but ſuch as he uſed when it was a priory; and that* time out of mind *the ſaid archbiſhop, and his predeceſſors, archbiſhops of Dublin, kept their cathedrals in this church; and that the prior and convent before, and the dean and chapter ſince the tranſlation, were the chapter of the ſaid archbiſhop, and* time out of mind *had been viſited by them*, as occaſion required, *and traverſed that the priory was of royal foundation.* Upon a ſpecial demurrer judgment was given in C. B. in Ireland for a conſultation, and that judgment affirmed in B. R. there, Upon error brought in the Houſe of Peers here,

it

it was argued, that this being an *eccleſiaſtical corporation, is by common intendment ſubject to the viſitation of the ordinary* of the place, unleſs by the patent of creation there had been a viſitor appointed by the founder; for all ſuch are prima facie ſubject to the juriſdiction of the ordinary, though founded by the crown, and ſo is CORBET's caſe, in D. 273. that the only material point is, *whether this was of royal foundation, or not?* which was not the point of the caſe between this * ARCHBISHOP and DR HARRISON ſome years paſt, who was a prebendary of this church. For if the priory was not of royal foundation, the deanry into which it was tranſlated, cannot be ſo; but if it was of royal foundation, then the tranſlation into dean and chapter is no prejudice to the founder, he remaining founder ſtill; for nothing is altered but the monaſtic rule and habit; and ſo it was held in the DEAN AND CHAPTER OF NORWICH's caſe. 3 Rep. 73. 30 H. 8. at which time the priory and convent of the cathedral church of the Holy Trinity of Norwich was tranſlated into the dean and chapter. So that *if* [249] *nothing is altered by the tranſlation, the founder is not deprived of his right of patronage, neither is the viſitor of his right of viſitation;* becauſe it is ſtill the ſame body corporate, though by another name. And judgment was affirmed. 8 Mod. 183. Mich. 10 Geo. 1724. Trinity-chapel in Dublin v. Archbiſhop of Dublin.

*See (C. f) Marg. pl. 2.

(F. f) *Exemptions.* [Viſitation.]

The king may erect a *free chapel*, and exempt it from the juriſdiction of the ordinary.

[1. THE king might exempt *abbies* from the viſitation *of the ordinary;* for the king is ſupreme ordinary. Da. Commend. 73.]

This is agreed on all hands; and our law-books add, that he may *licenſe any ſubject to found ſuch a chapel, with ſuch exemption*; which, however poſitively ſaid, ſeems not to be a ſelf-evident truth; and yet I find not any inſtances alleged to confirm it. That many free chapels have been in the hands of ſubjects, is not denied; but it does not therefore follow, that thoſe were not originally of royal foundation. Gibſ. Cod. 237.——The king may erect a free chapel, and exempt it from the ordinary; and I think he may do it without conſecration, as in the inſtance of Whitehall: but though the Codex is unwilling to grant it, yet our books are very expreſs, that the king may licenſe a ſubject to found a free chapel, and exempt the ſame from the juriſdiction of the ordinary. Watſ. Clerg. Law, 646.

† The court of delegates *is ſo called, becauſe* the *judges* are delegated, and *fit by* force of *the king's commiſſion* under the great ſeal, upon appeals to the king in *three caſes:*

(G. f) *Appeal.* † *Delegates.*

[1. *BY the ſtatute* 25 *H.* 8. appeals to Rome *are prohibited, and ordained, that for default of juſtice in any of the courts of the archbiſhops of this realm, &c. it ſhall be lawful to appeal* to the king in his court of Chancery, *and thereupon a commiſſion ſhall be* ‡ *granted, &c.* And by a *proviſo* circa finem ſtatuti, an appeal *is given to the king in Chancery*, upon ſentences in places exempt, *in the ſame manner as was uſed before to the ſee of Rome.*]

1ſt, When a decree or ſentence is given in an eccleſiaſtical cauſe by the archbiſhop, or any of his officials. 2dly, When any decree or ſentence is given in any eccleſiaſtical cauſe in *places exempt*, or peculiars belonging to the king, or to an archbiſhop. 3dly, When a ſentence is given in the *court of Admiralty* according to the civil law. Wood's Inſt. 505.——S. P. 4 Inſt. 339. cap. 74.—S. P. Godolp. Rep. 116. cap. 11. ſ. 13.

‡ The

† The ſtatute goes on and ſays, that a commiſſion ſhall be granted *under the great ſeal, to certain perſons to be named by the king, who ſhall thereby have power, as in caſes of appeal from the admiral court, to hear and definitely to determine all ſuch appeals, and the cauſes concerning the ſame, and from whoſe decree or ſentence no further appeal ſhall be had.* But note, in caſe where a ſentence is given by commiſſioners delegated by the prince, as by the late viſitors anno 1 Eliz. the *party grieved appealing*, ſuch appeal is out of the orders preſcribed by the ſtatute of 24 H. 8. and 25 H 8. cap. 19. And the prince in that caſe may grant *a new commiſſion to others to determine that appeal.* And this was done by the opinion of ſeveral juſtices in GOODMAN'S CASE, deprived of the deanery of Wells. 4 Inſt. 340. cap. 74. cites a manuſcript report of Lord Dyer.

The *biſhop* of Winton *is made viſitor of Magdalen College* in Oxford *by the founder, and exempted from any ordinary*, &c. Dr. Coveney, *preſident* of the ſaid college, *was deprived by the viſitor*; and from his ſentence *appealed to the queen* in Chancery. It was reſolved by the Juſtices to whom this appeal was referred, they having conferred with civilians, that the appeal doth not lie; for it is out of the ſtatutes 24 & 25 H. 8. cap. 12.; for this deprivation is a matter merely temporal, and as if done by a lay patron, ſo that if he be expelled he may have aſſiſe, or ſuch ſuit at the common law. D. 209. pl. 20. Mich. 3 & 4 Eliz. Dr. Coveney's caſe. ——— S. C. cited 4 Inſt. 340. as Dr. Coveney's caſe, preſident of New College in Oxford. ——— S. C. cited Arg. 4 Mod. 112. 116. And there the CASE OF SHIRAX in the Year-book of E. 3. Fitzh. tit. Aſſiſe, pl. 150. is cited, that he being deprived by the ordinary where the foundation was lay brought an aſſiſe; and it was held good. And Ibid. 124. the Court ſaid, that Shirax having a donative, and being deprived by the archbiſhop of York as ordinary and viſitor, and another being collated, the queſtion was, who was viſitor? And it appeared plainly that it could not be the archbiſhop, becauſe the matter was not ſpiritual, it was in caſe of a lay hoſpital, which had no ſpiritual poſſeſſion, it was neither college nor convent; and therefore the aſſiſe was held good, which proves nothing in the caſe of a ſpiritual corporation; for if the deprivation had * been by a proper viſitor, and one who had a lawful juriſdiction, his ſentence would have been final, and no aſſiſe could have been brought to examine it. Trin. 4 W. & M. B. R. in caſe of Philips v. Bury. ——— Show. Parl. Caſes, 47. Arg. in the caſe of Philips v. Bury, it was inſiſted that this caſe of Dr. Coveney in D. 209. nor that of BAGGES'S CASE, 11 Rep. 99. of an aſſiſe lying becauſe of no appeal, will not upon peruſal warrant the diſtinction; for that the party is as much concluded in the one caſe as in the other, and that it is reaſonable to ſuſpect that caſe not to be law, becauſe that is impracticable which it is brought to prove. The head of the college cannot maintain an aſſiſe for his office of headſhip; he hath not ſuch an eſtate as will maintain that writ; he hath no ſuch ſole ſeiſin; the whole body of the college has an intereſt therein; he has no title to the monies in his own right, till a diſtribution thereof is made by conſent; he is the only viſible head indeed of the body, but has no ſingle right. And that in APPLEFORD'S CASE it was ſaid by Lord Hale, that it was impoſſible he could have an aſſiſe.

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[2. *But* it is to be obſerved that *this appeal* to the king in Chancery, *is only* by the ſtatute aforeſaid, *upon a ſuit in the archbiſhop's court, or in a peculiar exempt*; for if there be a *ſuit upon a commiſſion general of the king*, there no appeal may be *to the king in Chancery*, within the ſtatute of the 25th by the words aforeſaid; and therefore *there may be* † *an appeal to the king generally*, as he is the ſupreme head of all eccleſiaſtical juriſdiction within the realm; and this ought to be upon a bill ſigned by him, before the Chancellor may make the commiſſion of delegates to hear it. But upon appeals upon the ſtatute, *the Chancellor* may *grant the commiſſion* of himſelf of courſe, without any *bill ſigned*. 5 E. 6. Stephen Gardiner was deprived upon a commiſſion of delegates, and he appealed to the king generally and not to the king in Chancery, and thereupon the ſentence repealed. 1 Mar. as I have heard by report of Mr. Selden; and ſo was it done in the Lord HARTFORD'S caſe about the 1 Jac.]

Note, it is commonly ſaid, there muſt be a *warrant under the ſign manual* of the king before the lord chancellor or lord keeper can iſſue out any commiſſion of delegates, notwithſtanding the ſtatute of the 25 H. 8. Watſ. Clerg. Law, 56.

[3. The delegates *may excommunicate*. H. 10 Ja. B. [Said] Per Cook to be reſolved by all the Juſtices in the Archbiſhop of Canterbury's caſe.]

Williams J. held, that the court of delegates *cannot pronounce a ſentence of excommunication*; and ſaid that they had lately adjudged that point againſt the court of delegates. 2 Bulſt. 4. Mich. 10 Jac. B. R. in caſe of Stevenſon v. Wood. ——— But Wood's Inſt. 505. ſays, that if the delegates in eccleſiaſtical cauſes are *ſpiritual perſons*, they may proceed to excommunication; if they are all *laymen*, the fault is not in the law, but in the nomination.

The power of the judges delegates is *poteſtas delegata corrigere, non exequi*; they have power there to examine, but not to correct. Per Williams J. 2 Bulſt. 4. in caſe of Stevenſon v. Wood.

[4. They *may commit adminiſtration.* Hill. 10 Ja.]

Though the court of delegates may revoke or confirm an adminiſtration, yet it ſtill remains a *quære, whether they may grant it originally*; and in the firſt inſtance this was a point ſtated in the caſe of * STEVENSON v. WOOD. 10 Jac. 1. And the better opinion was, that they could not. Watſ. Clerg. Law, 58. ——— * S. C. 2 Bulſt. 4. accordingly; but the doctors of the civil law differing in opinion among themſelves, the Court pronounced no abſolute judgment, but it was adjourned, and not ſpoken to again. But Williams J. cited one BRACKENBURYE'S CASE, where it was adjudged, that they could not grant letters of adminiſtration, they having no power ſo to do.

In a prohibition the caſe was; A. died inteſtate. B., his brother, gets adminiſtration in the inferior dioceſe; M., who pretended to be wife of A., ſuggeſted bona notabilia, and procured a prerogative adminiſtration; B. appealed to the delegates, and died; C. his ſon and heir gets the prerogative adminiſtration repealed, and adminiſtration granted to himſelf. M. prayed a prohibition, ſuppoſing that by the death of one of the parties the commiſſion was determined: but the Court were of opinion againſt the prohibition, and that the delegates authority to proceed in that caſe continued notwithſtanding B.'s death; for by the words of their commiſſion, the eccleſiaſtical law is to be their rule, and by that law a ſuit does not abate by the death of the parties. And Hale ſaid, the appeal is to the king in Chancery, and is by reaſon of his original juriſdiction, and thereupon he grants a commiſſion to hear it; now if he could hear it in perſon, he may certainly determine the cauſe after the death of the parties, and conſequently they to whom he has delegated his authority, may do the ſame. But upon the Attorney-general's deſiring to be heard, the Court gave further time. Vent. 133. Trin. 23 Car. 2. B. R. Pollexfen v. Pollexfen. ——— 2 Lev. 6. Paſch. 23 Car. 2. B. R. ſays, the prohibition was denied. ——— 2 Keb. 779. S. C. and that the prohibition was diſcharged niſi.

It was the better opinion, and in a manner agreed, that B. R. may prohibit the delegates *from committing adminiſtration*: 1ſt, Becauſe the authority of the delegates is *given by* 25 *H.* 8. and ſo their juriſdiction does not commence by ſpiritual law; but as the pope had an uſurped power, which is transferred to the king by parliament, and the king gives it to the commiſſioners delegates; and 2dly, Becauſe they cannot be judges in their own cauſe. Lat. 86. in caſe of Reeve v. Denny.

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Mo. 462. pl. 652. S. C. by name of HALLIWELL v. JERVOISE, ſays, the Court conferred with all the Juſtices of England, and that Popham inclined that the prohibition was not grantable, becauſe the pope uſed to review in

5. A ſentence in the ſpiritual court at L. was had againſt the plaintiff, who afterwards appealed to the arches, where the ſentence was affirmed, and adjudged, ut ſupra, againſt the plaintiff. Whereupon he ſued a commiſſion to the delegates, and the matter was re-examined, and ſentence then given for the plaintiff. Thereupon another commiſſion was ſued out to re-examine this matter. A prohibition was prayed to ſtay it, becauſe the 25 H. 8. enacts, that a ſentence before the delegates ſhall be final, and conſequently this ſecond commiſſion is not well awarded. But it was anſwered, that the queen hath by law an abſolute power to grant commiſſions to re-examine, which is not reſtrained by the 25 H. 8. And that it hath been ſo ruled before theſe times; and of that opinion was Popham; but becauſe it was a new caſe, they would adviſe thereof. Cro. E. 571. Trin. 39 Eliz. B. R. Gervis v. Hallewell.

ſuch caſes after ſentence by the legate: and whatever the pope was wont to do is united to the crown by the ſtatute 25 H. 8. cap. 20. [19.] But they agreed that this review ſhould be final without further appeal. Fenner ſeemed e contra, and that the pope's authority is abrogated and extinct, and that no appeal is given by the ſtatute any further than to the delegates; and therefore it could not be lawful to go any further. But at another day, by a conference with all the Juſtices, they agreed that the commiſſion was well granted, and that conſultation ſhould be awarded; but that if the commiſſioners do not proceed to the examination according to the common law, they ſhall be reſtrained by prohibition.

6. The delegates *cannot make a diviſion of* inteſtates *goods.* Per Hubbard. Noy, 24. in Took's caſe.

7. The delegates *cannot interpret a ſtatute.* Per Hubbard. Noy, 24. in Took's caſe.

8. The court of delegates have *no power to prove wills.* Per Williams J. 2 Bulſ. 4. Mich. 10 Jac. B. R. in caſe of Stevenſon v. Wood.

9. The

9. The judges delegates muſt *judge according to the eccleſiaſtical law.* Per Ld. Keeper. Chan. Caſes, 201. Paſch. 23 Car. 2. in caſe of Vanbrough v. Cock.

10. The judges and civilians ruled on debate, that the *teſtimony of one* N. who was *examined in Chancery between the ſame parties*, and croſs-examined there, ſhould be *read before the delegates;* though it was objected that the appellant here ſhould take the advantage here which he ſhould have had if he had been croſs-examined; for croſs-examining a witneſs ſets him upright in Chancery but not here. 2 Chan. Caſes, 250. Hill. 30 & 31 Car. 2. Gargrave alias Fan v. .....——[So the book is.]

11. The *Reformatio Legum*, ſpeaking of the appeal to the king, adds as follow, *quo cum fuerit cauſa devoluta, eam vel concilio provinciali definiri volumus, ſi gravis ſit cauſa, vel a tribus epiſcopis a nobis ad id conſtituendis.* But in modern practice (viz. only from the year 1639) there are *temporal judges and temporal lords* appointed for the final determination of matters confeſſedly ſpiritual. Gibſ. Cod. pag. 1082.—The ſame author ſays, that there are *no footſteps of* any of the *nobility, or common law judges in commiſſion till the year* 1604, (i. e. for 70 years after the erecting the ſaid court,) nor from 1604 are they found in above one commiſſion in forty till the year 1639; from whence (i. e. from the downfall of biſhops and their juriſdiction which enſued,) we may date the preſent rule of mixtures in that court. Ibid. Introd. Diſcourſe, pag. 21.

Watſ. Clerg. Law, 56. ſays, this is a groſs error; and that the practice has been all along to have lay judges joined in the commiſſion with eccleſiaſtics.

12. There lies *no appeal to the Houſe of Lords* from a ſentence in the delegates; for they cannot have any original juriſdiction; becauſe it is a matter grounded upon an act of parliament, and the act gives them none; per Lds. Commiſſioners. 2 Vern. 118. Mich. 1689. Saul v. Wilſon.

13. A woman was ſuppoſed to be married firſt to A. and afterwards to B. both A. and B. being then living; and upon a diſpute the ſpiritual court affirmed the firſt marriage, but was diſallowed on appeal to the delegates, and the 2d held good; there was iſſue by the 2d, but none by the firſt. Upon a petition for a commiſſion of review to reverſe the laſt ſentence, Ld. C. King ſaid, [252] that a *commiſſion of review is not a matter of right*, but purely in the diſcretion of the crown; and as ſuch commiſſion tends to baſtardize the iſſue he was againſt it, and ſhould adviſe the crown accordingly. 2 Wms.'s Rep. 299. Trin. 1725. Franklyn's caſe.

(H. f) Appeals.

[1. IF a *ſentence* be given *in the high commiſſion court*, no appeal lies from it de mero jure. M. 5 Jac. B. M. 8 Jac. B.]

An appeal did not lie from the high commiſſion court when in being; becauſe they *themſelves were the king's delegates*, as acting by an immediate commiſſion from him. And there was *no remedy* againſt their ſentences, *but a new commiſſion to others*, grantable by virtue of the royal prerogative independent on the authority given by 25 H. 8. or any other ſtatute. Watſ. Clerg. Law, 55, 56.

[2. *But* upon ſuch ſentence an appeal may be, if the party can acquire a *ſpecial commiſſion to examine it.* M. 5 Jac. B.]

[3. H. 2. ordained, that appeals ſhould be *from the conſiſtory to the archdeacon*; from him *to the biſhop*; from him *to the archbiſhop*; from him *to the king*. Fox, 265. Speed. 458.]

[4. *But* Matthew Paris has further, that the *king commanded the archbiſhop to make an end of the ſuit, and that he proceed no further without licence of the king*. Speed. 458. Jan. Anglor. 94. 53.]

[5. In Roger Hovend. fol. 303. and Jan. Anglor. 94. it is, that appeal ſhall be *from the archdeacon to the biſhop commencing with the archdeacon without ſpeaking of the conſiſtory*, and ſo Cook in his 6th Epiſtle cites it, and there he obſerves the power of the king upon eccleſiaſtical juriſdiction to be ancient and not new.]

[6. Among the petitions in parliament, 18 E. 1. there is ſuch petition, William de Nottingham *clericus petit, quod poſſit proſequi appellationem ſuam in curia Romana, &c. Rex non conceſſit, quod privilegium ſuum infringat, ſed impetret intra regnum, ſi ſibi videret expedire.*]

7. 24 *H.* 8. *cap.* 12. *ſ.* 5. enacts, That appeals *in cauſes teſtamentary, cauſes of matrimony and divorces, right of tithes, oblations and obventions*, ſhall be ſued from the archdeacon, *or his official, if the matter be there commenced*, to the biſhop *of the dioceſe*.

A parſon of a church in the dioceſe of Winton was deprived, and he

S. 6. *And if the matter be there commenced before the* biſhop *dioceſan or his commiſſary, then within* 15 *days after ſentence given, an appeal may be* to the archbiſhop *of the province to be there definitely adjudged.*

appealed to the archbiſhop of C. in curia prærogativa ſua de arcubus; the queſtion was, whether this appeal was well brought? becauſe the ſtatute mentions only the archbiſhop of the province where, &c. without limiting any court in certain. It was the opinion of all the Juſtices of B. R. that the ſaid words in the appeal, viz. (in curia prærogativa ſua de arcubus) were void and ſuperfluous, and that the words, viz. (to the archbiſhop of C.) were ſufficient to have the benefit of the appeal by the equity and intendment of this ſtatute. D. 240, pl. 46. Trin. 7 Eliz. Anon.

In Trin. 3 W. 3. the Court agreed, that no appeal could be

S. 7. *If the matter be commenced before* the archdeacon *of any archbiſhop, or his commiſſary, the appeal may be within* 15 *days, &c.* to the audience or arches *of the ſaid archbiſhop*, and from thence *within other* 15 *days, &c.* to the archbiſhop himſelf, *and no further.*

made from the dean of the arches to the archbiſhop, becauſe it was one and the ſame. Carth. 170. in Lee's caſe. —— But Ibid. in Marg. the reporter ſays, that the ſtatute 24 H. 8. 12. is expreſsly to the contrary, but that this ſtatute was not mentioned.

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S. 8. *And* if *the caſe be* commenced before the archbiſhop, then *to be there definitively* determined without further appeal.

S. 9. *Where the* matter touches the king, *the appeal may be within* 15 *days* to the higher convocation houſe of that province, *and no further, but finally to be there determined.*

S. C. cited Dav. 46. b. in caſe of the Dean and Chapter of Fernes.

8. G. was inſtalled *dean of Wells*, and afterwards *made a prebendary* of the ſame church. Upon a viſitation by the king's letters patents, he was *deprived of his deanry by the biſhop's commiſſary*, becauſe he could not hold two dignities ſimul & ſemel in the ſame church, and the firſt was void by the canon law. The dean *appealed to the archbiſhop*, who affirmed the ſentence. Whereupon he appealed *to the king; but the king granted the deanry to* one *Turner*; after which the king died. Queen Mary granted another commiſſion

ſion to the *delegates*, who *reſtored him* to his deanry. After the death of queen Mary (viz.) anno 1 Eliz. *Turner by a new commiſſion was reſtored* by ſentence, and that ſentence after affirmed by other commiſſioners, notwithſtanding the reclaimer and appeal of G. Dyer, 273. pl. 35. Paſch. 10 Eliz. Walrond v. Pollard.

10. Stephen Gardiner, biſhop of Wincheſter, was *deprived* at Lambeth *by commiſſion* from E. 6. made to 10 perſons proceeding thereupon ex officio mero, mixto vel promoto, *omni appellatione remota*, ſummarie de plano, without any form or figure of judgment, but only upon an inquiry into the truth of the fact. 4 Inſt. 340. cites a MS. Rep. of Ld. Dyer's.

11. An appeal being a natural defence *cannot be taken away by any prince or power*; and in every caſe generally, when ſentence is given and appeal made to the ſuperior, the judge, that did give the ſentence, is bound to obey the appeal, and to proceed no further until the ſuperior hath examined and determined the cauſe of appeal; nevertheleſs, where this clauſe *(appellatione remota)* is in the commiſſion, the judge, that gave ſentence, is not bound to obey the appeal, but may execute his ſentence and proceed further, until the appeal be received by the ſuperior, and an inhibition be ſent unto him; for the clauſe (appellatione remota) *hath three* notable *effects*; 1ſt, That the juriſdiction of the judge that gave ſentence is not by the appeal ſuſpended or ſtopped; for he may proceed, the ſame notwithſtanding. 2dly, That for proceeding to execution or further proceſs he is not puniſhable. 3dly, That thoſe things that are done by the ſaid judge after ſuch appeal cannot be ſaid void; for they cannot be reverſed per viam nullitatis. But if the appeal be juſt and lawful, the ſuperior judge ought of right and equity to receive and admit the ſame, as he ought to do juſtice to the ſubjects; and ſo if the cauſe of the appeal be juſt and lawful, he ought to reverſe and revoke all mean acts done after the appeal in prejudice of the appellant. Thus far the Report of the Lord Dyer truly tranſlated. 4 Inſt. 340. cap. 74.

(I. f) The *Effect* of Appeal.

See (H. f).

[1. IF *after ſentence* the party appeals, *the ſentence is utterly ſuſpended* during the appeal. 2 R. 2. Quare Impedit, 143.]

The very bringing an appeal is a ſuſpenſion of the firſt judgment in the ſpiritual court for the principal matter, but not for the coſts; per Lord Keeper Egerton. Goldſb. 119. pl. 4. Hill. 43 Eliz. in the caſe of Willoughby v. Willoughby.

[2. If a man appeals *from a ſentence of excommunication he may celebrate maſs.* 20 H. 6. 25. b.]

[3. *So* after appeal he *may bring actions at common law*, and ought to be anſwered. Dub. 20 H. 6. 25.] [254]

4. If an *inferior* ſpiritual *court commits adminiſtration, and* an appeal is made from thence *to the arches, and there* the firſt adminiſtration is *affirmed*, the *uſe is to remit the cauſe; but when* the firſt ſentence is *reverſed, the firſt* court ſhall be *ouſted of juriſdiction*, and the

court that reverſes it, &c. ſhall *commit de novo.* Lat. 85. Reeve v. Denny.

5. If a church be only voidable by deprivation, and the eccleſiaſtical judge hath actually pronounced a ſentence of deprivation againſt the incumbent, yet *if the perſon deprived appeals, the church is not* actually *void* ſo long as the appeal dependeth; and if the *ſentence* of deprivation upon the appeal be *declared void*, the *clerk is* perfect *incumbent as before*, without any new inſtitution. Watſ. Comp. Inc. 8vo. 95. cap. 6. cites Fitzherb. Abr. 2 R. 2. Quare Impedit, 143. 27 H. 7. Gard. 118. Trin. 7 Eliz. Dyer, f. 240. and Mich. 33 & 34 Eliz. Gayton's caſe. Owen, 12. Packman's caſe. 6 Co. 18.

6. If the *appeal* be *to the king* in Chancery, and the *deprivation* be *affirmed* by the king's delegates, or if the deprivation be immediately made by the Lord Chancellor, or Keeper, for that the incumbent is viſitable immediately by the king, I conceive that *no appeal lies*, and that the only remedy, that the perſon deprived hath, is to *get a commiſſion of review*, which is only grantable of grace by the king, and not of right; nor is there any remedy at common law if the cauſe of the deprivation was eccleſiaſtical; for there the ſentence is binding, and not thereby examinable; and therefore, if a perſon be deprived by the authority aforeſaid, and another be inſtituted to his benefice, the new incumbent's title ſtands good until it be reverſed upon the commiſſion of review; for this was ſaid in the caſe of a clerk deprived by the high commiſſioners. Watſ. Comp. Inc. 8vo. 95. cites Trin. 4 Jac. Bird v. Smith. Moor, 781.

See Commendam.

(K. f) Prerogative of the King in *Matters Eccleſiaſtical.*

Cro. E. 542. S. C. where it is held by Gaudy and Fenner, that the king had this prerogative by the common law; for the benefice is made void by the king's act, and he may well diſpenſe with his own act.

[1. THE king by his prerogative royal may *grant licence* to an incumbent *to hold* his benefice *in commendam* with a biſhopric. H. 39 El. B. R. ARMIGER and HOLLAND.]

[2. 9 E. 1. Rot. Clauſ. M. 4. Dorſ. *Rex epiſcopo* Ciſtr., &c. cum nos & progenitores noſtri hoc privilegio uſi ſumus a tempore quo non extat memoria *quod clerici noſtri* ad ordines ſuſcipiendos vel ad faciend. ſuper ſuis beneficiis *perſonalem reſidentiam dum noſtris immortantur* * *obſequiis compelli non debeant mandamus vobis quod W. clericum noſtrum, &c.*]

* Fol. 234.

[3. H. 8 E. 3. B. R. Rot. 23. *The archbiſhop of York ſummonitus per breve de ven. fac. ad reſpondend. domino regi pro conſecratione epiſ. Durham elected a biſhop without the aſſent of the king;* the defendant comes and ſays, that he is a *peer* of the realm, and ought not to be compelled to anſwer by attachment and diſtreſs, &c. To which it is anſwered, *quod contemptus exceſſus & tranſgreſſio prædicta tangunt*

tangunt uſurpationem juris regii contra coronam per quod prædictum breve de venire fac. fuit invent. per concilium regis, quia in novo caſu novum remedium eſt apponendum, dies datus ad audiend. judicium.]

4. The kings of England from time to time in every age before the time of H. 8. have uſed to *grant diſpenſations in cauſes eccleſiaſtical;* for where the law of the church is, that every ſpiritual perſon is viſitable by the ordinary, king William *the Conqueror* by his charter *exempted the abbot of Battel from viſitation and juriſdiction* of the ordinary in thoſe expreſs words *(ſitque dicta eccleſia libera et quieta imperpetuum ab omni ſubjectione epiſcoporum et quarumlibet perſonarum dominatione*, ſicut Eccleſia Chriſti Cantuarenſis, &c.) by which he diſpenſed with the law of the church in this caſe. Dav. Rep. 72. b. 73. a. Paſch. 9 Jac. C. B. in Ireland, in the caſe of commenda. [255]

5. The king may *diſpenſe with a prieſt to hold two benefices*, and *with a baſtard that he ſhall be a prieſt*, notwithſtanding the eccleſiaſtical laws which are to the contrary; and as he may diſpenſe with thoſe laws, ſo he may pardon all offences againſt them. Dav. Rep. 73. a. Paſch. 9 Jac. C. B. in Ireland, in the caſe of commenda.

6. The eccleſiaſtical court cannot proceed to *puniſh* a perſon for a *crime*, according to the canons, for which he is *pardoned*, or at common law excuſed. Arg. Skin. 500. Trin. 6 W. & M. B. R. in the caſe of Philips and Bury.

(L. f) Prerogative of the King in *Eccleſiaſtical Courts*, by *Writs* of *the King*.

[1. IF *pariſhioners* of a pariſh *have uſed time out of mind to elect two churchwardens annually, and to preſent them to the archdeacon to be ſworn*, and he has uſed to ſwear them, and now upon ſuch election and preſentation to him to be ſworn, *he refuſeth to ſwear them*, a writ may be directed out of B. R. to the archdeacon commanding him to ſwear them. M. 17 Jac. B. R. Such writ granted for the churchwarden of SUTTON-VALENCE in KENT. For though a *canon* be *made 1 Jac. to the contrary*, it cannot take away the cuſtom. T. 15 Car. B. R. Such writ granted for the churchwardens of the pariſhes of * ETHELBOROUGH and ST. THOMAS APOSTLE's in London, after divers motions and upon hearing of counſel on both ſides. P. 4 Car. B. R. Rot. 420. † DRAPER and STONE, like writ granted.—For the churchwardens of ‡ HOLBETON in DEVON, like writ granted.]

* Mar. 22. pl. 10. S. C. Jo. 439. S. C. by name of Evelyn's caſe. —— Cro. C. 551.

S. C. —— † Prohibition (F) pl. 51. S. C —— ‡ Mar. 66. pl. 104. Mich. 15 Car. S. C. and cites the caſes of Sutton-Valence in Kent, and of St. Ethelborough in London. —— S. P. Raym. 439. Paſch. 33 Car. 2. Carpenter's caſe. —— If the *party elected offers himſelf*, and the *eccleſiaſtical judge refuſes to tender the oath to him*, a *mandamus* from the temporal court will be granted, and will not be revoked upon a *return that he is not habilis perſona*; becauſe they ſay, that in this the eccleſiaſtical court are not to judge of the qualifications of the perſon any more than of an executor or an adminiſtrator; but the pariſhioners who chuſe him are the moſt proper judges of his fitneſs for the office. And it muſt be owned, with regard to the goods of the church, that the pariſhioners who are to repair what is loſt or ſpoiled, ought to be judges in what hands they ſhall be lodged, becauſe they may well be preſumed to chuſe

chuſe ſuch hands as are ſafe. But with regard to the duty of preſerving order, and preſenting vice, the preſumption does not hold ſo ſtrong that the pariſhioners will always chuſe ſuch as ſhall be zealous in that work, which yet is a very conſiderable branch of the office of churchwarden. Gibſ. Cod. 243.

[2. 36 E. 3. The *king commanded the biſhop* of Exon *to ſend chriſme to the pariſh of* St. Burien in Cornwall.]

[3. F. N. B. 63. A writ *de cautione admittenda* directed to the ordinary.]

[4. F. N. B. 229. A writ directed *to the mayor of* Oxford *to inrol a teſtament and to prove it.*]

[256] [5. If a *clerk of a pariſh* in London has been *uſed time out of mind to be elected by the veſtry, and after admitted and ſworn before the archdeacon*, and *he refuſes* to ſwear ſuch clerk ſo elected, but admits another elected by the parſon, a writ may be awarded to him, commanding to ſwear him. 22 Jac. B. R. WALPOOLE'S CASE. Mich. 16 Car. B. R. between * ORME AND PEMBERTON, for the clerk of the pariſh of St. FOSTER'S London ſuch writ granted.]

* Cro. C. 589. S. C.

For more of Prerogative in general, ſee **Aid of the King, Canons, Commendam, Preſentation,** and other proper titles.

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† Preſcription.

Fol. 264.

† Preſcription is from time whereof the memory of men living, &c. and this h d if there be no ſpecial evidence by record to the contrary. Jenk. 26. in pl. 49.

(A) [*Who*. And] *by what Names* they may preſcribe, [though they hold only at Will, &c.]

[1. ‡ A *Serjeant at law* may preſcribe, that he and all ſerjeants have uſed, &c. *to be impleaded only by original.* 11 E. 4. 2. b. though they are not a corporation.]

‡ Bill of *debt againſt a ſerjeant at law*, who *ſaid, that he came to the bar to plead and miniſter matter for his client, and bill does not lie againſt him*; *and* after he *ſaid, that he is ſerjeant at law, and that he and all ſerjeants at law time out of mind have been impleaded by writ original, and not by bill*; and demanded judgment if the Court will take conuſance. The plaintiff demurred. Per Brian, you cannot preſcribe; for you are not incorporated. But it was held, that *ſeveral may preſcribe, who are not incorporated*, as *officer of the court* ſhall preſcribe in privilege, &c. Br. Preſcription, pl. 72. cites 11 E. 4. 2.

Br Preſcription, pl. 72. cites S. C.— So in treſpaſs for tramp-

[2. *So* an *attorney* may preſcribe, that he and all attornies, &c. have uſed *to have privilege*, &c. 11 E. 4. 2.]

[3. A man may preſcribe, that *all the inhabitants of the pariſh* have uſed

uſed to have their *ſacraments, and to be buried in the church-yard*, &c. 18 E. 4. 2. b.]

ling his graſs, the *defendant ſaid, that* the place, &c. is, &c. and that the city of Coventry is an ancient city time out of mind, and *all the citizens and inhabitants* of the ſame city *have had common in the ſaid place* for all their beaſts levant and couchant in the ſame city time out of mind *from ſuch a day to ſuch a day, and that the defendant is an inhabitant in the ſame city*, by which he put in his beaſts as in his common; and it was agreed, that the *mayor and citizens of C. may preſcribe for them and their inhabitants*, &c. and not otherwiſe. Br. Preſcription, pl. 28. cites 15 E. 4. 29. —— S. P. Br. Cuſtoms, pl. 40. cites 18 E. 4. 3. —— So Preſcription may be, that the uſage of the vill of D. has been time out of mind, that the inhabitants, &c. *have had* * *way over the land of the plaintiff to the church*, &c. or that they have been *quit of toll at the mill*, &c. Br. Preſcription, pl. 76. cites 18 E. 4. 3. ——— S. C. cited D. 71. pl. 72. —— * S. P. and that inhabitants may preſcribe *in caſement, contra in profit apprender out of another's land*; per Pigot, which was not contradicted. Br. Preſcription, pl. 28. cites 15 E. 4. 29. —— Inhabitants, *unleſs they are incorporated, cannot preſcribe to* have *profit in the ſoil of another, but* in matters of *caſement only*, as in a way to a church; *ſo* in matters of *diſcharge*; as to be diſcharged of toll or tithes, or in a † modus decimandi; but not in matters of intereſt. Cro. J. 152. Hill. 4 Jac. B. R. Smith v. Gatewood. ——— 6 Rep. 59. b. S. C. —— S. C. cited Arg. 2 Lutw. 1346. in caſe of Johnſon v. Wyard. —— S. C. cited 3 Bulſ. 326. in caſe of Turner v. Denning. —— † S. P. Cro. E. 446. Mich. 37 & 38 Eliz. C. B. in caſe of Auſtye v. Fawkener.

Brooke makes a quære, if *houſeholders* may preſcribe. Br. Preſcription, pl. 98. cites 11 H. 6. 19.

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[4. A man may allege a cuſtom *quod quilibet capitalis juſticiarius de Banco* pro tempore exiſtens has uſed *dare quodlibet officium of the Court*, &c. D. 2, 3. Ma. 114. 63.]

S. P. Br. Preſcription, pl. 4. cites 20 H. 6. 8. ——

S. P. Br. Preſcription, pl. 72. cites 11 E. 4. 2.

[5. A *ſheriff* cannot preſcribe, that he and all thoſe who have been ſheriffs have been ſeized of *a certain gift at every tourn* held, &c. For ſheriff is choſe by the king every year, and removeable at the king's will. 42 E. 3. 5. adjudged.]

Br. Office and Officer, pl. 31. cites 42 E. 3. 4. ——— Br. Preſcription, pl. 9. cites 40 E. 3. 4. [But it ſhould be 42 E. 3. 4. according to Br. Office.]

[6. *But* vide in 21 H. 7. 16. b. An *under-ſheriff* preſcribed, that he and all under-ſheriffs of the county have uſed to have *ſo much for bar fees*, and admitted good.]

See Fees (A) pl. 1. in the Notes. Br. Fees, pl. 6. cites S. C. ——Br. Preſcription, pl. 37. cites S. C.

7. *Scire facias to repeal letters patents* of the king *of an office in Ireland againſt J. N. becauſe the plaintiff has other letters patents of it of elder date*, &c. the *defendant ſaid, that the land of Ireland is, and time out of mind has been a land ſevered from the realm of England, and ruled and governed by the cuſtoms and laws there, and that the lords there of the king's council have uſed in the abſence of the king to chuſe a juſtice, who has power to pardon and puniſh all felonies and treſpaſſes, and to aſſemble a parliament by advice of the lords and commonalty, and make ſtatutes, and alleged* how *a parliament* was *ſummoned, by which it was enacted, that thoſe who have offices there ſhall be reſident upon it by a day*, &c. *or otherwiſe ſhall forfeit* his office, and *that the plaintiff was officer*, &c. *and did not come by the day, by which the office was void, and the king granted to the defendant*, &c. The other demurred upon the plea; and by ſome the preſcription is contrary to reaſon, and ‡ may bind the king, and therefore ill; but per Forteſcue, the preſcription is void, and is in the king, and not in thoſe of Ireland; *as* ‖ *Chancellor of England* who is only at will *preſcribes to have preſentation*

‡ Orig. is (poet lie). ‖ S. P. Br. Preſcription, pl. 72. cites 11 E. 4. 2.

* S. P. under 20 marks per annum when they void; quod nota; but it is

ſentation to all benefices of the king * *under a certain ſum*, and that ſtatutes of England, as of 10ths, 15ths, &c. do not bind Ireland, becauſe it is ſevered, and does not come to parliament; therefore *quære legem*. Br. Preſcription, pl. 4. cites 20 H. 6. 8.

uſed that he may make collation or preſentation to all which are *under* 20*l. per annum*. Br. Preſcription, pl. 86. cites 38 E. 3. 3.

8. In debt it was awarded, that the *ſexton of an abbey* cannot preſcribe that he and his predeceſſors, ſextons of the abbey of B. have *been parſons of St. A. in B. and have impleaded and been impleaded time out of mind*; for ſexton cannot preſcribe; and grant to him by the king ſhall not ſerve to his ſucceſſor; for he *has no ſucceſſion*, quære of himſelf; for it ſeems that he is a monk, and therefore a dead perſon in law. Br. Preſcription, pl. 99. cites 32 H. 6. 31.

9. *Prior dative and removeable* preſcribed *to implead and to be impleaded*, and to anſwer and to be anſwered time out of mind, and a good preſcription. Br. Preſcription, pl. 94. cites 2 E. 4. 17. and 44 E. 3. 4. accordingly.

And ſo may tenant for years, per Choke; quod fuit conceſſum.

10. My *very tenant* may preſcribe *in his own right*; per Choke; Br. Preſcription, pl. 28. cites 15 E. 4. 29. Ibid. —— But tenants at will cannot preſcribe in their own rights, but in right of their lord; per Cur Br. Preſcription, pl. 76. cites 18 E. 4. 3. —— S. P. per Choke. Br. Preſcription, pl. 28. cites 15 E. 4. 20. —— They cannot preſcribe *in a thing which ſhall endure for ever*, &c. but in the uſage and cuſtom of the vill they may; and ſo note the diverſity. Br. Preſcription, pl. 76 cites 18 E. 4. 3. —— *Tenant for life cannot* preſcribe, *nor* a man cannot preſcribe *againſt tenant for life*, and *where there is no ſucceſſion nor perpetuity* there can be no preſcription. Br. Preſcription, pl. 77. cites 22 E. 4. 17.

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Cro. E. 153. Honeywood v. Huſbands, S. C. Reports, that Gawdy held it to be good; but per Wray, the plaintiff ought to

11. In caſe for diſturbing the plaintiff in uſing his common, plaintiff ſet forth, that A. was ſeiſed of certain lands to which common was appendant for life, remainder in tail to B. and that they demiſed the lands to the plaintiff for years; it was objected againſt this declaration, that *leſſee for life and* he in *remainder* cannot *preſcribe together*, and cited 20 E. 4. 10. But per Popham and Gawdy, it is well enough; for all is but one eſtate. 1 Leon. 177. Paſch. 31 El. B. R. Hauxwood v. Huſbands.

have made a diſtinct title to the common, and not confounded them as he has done. Et adjornatur.

12. A copyholder preſcribed, that every copyholder *of ſuch a parcel of wood had uſed* to cut down trees there growing; and held good; and a difference was taken between a preſcription for *freehold* and for *copyhold* land; for *cuſtom* which concerns freehold ought to be throughout the county, and cannot be in a particular place, but a preſcription concerning copyhold land is good in a *particular place*; for de minimis non curat lex, and the law is not altered thereby, and it may be there is but one copyholder there for which he might preſcribe.. And cuſtom to have *profit apprender, privilege, or diſcharge*, may well be in a particular. Cro. E. 353. Mich. 36 & 37 Eliz. C. B. Taverner v. Ld. Cromwell.

It is true, that tenants in ancient demeine

13. The *inhabitants of Egham, and all the towns in Surry, joined in a claim to cut down all the coppices at their pleaſure*, and to have common for all cattle commonable, and common of turbary, and made title

title by preſcription. Noy, the Attorney-general, ſaid, that they ought not to have joined in one claim. Jo. 275, 276. 8 Car. in Itin. Windſor, the Inhabitants of Egham's caſe.

may join in a claim for a common, &c becauſe king cannot claim for them; but [as to] other men, if [they are] copyholders, they only muſt join that are tenants to one lord, and the lord muſt preſcribe for him and his tenants; but the lord of a manor cannot preſcribe for any of his freeholders, but every of them muſt put in ſeveral claims; for the reaſon why the lord may preſcribe for his copyholders, is, becauſe the freehold of the land is in law in him. Jo. 276. in the S. C.

14. Preſcription for a thing appurtenant to a manor (as liberty of foldage of the tenant's ſheep) was laid *in a body aggregate by a que eſtate*, and was held to be well enough.——2 Vent. 139. Hill. 1 W. & M. C. B. Dickman v. Allen.—Cites Keilw. 140. b. Co. Litt. 121. a. Cro. J. 673.

15. In treſpaſs of breaking his cloſe called Jenning's Key, the defendant preſcribed, that *omnes ligei domini regis*, time out of mind, &c. uſed to land goods of too great burden in the lands adjoining,) the plaintiff had verdict; but upon exception in arreſt of judgment, the Court held the preſcription good enough, and a nil capitat was awarded. 3 Keb. 179. Trin. 25 Car. 2. B. R. Jennings v. Clenial.

(A. 2) Againſt whom.

1. THE *lord* cannot preſcribe *againſt his villeins, nor his tenant at will.* Br. Cuſtoms, pl. 52. cites 13 E. 3.

2. A man preſcribed in the biſhop of C. and his predeceſſors, that they had preſented to ſuch a priory, as patrons, time out of mind; Skip. ſaid, he cannot preſcribe againſt the king; but Kirk. ſaid, that he may *as well againſt the king as another perſon*; for *otherwiſe the lords ſhall loſe their franchiſe in quo warranto.* Br. Preſcription, pl. 52. cites 38 Aſſ. 22.

3. Debt of 3l. for pound breach, becauſe the cuſtom of his manor of C. is *that the lord for the time being has had 3l. for pound breach* time out of mind, and that the defendant was diſtrained, and ſhewed by whom, and for what cauſe, and he broke the pound, for which he brought his action; and by all the Juſtices the cuſtom *is not good to bind a ſtranger*; for it cannot have lawful commencement, *but* ſuch cuſtom upon the tenants of the manor *may be good*; for it may be that it was reſerved upon their tenures in principio.—Br. Preſcription, pl. 106. cites 11 H. 7. 13, 14. [259]

4. As where the *tenants grant to the lord, that when their rents are arrear, they ſhall render* 2cs. Ibid.

5. In replevin, the defendant avowed for damage-feaſant; the plaintiff juſtifies, for that he had a cloſe adjoining to the defendant's cloſe, and that the defendant, and all the *occupiers* of the ſaid cloſe, time out of mind, had *uſed to repair the fences between the ſaid cloſes*, and for not ſufficient incloſing his beaſts entered, &c. Iſſue was taken upon the preſcription, and found for the avowant; it was moved in arreſt of judgment, that the preſcription, that *every occupier*, &c. is too general, for tenant at will, tenant at ſufferance, or

So in an action on the caſe, the plaintiff ſet forth, *that he had been 3 years laſt paſt an occupier* of ſuch a paſture, *and that de-*

fendant occupied ſuch another cloſe, and that omnes alii occupatores of the defendant's cloſe did uſe to ſhut the gates

or a diſſeiſor are occupiers, and for this reaſon it was held, that the preſcription was not good, though being after a verdict, it is aided by the ſtatute of jeofails. Cro. E. 445. Mich. 37 & 38 El. C. B. Auſtye v. Fawkener.

; this was found for the plaintiff, and it was moved in arreſt of judgment, that omnes occupatores is not good; but it was adjudged, that notwithſtanding this exception, without alledging any [thing more] than that all the occupiers had uſed to do it, it was good. Cited by Bridgman Ch. J. Cart. 32. Mich. 17 Car. 2. C. B. as the caſe of GUNTER v. MORE, and that it was by the advice of all the judges.

(B) *Of what Thing* it may be. [And what ſhall be ſaid a good Preſcription.]

Br. Preſcription, pl. 19. cites S. C.

[1. A Man may preſcribe *to be tenant in common* with another *of land.* 8 *H.* 6. 16. *b.*]

As if one and his anceſtors, or thoſe whoſe eſtate he has in a moiety have held the ſame in common with the other tenant or his anceſtors, or with thoſe whoſe eſtate he has pro-indiviſo time out of mind, &c. But *joint tenants* cannot be by preſcription; becauſe there is ſurvivor between them, which there is not between tenants in common. Co. Litt. f. 310. 195. b.

He cannot make title to the land itſelf

[2. But a man cannot *make title to land by* preſcription. Brooke, Preſcription, * 122.]

[as] that he and his anceſtors, or thoſe whoſe eſtate, &c. have been ſeiſed time out of mind, &c. Br. Preſcription, pl. 19. cites 8 H. 6. 16. and cites tit. Treſpaſs, pl. 122. ——— [* There are not ſo many pleas in Preſcription, but it ſeems it ſhould be (pl. 19.) and that the (122.) is a miſtake occaſioned by the plea out of (Treſpaſs, 122.) which Brooke cites.]

3. It ſeems, that a *dean and chapter* may preſcribe *to make induction and inſtallation*, as to them belonging, time out of mind. Vide 9 H. 4. 9. a. b. the biſhop of Coventry and Litchfield v. Weſtwood.

Br. Aid, pl. 78. cites S. C.

4. Maſter of an hoſpital preſcribed in writ of *annuity of the ſeiſin of the annuity againſt a parſon and his predeceſſors* time out of mind, and good, and ſo charged the parſon, and no land but the church. Nota. Br. Preſcription, pl. 21. cites 19 H. 6. 39.

5. Where *rent* is *granted by fine or patent* of the king before the time of memory, the party may *count by preſcription.* Per Newton. Br. Preſcription, pl. 22. cites 19 H. 6. 75.

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One may preſcribe to have *game of ſwans within his manor*, as well as to have park or warren. 7 Rep. 16. b. Trin. 34 Eliz. the caſe of Swans.

6. It is a good cuſtom to preſcribe *that where a ſwan comes upon the land of any adjoining to the river Thames, and makes a neſt there, and has three cygnets, that the owner of the ſwan ſhall have two of the beſt, and* † *the owner of the land the third*; for otherwiſe the owner of the land may chace them; quod nota; and here in a particular county. Br. Preſcription, pl. 100. cites 2 R. 3. 15.

——— *And* he that has ſuch game of ſwans, may preſcribe, *that his ſwans ſhall ſwim within the manor of another.* Ibid. 16. b. 17. a. ——— And in that caſe a preſcription being laid for wild ſwans unmarked, nidificantes, &c. it was reſolved that if the defendants had alleged, that within the ſaid creek there had been time out of mind a game of *wild ſwans unmarked, nidificantes & gignentes*, and then *preſcribed that ſuch abbot and all his predeceſſors, &c. had uſed*, time out of mind, *to have and take to their uſe ſome of the ſaid game* of wild ſwans *and their cygnets within the ſaid creek*, this had been good; for though the cygnets are royal volatiles, yet in ſuch a manor a man may preſcribe in them; becauſe this may have a lawful commencement by grant of the king, and conſequently a man may preſcribe in them within a certain place, ſince it may have a lawful commencement. Ibid. 18. a. b.

7. It

7. It is a good preſcription *to have a halfpenny of every one who goes over his land;* for this is *toll traverſe.* Br. Preſcription, pl. 57. cites 5 H. 7. 9.

So in a vill *for toll thorough*; for this is quid pro quo. Ibid.

8. It is a good preſcription, *that if the tenants of the manor do not pay their rent by one year, nor any diſtreſs can be found there by one year, that the lord may re-enter,* and this is good for the generality; for though ſome do not pay, by which the lord enters, yet it may be, that there are others who pay well. Br. Preſcription, pl. 36. cites 21 H. 7. 15.

Br. Cuſtoms, pl. 30. cites 21 H. 7. 13. 15. S. C.

9. Preſcription by a lord of a manor was *to have after the death of every tenant for life or years, or at the will of the lord,* for every tenure held by ſuch tenant at the time of his death, his beſt beaſt, *in the name of a heriot, and to ſeiſe the ſame.* Kingſmill and Vavaſor J. thought this not a good preſcription. But Frowike Ch. J. contra. Keilw. 79. b. Mich. 21 H. 7. Talbot's caſe.

And Kingſmill J. thought this caſe not like the caſe of 14 H. 4. fol. 2. Recordare de Glouceſter Fee; for there the lord of the honour ſhall have *relief, heriot,* and other caſual profits for every alienation, and there *unity of poſſeſſion* in the lord ſhall not hurt the cuſtom, becauſe the *cuſtom runs in a generality*, that is, throughout the whole honour; and where the cuſtom runs in ſuch generality *throughout all and every part of a place*, as *gavelkind, borough Engliſh*, and the like. In thoſe caſes, unity of poſſeſſion is not material; but in the caſe above, the cuſtom cannot run in ſuch generality; and for this reaſon the preſcription is not good. And alſo becauſe every * preſcription ought to *depend on* a thing which may have *perpetual continuance*; whereas between leſſor and leſſee for term of life, or years, or at will, the leſſees have only an eſtate determinable within a time certain. Keilw. 80. 21 H. 7. Talbot's caſe. ——*But* Frowike Ch. J. held this a good preſcription, and diſtinguiſhed between *one ſingle leaſe of one ſingle part* and ſeveral of ſeveral parts; that though in the firſt caſe on the determination of ſuch ſingle leaſe, an interruption would be of ſuch preſcription, becauſe it referred only to that particular parcel; but here, notwithſtanding ſuch determination, there are other lands in leaſe, upon which the cuſtom may depend and take place, it extending throughout the whole manor, and ſo makes it ſquare with the caſe of Glouceſter Fee cited by Kingſmill J. Keilw. 8. Talbot's caſe. —— Br. Preſcription, pl. 36. cites 21 H. 7. 15. S. C. —— Br. Cuſtoms, pl. 30. cites S. C. —— * It is an infallible rule, that if a man has a thing of common right, and by preſcription, he has eſtate in fee-ſimple in the ſame thing. Dav. 9. b.

In replevin, the defendant avowed, that J. S. held of him by homage, fealty, and rent, and *at every alienation of his tenant* that he and his anceſtors have uſed *to have the beſt beaſt, if the alienee does not give notice to the lord in the life of the alienor*; and that his tenant alienedto the plaintiff and died, and the plaintiff did not give any notice in the life of the other. And the beſt opinion was, that this is a good preſcription; for it may have lawful commencement, as by condition or reſervation at the making of the tenure. Br. Preſcription, pl. 58. cites 8 H. 7. 10.

10. Preſcription *to diſtrain in his own land* is good. Br. Preſcription, pl. 1. cites 26 H. 8. 5.

See (Y) pl. 27. S. C. at large.

11. Where a man preſcribes *to go quit of tithes for his lands in D.* where all others of D. pay tithes, this is void; for *cuſtom cannot be particular*, but ought to be throughout a country or vill. Br. Preſcription, pl. 93. cites Doct. & Stud. lib. 2. cap. 55.

My Lord Ch. J. Hobart ſaid, that in the caſe of preſcription, *tithes* differ from all other caſes in law; for whereas preſcription and antiquity of time fortifies all other titles, and ſuppoſes the beſt beginning that law can give them, yet in caſe of tithes it is clear contrary; for though the grant of a parſon, patron, and ordinary, is good in itſelf without any recompence or conſideration, yet when it runs to preſcription it dies and perithes; whereof no other reaſon is given but that our books ſay, that a man may preſcribe *in modo decimandi*, but not in *non decimando*, and this is *in favorem eccleſiæ*, leſt laymen ſhould ſpoil the church. But he gives another reaſon, that the law violently preſumes that a *layman* cannot be diſcharged abſolutely, and ſo will not allow the † preſcription, but will prefer the good of religion and the church to the benefit of a private ſingle perſon. Hob. 297. Mich. 15 Jac. in the caſe of Slade v. Drake.

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12. A man cannot preſcribe in *things which touch the crown.* Br. Lect. Stat. Limit. 39.

Bendl. 21. pl. 36. Paſch. 28 H. 8. Rot. 351. GUSTON v. SHITTINGTON; the pleadings but nothing more. D. 279. b. Marg. pl 9. [but it is miſplaced, and ſhould be pl. 10.]

13. In treſpaſs of taking his goods, the defendant ſet forth, that the city of York was an ancient city, and that there *were mayor, bailiffs, and citizens in the city time out of mind till* 1 *R.* 2. *who then incorporated them to be mayor, ſheriffs, and citizens; and that time out of mind there had been a cuſtom to ſeiſe wares foreign bought and foreign ſold within the liberty of the city of York, as forfeited;* and becauſe the ſaid goods were wares foreign bought and foreign ſold, he, as ſervant to the mayor, &c. juſtified the taking. And this manner of preſcription was traverſed and allowed. D. 279. b. pl. 10. cites it as a precedent.

ſays, that Mr. Glanvill in his Reading, Feb. 5 Car. ſaid, that he doubted of this caſe; for he held, that the preſcription is ill, and ſays, that he had ſearched for the rule of this caſe among the records, but could not find any ſuch; and he grounded his reaſon upon the ſtatute of 9 E. 3. cap. 1. for it is expreſsly contrary to this caſe. ——— [That ſtatute does not concern the manner of the preſcription, but only prevents ſuch forfeitures.]

14. A *body politic* or incorporate may commence and be eſtabliſhed by preſcription. Co. Litt. 250. a. ſ. 413.

Le. 142, 143. Trin. 31 Eliz. B. R. S. C. But it does not appear there, that any judgment was given. —— But Cro. E. 203. Mich. 32 & 33 El. B. R. S. C. ſays, that it was adjudged for the plaintiff; for the cuſtom is between the lord and his tenants, which by indenture may have a good and lawful beginning, and peradventure their lands were given to them upon this condition, and it is reaſonable that the lord maintaining a bakehouſe, that for this cauſe they ſhould have reaſonable recompence, and the plaintiff had judgment. — S. C. cited 8 Rep. 125. b. Hill. 7 Jac. in the CITY OF LONDON'S caſe; and ſays, it was adjudged a reaſonable cuſtom by Sir Chriſtopher Wray & tot. Cur. and yet this cuſtom reſtrains a man to uſe his trade within a certain place.

15. In action upon the caſe the plaintiff claimed ſuch a cuſtom in the town of T. *that he* and his anceſtors *had a bakehouſe within the town* to bake white and houſehold bread, *and that* he had ſerved all the town with bread, and that *no other could uſe the trade without his licence*, and that the defendant had uſed the trade without his licence; upon which the defendant demurred. And after argument it was adjudged, that the action will not lie. Ow. 67. Hill. 32 Eliz. B. R. Sir George Farmer v. Brook.

16. In treſpaſs for entering and cutting down the plaintiff's wood, the defendants allege a preſcription, &c. to take the *underwood growing on the lands of the plaintiff adjoining to their land, to make the hedges of that land on which the wood did grow.* It was argued, that this preſcription is not good; becauſe it founds in charge, and is not for the benefit of him who preſcribes; for if the defendants did not repair the wood, they would receive no damage. Sed adjornatur. 1 Leon. 313. Mich. 32 Eliz. B. R. Leigh v. Okely.

17. One cannot have a *court* by preſcription *unleſs where he cannot have it otherwiſe.* Per Walmſley J. Cro. E. 792. Mich. 42 & 43 Eliz. C. B. in the caſe of Pill v. Towers.

If in replevin ſo much of the preſcription be found as ſerves the

18. In replevin, &c. the iſſue was upon a preſcription for every yard-land within ſuch a vill to have *common for* 12 *cows*, and for a quarter of a yard-land common for 3, and for half a quarter for a cow and an half, and a verdict for the plaintiff. It was objected, that

that a man could not preſcribe to have common for a cow and an half; but adjudged, that this being on a verdict it ſhall be intended ſo as it can be (i. e.) common for half a year, or that two men had but one cow, and ſo each of them had half a cow. Sid. 226. Mich. 6 Car. 2. B. R. Ellard v. Hill.

turn of the party, though all be not found, it is ſufficient. And here the replevin was brought for one cow only, and the plaintiff pleading a preſcription for four cows and an half is a good juſtification for putting in of one cow. Per Windham and Twiſden cæteris abſentibus, and they gave judgment for the plaintiff. Lev. 141. Hill v. Ellard.—It was urged in * arreſt of judgment, that it ſhould have been ſaid, for the half feeding of a cow; but the ſaid juſtices held, that the avowry being but for one cow, it was ſufficient, whether it was good for the half cow or not. Keb. 793. S. C. by name of Hill v. Allen.

19. Preſcriptions muſt have a *lawful beginning*. Vent. 387. Potter v. North.

* [262] They muſt have a reaſonable cauſe of commencement. Dav. 9. b.—Every preſcription to charge a ſubject with a duty, muſt impart a benefit or recompence to him, or elſe ſome reaſon muſt be ſhewed why a duty is claimed. Per Cur. 4 Mod. 323. Mich. 6 W. & M. B. R. in the caſe of Warrington v. Moſeley.—Preſcription muſt be in a thing done. Per Anderſon Ch. J. Godb. 16. Paſch. 25 Eliz. C. B. in Skipwith's caſe.

20. In treſpaſs for *taking*, &c. his *beaſts*, the defendant juſtified, for that he had a *drift of common*, to ſee that it was not ſurcharged, and that the beaſts were there ſurcharging the common; and therefore he *took and detained* them *until 5l. paid in ſatisfaction of the treſpaſs*. Upon demurrer it was objected, that a preſcription for drift of common doth not warrant a diſtreſs unleſs he had preſcribed to diſtrain alſo; but adjudged, that it is a thing of common right for the preſervation of the common. 2 Lev. 87. Paſch. 25 Car. 2. B. R. Bromfield v. Teigh.

21. One preſcribed, that *by* reaſon of *repairing a chapel of eaſe* he had been time out of mind *exempted from contributing towards the repairs of the church*, and this was held a good preſcription. Freem. Rep. 468. pl. 644. Mich. 1678. Wiſe v. Green.

22. A *vicar* libelled in the ſpiritual court for a ſtipend of 4l. per annum, claiming it by preſcription, and prohibition moved for upon ſuggeſtion that *none can claim a ſtipend* by preſcription *but a corporation* or body politic; and ſo ſaid Holt, and that a ſheriff, though removable at the will of the king, may claim a fee as incident to his office. But againſt the prohibition was cited Litt. Rep. 19. 51. 12 Mod. 249. Mich. 10 W. 3. Birch v. Wood.

(C) *Who* may be *bound by* a Preſcription.

[1. A Preſcription does not run againſt the *king* there *where he has right*. 38 Aſſ. 22.]

[2. *As* if the king was *patron of right of a chapel*, another cannot have it by preſcription, and ſo bind the king. 38 Aſſ. 22.]

[3. A *corporation* cannot preſcribe *to be diſcharged of the ancient grand cuſtom, nor to receive it*, becauſe it is an *annual revenue of the crown*, and a caſualty, as *waif and ſtray*, &c. M. 6 Ja. Scaccario. Reſolved.]

4. A man *ſhall not charge the heir in annuity by preſcription, that his anceſtors* And yet it was agreed,

that a perſon of a church may be charged of annuity by preſcription, but *as a corporation* as it ſeems. Ibid.

anceſtors have paid it time out of mind. Br. Preſcription, pl. 11. cites 49 E. 3. 5. per Belk. & tot. Cur.

5. It is ſaid that a *vill may be bound* by preſcription *to provide a pillory and tumbrel*, and that every vill is bound of common right to provide *a pair of ſtocks*. Quære. 2 Hawk. Pl. C. 73. cap. 11. ſ. 5.

[263] (D) *What* ſhall be a *good* Preſcription. Where it is *uncertain*.

[1. IF *tenants of a manor* preſcribe, *that they ought not to pay a fine for renewing their copyhold eſtates more than two years rent,* * Fol. 265. *but ought to pay the rent of two years, or leſs;* this is not a good preſcription for the uncertainty; for ſometimes they are to pay two years rent, and ſometimes leſs. M. 37 El. B. R. between GREENE AND BURY. Per Curiam.]

[2. If a man preſcribes *to pay a penny or thereabouts, for tithes* of every acre of arable land, this is not good preſcription for the uncertainty. M. 7 Ja. B. ALLEN's caſe. Per Curiam.]

Saund. 346. S. C.—— 2 Saund. 4. ——2 Keb. 527. 550. 570.—— 2 Lev. 246.

3. Preſcription for *common ſans number* appurtenant to land, without ſaying levant and couchant, is ill; you can put in no more than is proportionable to your land. Per Twiſden J. who cited the caſe of MASSELDEN v. STONEBY in Glyn's time, where ſuch preſcription without *levant and couchant* was held good after a verdict; but if it had been upon a demurrer, it had been otherwiſe. Mod. 7. Mich. 21 Car. 2. B. R. in caſe of the Corporation of Derby.

Sid. 354. Hill. 19 & 20 Car. 2. B. R. S. C.

4. Treſpaſs for digging turf; the defendant pleaded that he is ſeiſed of an ancient houſe, and preſcribed *to have as much turf in one year as two men could dig in one day*, as belonging to his meſſuage. The plaintiff demurred, becauſe he did not ſhew that the turf was to be burnt in the houſe; and as it is laid here, it may be ſold, though he claims it as appurtenant to his houſe. But it was anſwered and reſolved, that when the thing is uncertain, as eſtovers, it ought to be applied to the houſe to aſcertain it; but here it is certain enough in itſelf, ſcil. as much as two men can dig in a day; and for authorities were cited Raſt. Ent. 539. and 1 Cro. SPOONER v. DAY; and judgment was given for the plaintiff. Lev. 231. Hill. 19 & 20 Car. 2. Hayward v. Cunnington.

(E) *Against* the *Public Good.*

[1. A Man cannot prescribe *to do* a thing which is *a nusance*; for it is against the public good. Hill. 15 Ja. B. R adjudged Trin. 16 Ja. B. R. in the case of the DOVECOTE. Resolved per totam Curiam.] S. P. Jo. 222. Per Crook. Pasch. 6 Car. in case of James v. Hayward.—S. P. 2 Roll. R. 31 & 32. Trin. 16 Jac. in case of Dewel v. Sanders.—Cro. J. 491. S. C.

[2. *As* he cannot prescribe *to lay logs of wood in a common highway scambling about, and suffer them to continue there for a long time*; for this is a nusance, and so against the public good. Hill. 15 Ja. B. adjudged between] Cro. J. 446. Mich. 15 Jac. Fowler v. Saunders. S. C.

[3. If a man prescribes that he and his predecessors *who have been seised of the manor of* COLEHERBERT, *have been exempt from the government of the mayor of the city of London*, and of all his officers, this is not a good prescription; for by this means they of this liberty shall be without government, which is against law, and therefore void. H. 43 El. B. R. The Count of SHREWSBURY's case. Adjudged per Curiam in quo warranto.]

[4. *So* it is not a good prescription, that he and his predecessors, seised of the said manor, have used to have *assise of bread and ale*, and also to have the *search of weights and measures*, and to have the punishment of them; for this belongs properly to a court leet to punish; and also he has not any court to punish such offences by presentment or otherwise. Hill. 43 El. B. R. The Count of SHREWSBURY's case. Adjudged per Curiam in quo warranto.] [264]

[5. It is a good prescription for the corporation of Dublin, *that they are owners of the port, and* that they *maintain* perches *in the said river, and* direct the ships in the deep channel, and that they *maintain the key and crane*; and that in consideration of this they prescribe *to receive of all merchandizes in the said port 3d. of the pound*; for here is quid pro quo. M. 6 Ja. Scacc. Resolved.] To repair a *key* and to have *toll* of all goods brought within the river, is ill; but to have *toll of all goods put to land* within the manor, though not at the key, is good. 2 Lev. 96. Hill. 25 & 26 Car. 2. in case of PRIDEAUX v. WARNE, cites Trin. 7 W. 3. C. B. * Crisp v. Belwood.——* 3 Lev. 434. S. C.

6. A man cannot prescribe *to be discharged of his appearance at the leet by being sworn before the constable and portreeve*, nor such like. Br. Prescription, pl. 13. cites 2 H. 4. 15. Pr. Leet, pl. 10. cites S. C.

7. *For inhabitants to dance in another's soil omni tempore anni* is a good custom; and though pleaded by way of prescription, yet judgment was given on a verdict for defendant in trespass, though the plaintiff moved this in arrest of judgment, and a case cited where it was adjudged upon a demurrer, that it ought to have been pleaded by way of custom. But per Cur. though perhaps it had been ill upon demurrer, yet issue being taken and found by verdict, it is good; and defendant had judgment. 1 Lev. 176. Trin. 17 Car. 2. B. R. Abbot v. Weekly at Oxford.

(F) Against the *Law of God.*

Br. Prescription, pl. 91. cites S. C.

[1. A Man may prescribe *to have a way over a church-yard,* though it be sanctuary. 18 E. 4. 8.]

[2. *So* to have a way *through a church.* 18 E. 4. 8. Brook, Prescription, 91.]

3. It is no good prescription *that the lord of a vill shall have fine of every tenant who marries his daughter without his licence;* for it is against the law of matrimony. Br. Prescription, pl. 101. cites Littleton, tit. Villeinage.

See Customs (E) (G).

(G) Against the *Law of Reason.*

[1. A Prescription against reason *is not good.*]

A vill cannot prescribe *to keep suspected persons in their gaol of their vill* 3 *days before they carry them to the common gaol*; for then they were *irrepleviable by those* 3 *days* where they ought to be repleviable immediately by the law, and also if they may so prescribe by 3 days, they may do it for three years, which is not reasonable; per Brian Justice. Br. Prescription, pl. 80. cites 22 E. 4. 43.

[2. A corporation prescribes *to arrest a man for suspicion of felony, and imprison him for three days, and then to carry him to the next gaol,* and this is against reason. 22 E. 4. 43.]

* In *trespass* for hunting in his warren, and taking away † 30 hares and 300 conies. Defendant *justified,* because he had *common* in the place, where, &c. *to a messuage and 6 yard lands for 240 sheep, and that he and all those whose estate* he has time out of mind, *have used at such time as the common was surcharged with conies to hunt, kill, and carry them away as to his messuage appertaining.* The plaintiff demurred, because a man cannot make such a prescription in the free warren and freehold of another man: and 2dly, Because a man cannot so prescribe to hunt, kill, and carry away his conies as appertaining to his messuage; but a man may prescribe *to have so many conies to spend in his house*; and for these reasons the prescription in the principal case was held for a void prescription, and judgment given for the plaintiff. Godb. 184. pl. 263. Hill. 9 Jac. B. R. Samford v. Havel.

[3. A man cannot prescribe *to have a* * *chace or warren in any land but in his demesnes, or* in land *within his fee and seigniory.* 3 H. 6. 13. b.]

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Fol. 266.

In quo warranto the defendant claimed the liberty of *free warren in R.* and pleaded that he was seised in fee of the manor of R. whereof the locus in quo, &c. was parcel, and so prescribes to have liberty of free-warren *within all the said manor and the demesnes thereof, so that none shall chase any game of warren in the said manor and demesnes thereof without his leave.* Issue was taken, that he and all those whose estate, &c. had no free warren within the said manor and demesnes thereof, and found for the defendant. It was objected, that this prescription was not good, viz. to have free warren in the manor and in the demesnes of the manor; for though he might prescribe to have it in his own demesnes, yet he cannot prescribe to have it in the lands of others his freeholders; neither ought he to prescribe to have it as appertaining to his manor; but to this it was answered by Roll, that a prescription to have free warren in his manor is good, as well in lands of freeholders as in the demesnes; for being by prescription it shall be intended, that this liberty was before there were any freeholders, whose estates were afterwards extracted out of the demesnes of the manor after the beginning of this prescription. Cro. C. 311. Trin. 9 Car. B. R. the King v. Sherington Talbot. —— This case is abridged by Hughes, pag. 1499. pl. 26. as resolved, and cites 9 Jac. B. R. the King v. Sherington. Cro. 1. par. 227. —— And Neis. Abr. pag. 1278. pl. 11. taking it from Hughes, cites the case as in 2 Cro. 227. SHERINGTON's case, and that it was adjudged —— [But nothing more appears

appears to have been ſaid in the report of Croke as to this point than is mentioned to have been anſwered by Roll; nor does any opinion of the Court as to this point appear in the report of the S. C. Jo. 320. the King v. Sherington Talbot.]

5. In replevin for taking a fail of a ſhip; the defendant avowed, for that he was ſeiſed in fee in the manor of Padſtow, where there is a *common key* extending from ſuch a place, &c. *for unlading ſalt, and* that he and all thoſe, &c. have uſed to repair the ſaid key, and have kept a buſhel for meaſuring ſalt, *and have had of every ſhip arriving there laden with ſalt, one* buſhel of ſalt, and becauſe a buſhel of ſalt was not paid according to the preſcription, he avows the taking the fail: the plaintiff *pleads in bar* to the avowry, *that the river* on which this key is pretended, *is* a great river *of ten miles in breadth, and that the key extends but half a mile*, and *that the ſhip arrived ſeven miles diſtant*; and traverſed that it arrived at the key within the ſaid manor. Upon demurrer it was inſiſted for the avowant, that it is not material whether the ſhip arrived at the key, becauſe it might come thither when the mariners pleaſed; but per Hale Ch. J. this preſcription is only for a wharf, and not for a port, and here ought to be reaſonable recompence for the preſcription; and he who has a port ought to provide weights, meaſures, and other things; and in this caſe the avowant might as well preſcribe to the confines of France as to ſeven miles diſtant from the key, and therefore it is not a good preſcription. And it is not ſaid what ſalt was in the ſhip, and there might not be more than two buſhels. And therefore judgment was given for the plaintiff. Raym. 232. Mich. 25 Car. 2. B. R. Prideaux v. Warne.

Another exception was taken to this preſcription, it being to diſtrain the ſhip in default of payment of toll, whereas the maſter of the ſhip is in no default, but the owner of the goods. Hale Ch. J. ſaid, there are 3 intereſts in a port. 1. The propriety of it. 2. The public intereſt of it for all the king's ſubjects to come thither. 3. The intereſt of the king to guard it. And it having been inſiſted, that a man may preſcribe for a thing out of his manor, as in Sir HENRY CONSTABLE's caſe for wreck, as far as he could ſee, &c. Hale ſaid, the caſe of wreck differed much from this; for that is nullius in bonis. Sed adjornatur. Freem. Rep. 355. pl. 447. Mich. 1673. S. C.

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(H) Preſcription. Againſt the Law *of the Land*.

See Cuſtoms (I).

[1. A *Sheriff* of a county cannot preſcribe *to have gifts, or to take any thing to his own uſe as ſheriff*; for he ought to take nothing for doing his office. 42 E. 3. 5.]

[2. The *mayor of London* may preſcribe *to have a* court of *Chancery* in London *of matters tried in the court of the ſheriffs of London*, though ſuch court cannot be granted by the letters patents of the king. M. 5 Ja. between ANDREW and WEBB, per Curiam.]

Noy, 147. S. C. and S. P. agreed by the Court, and ſo the mayor's court of London, called the *mark court*, becauſe the mayor may mark any cauſe in the ſheriff's court before judgment, although it be after verdict, and may examine it. Cites 10 E. 6. 14. and that in the principal caſe a procedendo was granted to the mayor's court.

[3. The *mayor and citizens of York cannot* preſcribe *to have a Chancery there*, and to award ſuch proceſs as the court of Chancery at Weſtminſter awards; becauſe it is greatly dangerous that ſuch petty corporations ſhould have ſuch courts. M. 13 Ja. B. per Curiam, præter Warburton, between MARTIN AND MARSHAL. Vide the ſame caſe, Hobart's Reports, 86.]

Roll. R. 109. S. C. —Hob. 63. S. C. and there it is ſaid that the Courts of Equity of London and the cinque ports are by reaſon of their having acts of parliament for them. ——No man can claim to hold

hold a court of Chancery by preſcription, becauſe every preſcription is againſt common right, and a Chancery court is founded upon common right, and is by the common law. Godb. 262. pl. 360. Mich. 13 Jac. B. R. the Mayor of York's caſe.

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So the cuſtom in London to ſhoot in the land of another, is good. Per Cur. Mar. 17. in Bond's caſe.——So for the inhabitants of a town to have a way over the land of another to their church. Ibid.

9. Preſcription to *cut graſs* in another's land *to ſtrew the church* is good. Per Cur. Mar. 17. Paſch. 15 Car. in Bond's caſe.

10. In caſe the plaintiff declared, that he was ſeiſed of an ancient meſſuage, &c. in T. and that he and all his anceſtors, whoſe heir he is, owners of the ſaid, &c. had uſed time out of mind *to ſet up hurdles in aperta platea* of T. *near the ſaid meſſuage every market day, to make penns for ſheep*, for which he, &c. have uſed for ſuch penning to receive money, and further, that the defendant Brooke cut down his hurdles, per quod proficium ſuum inde amiſit; it was objected upon a demurrer, that this preſcription was too general, it being to ſet up hurdles in aperta platea, *not ſhewing whether on his own lands, or on the lands of another*; for though fiſhermen may preſcribe to ſet ſtakes on other men's lands adjoining to the ſea to dry their nets, that is for the commonwealth; but this is only *for a private gain*, which cannot be on the lands of another; but it was anſwered that the preſcription was good: for a market is as well for the benefit of the public as fiſhing; and afterwards judgment was given for the plaintiff. 1 Le. 108. pl. 147. Paſch. 30 Eliz. B. R. Ferrers's caſe.

In arguing for the reaſonableneſs of this preſcription were cited 8 E. 3. 37. b. where the defendant juſtified in treſpaſs for pulling down of a fold as ſervants to the lady of the manor of Haſtings, who by reaſon of her ſeigniory had a *frankfold throughout the ſaid vill, ſo that no other could fold there without her leave*; and it was held that though this extended as well to ſtrangers as to thoſe of that vill, it was good. And [D. 352. b. Trin. 18 Eliz. Anon. for a cuſtom called granage] where the lord mayor of London brought an action on the caſe, grounded on a cuſtom to have the 20*th part of that ſalt of every ſtranger who brought it to the port of London*; and though no reaſon was alleged why he ſhould have that part, yet it was adjudged for the mayor. But per Cur. the caſe in Dyer ſeems to be very hard to have the 20th part, without giving any reaſons why. But as for the foldage, it was upon the lands of the manor of Haſtings, whereof the tenants had the feedings, and that may have a reaſonable commencement. 4 Mod. 322. 323.——[The caſe of the foldage was adjourned over, and was that of Jefferey at Hay v. Ford & Gray. Vide the Year-book.]

11. The plaintiff preſcribed for *toll of goods bought within his manor*, viz. 2d. for every pack of Mancheſter wares bought in Mancheſter, except of the burgeſſes there; and the queſtion upon the pleadings was, whether a toll *independent of all markets and fairs* can be good, *without ſhewing that the ſubject hath ſome benefit*. The Court was not ſatisfied with this preſcription, becauſe there was no recompence for it; and every preſcription to charge the ſubject with a duty, muſt import ſome benefit or recompence to him who pays it, or elſe ſome reaſon muſt be ſhewed why the duty is claimed. 4 Mod. 319. 323. Mich. 6 W. & M. B. R. Warrington v. Moſely.

(L) Againſt the Law of the *Land and Common Right*.

[269]

[1. THE *tenants of a manor* may preſcribe *to have the ſole common* for their horſes *in a meadow after the graſs cut, and made into graſs cocks*, * *to tie and keep their horſes there, ſo that they do not meddle with the hay till Lammas*-day, and after Lammas-day for all † commonable beaſts levant and couchant upon their tenements at large,

* Orig. is (lier).
† Orig is (convenable).

large, without * tying or keeping till Lady-day in Lent annually, as to their tenements appertaining, *excluding the lord* of the meadow and manor from having any common or paſture there for this time, he having the ſoil of the meadow throughout the year, and the whole herbage till Lammas, or † till the cutting, if he keeps it for hay. Paſch. 12 Car. B. R. between WHEATLAND and SIR THOMAS PAINE, by Bramſtone Chief Juſtice, he only being in court upon evidence at a trial at bar, in an action upon the caſe, for eating of the common of a commoner; but he agreed that the defendant ſhould have thereof a ſpecial verdict if he would, but after he would not have a ſpecial verdict for the clearneſs of it, and upon this a general verdict was given for the plaintiff; for *here the lord is only excluded for a time;* and it is a common, inaſmuch as divers ſeveral perſons have paſture there in reſpect of their ſeveral tenements.]

* Orig. is (tier).

† Orig. is (ſhare).

[2. *But* P. 10 Ja. B. & Tr. 10 Ja. B. between KENRICK AND PARGETER per Curiam, it is not a good preſcription, that the lord from Lammas to Candlemas ought not to put in more than 3 horſes during this time, becauſe the lord cannot be ſtinted.]

The lord may be ſtinted. Yelv. 129. S. C. —Brownl. 187. S. C.

——Noy, 130. S. C. adjudged. —— 2 Brownl. 60. S. C. the pleadings.—— Cro. J. 208. S. C. [But that is only upon the point of the commoners diſtraining the cattle of the lord damage feaſant.]

[3. If a man preſcribes to have *common of paſture or eſtovers* in the ſoil of another man, and that the owner of the ſoil ſhall be excluded from having common there, this is a preſcription or cuſtom againſt the law, to *exclude the owner of the ſoil;* for it is againſt the nature of this word common; for it was implied upon the firſt grant of the common there, that the owner of the ſoil ſhould intercommon with him. Co. Litt. 122. and there cites P. 26 El. B. R. between WHITE AND SHIRLAND adjudged.]

See the notes upon pl. 6, 7.

[4. A man may preſcribe to have *ſeparalem piſchariam* in ſuch water, *and* thereby *to exclude* the *lord of the ſoil.* Co. Litt. 122.]

[5. *But* a man cannot preſcribe to have *common of piſchary or liberæ piſcariæ* in ſuch water, and to exclude the owner of the ſoil; for it is againſt the nature of a common of libera piſcaria. Co. Litt. 122. And there ſaid that it was ſo reſolved in Bank between CHIMNEY AND FISHEN. And M. 29, 30 El. between WHITE AND SHIRLAND, and between FRISTEN AND CRATCHRODE the ſame term.]

[6. A man may preſcribe to have *ſolam veſturam* of certain lands *from ſuch a day to ſuch a day, and* by this to *exclude the owner* of the ſoil from paſturing or feeding there; for by ſuch grant this is not any common, nor implies any intercommoning by the owner of the ſoil, but that the grantee ſhall have the ſole paſture. Co. Litt. 122.]

In replevin, &c. for taking his cattle in 5 acres of land, the defendant avowed as bailiff of Sir G. S. and ſaid a preſcription in him *to have herbage and paſturage in* the ſaid *five acres, when* it was *not ſown.* Plaintiff demurred; it was objected, that this preſcription was not good, it being not like a preſcription to have common, which is only a taking the profits by the mouths of cattle, but this is all one as to preſcribe to have the land itſelf; for by the demiſe of the herbage the land itſelf paſſeth. But adjudged that the preſcription was good, becauſe it *might have a good beginning by grant,* and conſequently if it might be good by grant, it may be good by preſcription. Winch. 6 Paſch. 19 Jac. Sir George Sparkes's caſe.—— Hutt. 45. S. C. by the name of Pitt v. Chick.

[7. *So* a man may preſcribe to have *ſeparalem paſturam of ſuch land,* and to exclude the owner of the ſoil. Co. Litt. 122.]

In treſpaſs by the lord of the manor, the defendant as tenant preſcribed to have *ſolam paſturam of a cloſe omni tempore anni.* The Court was divided in opinion, whether this preſcription to have ſole paſture of a

cloſe of the lord's *omni tempore anni* be good. Wild and Archer J. held it good, but Vaughan Ch. J. and Tyrrel contra. It was intended to have been adjourned into the Exchequer-chamber, but was not. Afterwards it was brought into B. R. and the preſcription adjudged good Lev. * 253. Mich. 20 Car. 2. C. B. Sir Hen. North v. Cox. ——— S. C. Vaugh. 251 to 258. the Court was divided — Vent. 383 to 398. S. P. (inter alia) argued by Sir Francis North, in the caſe of POTTER v. NORTH, in the court of Exchequer; and the report ſays, pag. 398. that afterwards another action was brought to trial in the Exchequer, and after a full evidence of about 4 or 5 hours, the plaintiff not daring to ſtand to the verdict, was nonſuited.—S. C. Lev. 268, 269. where it was argued that preſcription to have ſolam paſturam, and exclude the lord, is not good; and to that purpoſe were cited Fitzh. Preſcription, 51. Hutt. 45. Co. Litt. 122. Yelv. 129. Cro. J. 256. whence it was inferred that the tenants might preſcribe *to have part of the profits throughout the whole year, or all the profits for part of the year*; but that this here is to exclude the lord of all the profits, and is like a cuſtom *to have all the common, and exclude the lord.* But it was anſwered and reſolved, that this is not to exclude the lord of all the profits; for *he ſhall have the mines and the trees, and is not like to a preſcription to have all the common, and exclude the lord, which would be repugnant*; for in all caſes of common the lord is to intercommon with the tenants in the nature of common; and conſequently to exclude the lord would be repugnant to the eſſence of common; and judgment was given for the defendant. Trin. 21 Car. B. R.—Saund. 347 to 353. the pleadings and arguments of the counſel. And ſays, the Court ſeemed to incline that the preſcription was good; but that upon a trial at bar the tenants could not prove their title as alleged; whereupon the lord had a verdict.—In arguing this caſe, the counſel for the plaintiff cited a caſe in Trin. 1654. Rot. 549. in B. R. where one claimed a *fold-courſe, and excluded the owner of the ſoil by preſcription*, and adjudged good.—And that a preſcription by the copyholders to have *ſolam paſturam*, exclusive of the lord, was adjudged good; but that notwithſtanding ſuch preſcription, the ſoil is the lord's, and he hath mines, trees, buſhes, coals, ſtones, &c. and he may dig for turfs. 2 Lev. 2. Paſch. 23 Car. 2. B. R. HOPKINS v. ROBINSON, and Mod. 74 Mich. 22 Car. 2. B. R. by the name of Hoſkins v. Robins.—2 Saund. 324. S. C. adjudged.—Pollexf. Rep. 13 to 23. S. C. argued by Pollexfen, and adjudged.—S. C. cited by the reporter as adjudged. Vent. 398. at the end of the caſe of Potter v. North.

† Orig. is (deſtells).

8. Attachment upon a prohibition, the *defendant preſcribed that the clerks of Oxford have privilege to have the principal* † *houſes, which were wont to be let to clerks before any other*, and eſpecially where clerks were abiding before; and after iſſue was taken, if clerks were abiding there at the commencement of the ſuit or not; and therefore in a manner confeſſed that this is a good preſcription. Quære; for *they are not incorporate, nor people which have had continuance.* And per Finch. the merchants of the ſtaple have the like cuſtom, and thoſe of the king's Marſhalſea and the king's juſtices; quære, if the inns of court are not in the like plight. Br. Preſcription, pl. 8. cites 40 E. 3. 16.

Brownl. 219. S. C. Yelv. 187. adjudged. S. C. by the name of Dewclas, &c. v. Kendal, &c.

9. Treſpaſs, &c. for taking and carrying away 30 loads of thorns, by him cut down and lying on his land at C. in a place called the Common Waſte. Defendant juſtified, that he was ſeiſed in fee of a meſſuage and three acres of land, &c. and ſo preſcribes *to cut down and take all the thorns* growing in the ſaid place, *to ſpend in the ſaid houſe, or about the ſaid lands as appurtenant thereunto.* The plaintiff replied, that R. S. was ſeiſed in fee of the manor of C. whereof the ſaid eſtate was parcel, and gave him leave to take the thorns. Adjudged that *this preſcription* by the defendant *excludes the lord*; ſo that he can neither cut or licenſe any other to cut thorns. Cro. J. 256 Mich. 8 Ja. B. R. Duglaſſe v. Kendal.

(M) What ſhall be a *good* Preſcription. *In reſpect of* the *Time*.

Fol. 268.

[1. IN an action brought by the prior of Coventry againſt ſome of the men of Earl-ſtreet in the vill of *Coventry*, for the ſelling of merchandizes in their houſes and ſhops, in the days of the market held in Prioryſhhale [or market-houſe] in the ſame vill. The defendants ſay, *quod Ranulphus quondam comes Ceſtriæ dominus de Earle-ſtreet conceſſit* hominibus ſuis de Earl-ſtreet to have the ſame liberties as Lincoln had, *and ſhews the charter* teſtifying the ſame, and *alſo* ſhews the charter *of confirmation thereof made by H.* 2. And ſay, that idem comes habuit mercatum ibidem, &c. & hæredes [271] ſui, until one of the heirs leaſed it to farm to the prior of Coventry, unde ipſi defendentes dicunt, *quod ipſi & anteceſſores ſui ac eorum feoffatores & eorum anteceſſores tenebantur tenere, quæ ipſi nunc tenent in Earle-ſtreet, a tempore quo non extat memoria ac etiam a tempore prædicti comitis & anteceſſorum ſuorum ſemper hucuſque in domibus & ſeldis ſuis in ipſo loco conſtructis omnimoda mercimonia vendiderunt, &c.* But the defendants were demanded by the juſtices, *ſi ipſi porrexerint prædictas chartas pro titulo aut pro evidentia facti ſui prædicti & ſi ſe tenere velint ad chartas illas pro titulo an ad conſuetudinem prædictam. Qui dicunt quod protulerunt chartas illas ad evidentiam;* and upon this iſſue was taken upon the preſcription. 2 E. 2.]

[2. In writ of *annuity by a prior*, if he counts upon a preſcription, it is good for the defendant to *ſay, that the priory was founded ſince the time of king Richard.* 24 H. 6. 37.]

[3. In an *annuity by preſcription* the *defendant pleaded*, that it was *granted upon a compoſition, and ſo he ought to count upon the compoſition.* But there it is ſaid by Newton, that if he ſhall count upon this compoſition, then it ſhall come in iſſue whether it was made before time of memory, [and] then it cannot be tried; but *if the title had commenced with the poſſeſſion ſince time of memory*, this may be known by the jurors; and if they cannot find it, then the preſcription is good. 19 H. 6. 75.]

[4. A man *ſhall not have any advantage by allegation of a foundation, or other matter in fact, to be done before time of memory; becauſe this cannot be tried.* 1 E. 4. 6. b.]

[5. *So* a man ſhall not have any advantage by allegation *of a deed or ſpecialty* made before time of memory, becauſe this cannot be tried. 1 E. 4. 6. b. 14 H. 7. 1. of a *deed of a rent-charge whereof he had not ſeiſin within time of memory.*]

[6. *So* a man ſhall not have any advantage *of a record* before time of memory, becauſe it cannot be tried. *As* he ſhall *not have execution of a fine.* 1 E. 4. 6. b. and yet Bingham there ſaid, that he never ſaw any record of the king before the time of H. 3. of this opinion; for there was held a *diverſity between a record and deeds, and matters in fact.* 19 H. 6. 75. b.]

But Bingham ſaid, that now they are *held all one* as to this intent, viz. that he ſhall not have advantage either in one caſe or the other. Ibid.

[7. If the *king before time of memory had made a grant*, this is not of any effect as a *patent* after time of memory, unleſs it had been *allowed in eier* within time of memory. 19 H. 6. 75. b. 9 H. 7. 11. b. per Curiam, of conuſance of pleas. 2 E. 4. 23. accordingly. Co. 9. Ab. Stra. Mar. 27. b. Contra, 12 H. 4. 22. b.]

Br. Franchiſe, pl. 10. S. C. Per Vaviſor.

[8. If a *vill be incorporated* by letters patents before time of memory, and thoſe *franchiſes never* [*were*] *uſed ſince time of memory*, they have loſt their franchiſes. 14 H. 7. 1.]

Fol. 269.

[9. *Such things as do not lie in point of preſcription, but ought to be created and ſupported by charter, and the charters thereof were made before time of memory*, they are not pleadable nor of any avail, if they have not been *allowed* within time of memory. Co. 9. Ab. Stra. Marc. 27. b. 1 H. 7. 23. b.]

In *annuity* the parties were at iſſue upon preſcription of the annuity, and the *plaintiff gave in evidence a deed bearing date after the time of king R.* 1. and the *defendant would have demurred* in law upon it, and the *plaintiff would not, but ſaid, that he uſed it for confirmation, and not as an original grant*; and admitted there, that where the preſcription is in iſſue, it *ſuffices for the jury to inquire of the time of their own memory, where no ſpecial evidence is to the contrary.* Br. Preſcription, pl. 6. cites † 36 H. 6. 36.—*But where ſpecial evidence is to the contrary*, as above, there they *ought to inquire of the time of king R.* 1. Ibid.——*And* per Priſot there it is a good *plea, that the church* ‡ *of which the prior preſcribes was founded after the time of king R.* 1. *or after time of memory.* Ibid.——*So*, that it was founded *in the time of king John.* Ibid.——*But* Brook ſays, it ſeems that in thoſe caſes he *ought to traverſe the preſcription*; for *otherwiſe it is only argument.* Ibid.——*So* it ſeems *at this day by the ſtatute of limitations* 32 *H.* 8. to ſay, *that* the church *was founded within the* 60 *years*, or the like. Ibid ——[† It ſhould be 34 H. 6. 36.] —— ‡ Br. is (de que ie por pl. fait.) but the Year-book is as tranſlated.

[10. It is clear enough, that *there was a certain time which was called the time of memory* in preſcription. 19 H. 6. 75. Per Newton. 1 E. 4. 6. b. 9 H. 7. 11. 14 H. 7. 1.]

[11. The ſaid time of memory in a preſcription *was from the time of king R.* 1. 20 H. 6. 3. D. 3 Mar. 119. 5. 13 H. 4. 9. b. The time of king John [is] within memory. Lit. ſ. 170. 34 H. 6. 36. b. 37.]

[12. The ſaid time of memory *was from the commencement of the reign of king R.* 1. for all the time of king Richard 1. was * within the time of memory. 20 H. 6. 3. per Newton. 13 H. 4. 9. b. Where the ſeiſin of king R. 1. was allowed for good title, and ſo a warrant in his time.]

[13. It ſeems that by the words *(a tempore cujus contrarii memoria hominum non exiſtit)* properly and generally *is intended*, and all times before this and before the ſtatute of limitation was intended; *whereof no proof could be made to the contrary, either by teſtimony or evidence, in any time before, without any limitation of time.* 34 H. 6. 36. b. 37. it ſeems will prove it.]

* [272]

[14. *But* when by the ſtatute of limitations the *ſeiſin in a writ of right was limited to the time of R.* 1. ſo that none could count of a more ancient ſeiſin; and this writ being the moſt high writ was taken within the equity of the ſtatute; alſo, that though a man might prove to the contrary of a thing whereof the preſcription was made, yet this ſhould not deſtroy the preſcription if the *proof was of a thing before the ſaid time of limitation*; for it was reaſon that the inquiry in a preſcription ſhould be limited as well as in a writ of right, being more baſe than that; for it would be hard to put juries to inquire of things ſo ancient. And therefore it is ſaid in 13 H. 4. 9. b. that the limitation in writ of right is too long time

time for a preſcription; and yet this limitation is not changed, nor can be without ſtatute.]

[15. Rot. Parl. 43 E. 3. N. 16. *Pray the commons*, becauſe all the time of R. 1. is held for time of memory, from which time no man may have true cognizance, that it pleaſe *to limit in certain the time of memory*, ſo that it doth not paſs the coronation of king Edward grandfather of our lord the king, who now is; and like petition was for divers opinions and miſchiefs which happened 46 E. 3. N. 28. but no aſſent to them. But the anſwer to the firſt petition is, let the law ſtand as it has done heretofore till it be otherwiſe ordained.]

[16. It ſeems that as the time of memory in a preſcription was limited to the time of R. 1.* a ſeiſin in a writ of right within the equity of the ſtatute of W. 1. ſo that by the ſame reaſon, the time of memory at this day *ſhall be limited to* 60 *years*, as a writ of right within the equity of the ſtatute of 32 *H.* 8. *cap.* 2. for this is within the ſame miſchief mentioned in the preamble of the ſtatute. But I well know, that the *practice is e contra.*]

* Orig. is (ſelonque ceo).

[17. A *vicar endowed de minutis decimis anno Domini* 1310, *ſues the parſon* appropriate for them; the parſon cannot preſcribe againſt this endowment, though it was 300 *years paſt*; for the preſcription ought to commence ſince the endowment, which was ſince the time of limitation, ſcil. R. 1. P. 3 Ja. B. R. between PRINGE and CHILD. Adjudged.]

Noy, 3. S. C. adjudged.—Adjudged in a prohibition in B. R. that a parſon cannot preſcribe againſt the compoſition of the vicar for things allowed the vicar by the compoſition. And it was likewiſe decreed in Chancery, that the preſcription was not lawful againſt the compoſition; and an injunction was awarded for the vicar to ſtay the ſuit of the parſon limited to the vicar upon the compoſition. Mo. 761. pl. 1055. & 780. pl. 1081. S. C.—S. C. cited Watſ. Comp. Inc. 8vo. 730, 731. cap. 39.

18. Common law admits of no preſcriptions but what are *time out of mind*, &c. though the ſpiritual court allows of preſcriptions ſometimes of 20, and ſometimes of 40 years. Per Hale. Vent. 274. Mich. 27 Car. 2. B. R. Anon.—And ſo of 10 years. 3 Bulſt. 242. per Doderidge. Mich. 14 Jac. in the caſe of Harding v. Goſeling. [273]

† (Q) *How* it may be *made*. [Affirmatively or Negatively]. Fol. 270.

See Prohibition (H) pl. 8.

[1. ‡ PRESCRIPTION *in the affirmative* is good. 11 E. 4. 2. 18 E. 4. 3. b.]

† N. B. There is no letters of (N) (O) (P) in Roll.——‡ It ought to be in the affirmative and not in the negative. Br. Preſcription, pl. 71. cites 8 E. 4, 5.

[2. A preſcription *in the negative merely* is not good. 11 E. 4. 2. b. 18 E. 4. 3. b. 8 H. 6. 4.]

Br. Preſcription, pl. 17. cites 7 H. 6. 32. and 8 H. 6. 3.

[3. A preſcription *in the affirmative mixed with the negative, where*

Br. Preſcription,

Pl. 17. cites 7 H. 6. 32. and 8 H. 6. 3. —— As to be impleaded by writ and not by bill, or to pay but a penny for toll and no more. Br. Preſcription, pl. 72. cites 11 E. 4. 2. Per Littleton, Cateſby, and Brian.

where the affirmative is of effect and material, is good. 11 E. 4. 2. b.]

[4. It is a good preſcription, *that he and his anceſtors, and all thoſe whoſe eſtate he has* in ſuch a manor, *have uſed time, &c. to buy in ſuch a market or fair, &c. and not to pay any toll;* for this is negative mixed with the affirmative, which affirmative proves it to be put in ure. 8 H. 6. 4.]

Br. Preſcription, pl. 17. cites S. C.—S. P. But it ſhall be in the affirmative, as to ſay, *that he and his anceſtors have been quit of* toll time out of mind. Br. Preſcription, pl. 76. cites 18 E. 4. 3.

[5. It is not a good preſcription, *that he has not paid toll time, &c.* for this is merely in the negative. 8 H. 6. 4.]

By which he *ſaid, that he is lord of the manor of A. and he and his anceſtors, and thoſe whoſe eſtate,*

6. In aſſiſe *the defendant pleaded hors de ſon fee* (for it was *of rent*), and the *plaintiff ſaid, that he and his anceſtor, and thoſe whoſe eſtate,* &c. *have been ſeiſed of the rent time out of mind,* and held *no plea without deed of the conveyance of the que eſtate.* Br. Preſcription, pl. 51. cites 31 Aſſ. 23.

&c. were ſeiſed of the ſame rent as parcel of the ſame manor time out of mind. Ibid.

Br. Action ſur le Caſe, pl. 57. cites S. C.

7. The plaintiff preſcribed, that he and his predeceſſors have had a *mill in D. and no others had a mill there.* Per Priſot; this preſcription is *in the negative,* and therefore not good. But per Paſton, preſcription *in the affirmative, and alſo in the negative,* is good. To which no anſwer was given. Br. Preſcription, pl. 24. cites 22 H. 6. 14.

Brooke ſays, *and ſo ſee,* that the *leſſee for years preſcribes in his leſſor, and thoſe whoſe eſtate he has in the mill,* and *juſtifies in himſelf,* and does *not* preſcribe *that the owners and their leſſees may cleanſe the gutter,* and yet no challenge taken to it.—Ibid.

8. *Treſpaſs* upon the caſe *for ſtopping of a ſewer,* by which 12 acres of land of the plaintiff are ſurrounded in A. The *defendant preſcribed, that N. W. his leſſor, and all thoſe whoſe eſtate he has in a mill in A. have uſed to ſtop when the mill wanted water, and to repair a bay and gutter, and N. W. leaſed to him for years yet continuing,* &c. by which he ſtopped and repaired the ſewer, &c. and *the other ſaid, that de ſon tort demeſne, and traverſed the preſcription to ſtop.* Br. Preſcription, pl. 44. cites 39 H. 6. 32.

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9. *In the cinque ports* they preſcribe, that *writ of the king does not run there,* and well, and yet it is *in the negative;* the reaſon ſeems to be, becauſe it is a negative with an affirmative. Br. Preſcription, pl. 65. cites 2 E. 4. 18.

10. In treſpaſs the defendant *juſtified for damage feaſant;* the *plaintiff ſaid, that he had certain land in D. and that D. and S. adjoin, and that all the inhabitants of the vills aforeſaid have uſed to intercommon becauſe of vicinage time out of mind.* Per Choke, you ought to *allege* the preſcription *in the tenant of the franktenement;* for *tenant for term of years, nor at will,* cannot preſcribe or allege corporation by name of *inhabitants;* but per Danby and Littleton,

if the uſage be as above, this is good pleading. Brook ſays, *quære*, for the law ſeems to be with Choke. Br. Preſcription, pl. 69. cites 7 E. 4. 26.

11. Preſcription by a *que eſtate* is not reſtrained by the *ſtatute of limitation* 32 *H.* 8. 2. Br. Lect. Stat. Limit. 35. 40.

12. Where a *charge* is on the defendant *of common right*, which by law he is ſubject to, the plaintiff need not preſcribe in his declaration. 1 Salk. 22. Mich. 3 Ann. B. R. Tenant v. Golding.

(R) *Liberties.* What Liberties a Man may have *by Preſcription.*

[1. *SUCH franchiſes* and liberties, *which cannot be ſeiſed as forfeited before the cauſe of forfeiture appears of record*, cannot be claimed by preſcription; becauſe preſcription being but an uſage en pais, cannot extend to ſuch things which cannot be ſeiſed or had without matter of record. Co. Litt. 114. Co. 5. FOXLEY, 109. b.]

[2. *As* a man cannot have goods and *chattels of traitors*, * *felons*, *felons of themſelves*, *or fugitives*. Co. Litt. 114. Co. 5. FOXLEY, 109. b. Co. 9. Abb. Stra. Mar. 24. b.] Br. Preſcription, pl. 60. cites 9 H. 7. 20. pl. 64. cites 5 H. 4. 118.—9 Rep. 27. b. Abb. Stra. Marcella.—* S. P. *without ſhewing charter before time of memory, and allowance in eyre after time of memory.* Br. Preſcription, pl. 56. cites 1 H. 7. 23.—Br. Corone, pl. 128. cites S. C.—But per Knivet Ch. J. a man cannot preſcribe *in bona felonum & fugitivorum*; for this belongs to the king's crown, and *cannot paſs but by grant*. Br. Preſcription, pl. 10. cites 46 E. 3. 16.—S. P. Br. Eſtray, pl. 2. cites 44 E. 3. 19.—S. P. And this ſeems to be of the proper goods of the felon, but a man may preſcribe in *goods ſtolen and waived*; for a felon has no property. Br. Eſtray, pl. 13. cites 46 E. 3. 16.—Though a man cannot preſcribe in the ſaid franchiſe to have *bona & catalla proditorum*, felonum, &c. yet *may* they or the like *be had obliquely*, or by a mean by preſcription; for *a county palatine* may be claimed by preſcription, and by reaſon thereof to have bona & catalla proditorum, felonum, &c. Co. Litt. 114. b.

[3. *So* a man cannot have goods and chattels *of thoſe who are put in exigent* by preſcription. Co. Litt. 114.] S. P. Br. Corone, pl. 128. cites 1 H. 7. 22, 23. 25.—Goods of outlaws cannot be forfeited by preſcription, becauſe they are not forfeited until the outlawry appears of record. Co. Litt. 288. b.

[4. *So* a man cannot have *deodands* by preſcription. Co. Litt. 114.]

[5. *So* a man cannot have *conuſance of pleas* by preſcription. Co. Litt. 114.] S. P. *without ſhewing charter before time of memory, and allowance in eyre after time of memory.* Br. Preſcription, pl. 56. cites 1 H. 7. 23.—Br. Corone, pl. 128. cites S. C.—S. P. But a man may preſcribe *tenere placita*. Br. Preſcription, pl. 59. cites 9 H. 7. 11.—S. P. by Holt Ch. J. for the having conuſance of pleas excludes other juriſdictions. Comb. 282. Trin. 6 W. & M. B. R. in the caſe of Millard v. Cole.—But as to conuſance of pleas the king himſelf cannot have it but by matter of record, and therefore a common perſon cannot be in a better condition. Br. Preſcription, pl. 64. cites 5 H. 4. 118. [It ſhould be 5 E. 4. 118.]

[6. *So* a man cannot preſcribe *to make a corporation*. Co. Litt. 114. b.] [175] The citizens of London preſcribed in uſage, *that guild or fraternity may make another guild and fraternity*; and the cuſtom was condemned by award, for *none may do it but the king, or he who has the king's charter to do it by expreſs words*. Br. Cuſtoms, pl. 40. cites 49 Aſſ. 8.—Br. Preſcription, pl. 55. cites S. C.

[7. *So*

S. P. *without shewing charter of the king before time of memory, and allowance in eyre after time of memory.* Br. Prescription, pl. 56. cites 1 H. 7. 23.——Br. Corone, pl. 128. cites S. C.——Br. Sanctuary, pl. 15. cites S. C. ——S. P. Br. Sanctuary, pl. 8. cites 1 H. 7. 6.——S. P. Hawk. Pl. C. 336. f. 3.——S. P. But if he has *ancient charter and usage*, he may prescribe. Br. Prescription, pl. 65 cites 2 E. 4. 18. Per Choke. But Br. cites fol. 23. where the opinion was, that it was not good, though a grant of the king before memory was shewn and usage after; because it is against common right, and cannot have a lawful beginning.

[7. *So* a man cannot have a *sanctuary* by prescription. Co. Litt. 114. b.]

Serjeant Hawkins says, it is clearly supposed by the statute of 28 E. 3. 6. that not only the king but also other lords have the franchise of making coroners; from whence it seems reasonable to infer, that the king may lawfully claim such franchise by prescription, and that other lords may claim it by grant from the crown; but it is a privilege of so high a nature, that no subject can well intitle himself to it by prescription only. 2 Hawk. Pl. C. 44. cap. 9. s. 11.

[8. *So* he cannot prescribe *to make a coroner.* Co. Litt. 114. b.]

Serjeant Hawkins says, it is questioned by some, whether such power can be claimed by usage? Yet if the power of holding pleas, and even courts of record, which are of so high a nature, and imply a power of keeping the peace within their own precincts, may be claimed by usage, as it seems to be certain that they may; it seems strange, that the bare authority of keeping the peace in a certain district may not as well be claimed by such usage.—2 Hawk. Pl. C. 34. cap. 8. s. 10.

[9. *So* a man cannot prescribe *to make conservators of the peace.* Co. Litt. 114. b.]

10. In trespass, the *mayor of L. justified because it had been used* time out of mind, *that the mayors have been conservators of the peace, and* have used, *for affrays done in their presence, to commit the offenders to prison till they have found surety of the peace.* Brian said, you have no such power, but to commit him to ward till he has made fine; and by him and Pigot, the power of the mayor *cannot rest upon the usage.* Br. Prescription, pl. 79. cites 21 E. 4. 67.

11. A man cannot prescribe *to levy fines in his court* of lands within his manor, because fine is a record which no man shall have by prescription, and the *king upon every concord is donor*, which a man cannot be by prescription. Densh. R. of Fines, 3.

But Doderidge arguendo said, that retorna brevium could not be gained by prescription out of the crown. Mo. 670. pl. 918. Mich. 43 & 44 Eliz. B. R. in Cornwall's case.—

12. It was held by Hale Ch. B. that *return of writs* may be claimed by prescription, as *appertaining to a manor.* And so it appears in * Quo Warranto, 2. in 42 Eliz. where the law is admitted to be so, though the prescription there was not well laid to intitle the party to it; *but more especially* may it be claimed as appertaining *to an honour*, as it was held in 19 Jac. in HOWARD'S case, in the case of the HONOUR OF CLUN; for honours have more large incidents than manors have. Hard. 423. Trin. 17 Car. 2. in Scacc. Countess of Pembroke v. the Earl of Burlington.

* S. C. cited per Hale Ch. B. Vent. 405. as the EARL OF SHREWSBURY'S case; and says, you will find the pleadings in the New Entries Quo Warranto, pl. 2. Mich. 41 & 42 Eliz. B. R.

(S.) What *Things* a Man may have by Preſcription.

[1. A Man may have *treaſure trove* by preſcription. Co. [114. b.]

[2. *So* he may have *waifs and eſtrays* by preſcription. Co. Litt. 114. b. Co. 5. Foxley, 109, b.] [276] S. P. Br. Eſtray, pl. 2. cites 44 E. 3. 19.—S. P. Br. Preſcription, pl. 56. cites 1 H. 7. 23.—Br. Corone, pl. 128. cites S. C. Br. Preſcription, pl. 10. cites 46 E. 3. 16.—pl. 60. cites 9 H. 7. 20.——And a man may preſcribe in waif *and leet, without ſhewing of allowance* within time of memory, becauſe it ſtands with common right. Br. Ibid. pl. 65. cites 2 E. 4. 23.

[3. *So* he may have *wreck of the ſea* by preſcription. Co. Litt. 114. b.] Br. Preſcription, pl. 14. cites 11 H. 4. 15. S. P.—pl. 60. cites 9 H. 7. 20. S. P.—S. P. Br. Ibid. pl. 56. cites 1 H. 7. 23.—Ibid. Br. Corone, pl. 128. cites S. C.—S. P. per Thirn. but per Hank. he ought to have charter thereof, or allowance in eyre. Quære of allowance; for per Thirn. ſeveral franchiſes are enjoyed in England without allowance in eyre. Br. Preſcription, pl. 83. cites 11 H. 4. 16.

[4. *So* he may *hold pleas* by preſcription. Co. Litt. 114. b.] See (R.) pl. 5.

[5. *So* he may have a *court leet or hundred* by preſcription. Co. Litt. 114. b.] And a man may preſcribe *to diſturb a leet.* See Br. Action ſur le Caſe, pl. 75. cites 38 H. 6. 16.

[6. *So* he may have *infangthief and outfangthief* by preſcription. Co. Litt. 114. b.] Fol. 271.

Br. Preſcription, pl. 10. cites 46 E. 3. 16.

[7. *So* he may have a * *park or warren* by preſcription. Co. Litt. 114. b.] *A man may preſcribe that he and all thoſe whoſe eſtate he has in the manor of D. *have had park in the ſame manor as appendant*, &c. and good. Br. Preſcription, pl. 57. cites Itin. Not. 3 E. 3.——Br. Preſcription, pl. 188. S. P.

[8. *So* he may have *royal fiſh* by preſcription, as *whales, ſturgeon, &c.* Co. Litt. 114. b.] S. P. 7 Rep. 18. b. Trin. 34 Eliz. in the caſe of Swans, cites 39 E. 3. 39.——A man may allege a *piſchary to be appendant to houſe and land*, and may preſcribe in it alſo. Br. Preſcription, pl. 66. cites 4 E. 4. 29.

[9. *So* he may have *fairs and markets* by preſcription. Co. Litt. 114. b.]

[10. So he may have the *cuſtody of a gaol* by preſcription. Co. Litt. 114. b.]

[11. So he may have a *frankfoldage* by preſcription. Co. Litt. 114. b.] Frankfoldage *cannot be but appendant* to ſome land, and a man may preſcribe that he and his anceſtors time out of mind have had frankfoldage of the beaſts of his tenants in C. and his termor for years *need not ſhew deed*, for he does not claim but a *chattle*. Per Brian and Townſend. Br. Preſcription, pl. 105. cites 1 H. 7. 24.

In treſpaſs defendant juſtified under a preſcription, that he *lords of the manor* of H. have, and always uſed to *have free-foldage throughout the will* of H. and to have the penning of the ſheep; *ſo that the will of H. ought not to have free-foldage without conſent of the lord*; and that if any levied a fold without ſuch conſent, the lord had uſed to abate it. It was urged that this preſcription is void, being againſt common right, which gives every one foldage in his own land. Sed non allocatur; for every preſcription

tion is againſt common right. 8 Rep. 125. cites 8 E. 3. 37. a. b. Jeffery at Hay's caſe.—and cites 3 E. 3. 3. a. John de Sedgeford's caſe, S. P.—S. C. cited 2 Brownl. 287.——2 Bulſt. 195.—— The reporter obſerves upon this caſe, that though foldage of ſheep is for the maintenance of agriculture (which is ſo much favoured in law) yet by cuſtom one may be barred of it upon his own land, and he of whom the land is holden may have it. 8 Rep. 125. b.

S. P. And it was objected that this preſcription was not good, it being againſt law and common right to abridge the ſubject of the profits of his lands; but adjudged, that the preſcription was good; for it did not extend to deprive the ſubject of the whole intereſt and profits of his lands, which would not have been good, but only reſtrained him to ſet up hurdles, which is a reaſonable preſcription, and *reſtrains a particular profit only.* Le. 11. pl. 14. Mich. 25 & 26 El.z. B. R. Punſany v. Leacer.

12. In aſſiſe of *rent* the aſſiſe found that the plaintiff, and thoſe whoſe eſtate he has in the rent, were thereof ſeiſed time out of
[277] mind, and the plaintiff ſeiſed and diſſeiſed, and recovered; and ſo note rent recovered by preſcription. Br. Preſcription, pl. 46. cites 13 Aſſ. 4.

13. The defendant preſcribed in *toll-thorough*; Thorp, Juſtice, ſaid, this is to go through the highway, which every one may lawfully do, and therefore *it is a void preſcription; but* a man may preſcribe in *toll-traverſe*; for this is to paſs over my land; note the diverſity; for none denied it, and iſſue was taken that it was not a high ſtreet. Br. Preſcription, pl. 88. cites 22 Aſſ. 58.

So of the cinque ports; and per Needham, *the ſame in Cheſter and Wales.* Br. Preſcription, pl. 65. cites 2 E. 4. 18.

14. If a man be impleaded within the precinct of the monaſtery of Weſtminſter, of land in London, he may ſay, that time out of mind *lands in London have been impleaded in London in the huſtings before the mayor*, &c. per Laicon; quod Danby conceſſit. Br. Preſcription, pl. 65. cites 2 E. 4. 18.

15. Treſpaſs *of ſheep taken*, the *defendant ſaid, that the land where the treſpaſs is ſuppoſed is his franktenement*, where he has *foldage; and that he, and all thoſe whoſe eſtate he has, have uſed that if any depaſture his ſheep with the ſheep of the defendant in the day, that the defendant ſhall have them in the night for their dung, for their paſture in the day*, by which he took and folded them in the night becauſe they paſtured with his ſheep the day before, and in the morning he put them out again; and a good preſcription, per Fairfax and Tremail; for it *may have lawful commencement, and the plaintiff has quid pro quo*, ſcilicet, *the paſture for the dung.* Br. Preſcription, pl. 57. cites 5 H. 7. 9.

S. B. Br. Preſcription, pl. 106. cites 11 H. 7. 13, 14.

16. In a leet the lord may preſcribe *to have of every one, who makes an affray or bloodſhed*, 20*s. and* may preſcribe *to diſtrain for it*, and ſell the diſtreſs; for this is the court of the king, and he derives his intereſt from the king. Br. Preſcription, pl. 40. cites 21 H. 7. 40.

17. There cannot be a preſcription to have *omnia bona & catalla forisfacta* within, &c. Cro. E. 560. Paſch. 39 Eliz. B. R. in caſe of the Earl of Pembroke v. Berkley.

18. *To have paſturage for two horſes in a meadow of* 1000 *acres till the graſs is mowed* was held well enough; for being in ſo great a quantity of land cannot defoul or debruiſe the graſs ſo, but that the hay may well be made thereof. Cro. J. 27. Paſch. 2 Jac. B. R. Thornell v. Laſſels.

19. A

19. A man cannot preſcribe to have *fines pro licentia concordandi*; becauſe they are prerogatives of the crown, and an ancient flower of it. Arg. Lat. 46, 47. Trin. 2 Car. in Sir Edmond Bacon's caſe.——Cites Glanvil, 7. cap. 1. & D. 202.

20. For *matters of intereſt* it is a rule, that *nothing may be preſcribed for, that cannot at this day be raiſed by grant*; per Sir Francis North. Arg. Vent. 387. Potter v. North.

21. Preſcription *to have all the loppings of* all trees called *pollards* in ſuch a place ſeems good. Per Raymond Ch. J. Gibb. 87. Trin. 2 & 3 Geo. 2. B. R. Dickins v. Hampſtead.

(T.) *Deſtruction.* What may deſtroy it.

[1. IF a *leſſee for years of a copyhold manor leaſes a copyhold by indenture for years*, yet this ſhall not deſtroy the copyhold againſt him in reverſion; becauſe he has not the abſolute eſtate in the ſeigniory. P. 38 El. B. R. between RUSLEY AND CONESBY, per Curiam upon evidence at bar.] Cro. E. 459. (bis) S. C.

[2. *So* if *leſſee for life* of ſuch a manor grants a leaſe for years by indenture of a copyhold, this ſhall not deſtroy the copyhold as to him in reverſion for the cauſe aforeſaid. P. 38 El. B. R. between RUSLEY AND CONESBY, per Curiam upon evidence.] [278] Cro. El. 459. (bis) S. C.

[3. *So* of *tenant in tail* of ſuch manor. P. 38 El. B. R. per Curiam.]

[4. *So* if *baron ſeiſed in right of his feme of a copyhold manor* leaſes a copyhold for years by indenture, this ſhall not deſtroy the copyhold after the death of the baron as to the feme and her heirs. P. 38 El. B. R. between RUSLEY AND CONESBY, per Curiam upon evidence at bar.]

[5. If a *court by preſcription be granted and confirmed by the king by his letters patents*, this does not deſtroy the preſcription; but the ſtile of the Court may be by preſcription as before. M. 10 Ja. B. R. between GOODSON AND DUFFIELD. Adjudged.] S. C. Cro. J. 313. It was in error brought upon a judgment in a court of pie-powders, and the error aſſigned was in the ſtyle of the Court, which mentioned it to be held by cuſtom, and by charter of the king granted and confirmed, &c. which was urged to be repugnant; for that the charter determines the preſcription; ſed non allocatur; for they may uſe their charters either as confirmations or as grants, or may claim thoſe liberties by preſcription notwithſtanding ſuch charters. For, as Fleming ſaid, every corporation uſes in every king's time to take a new confirmation of their liberties, or otherwiſe they ought to plead upon a quo warranto brought for the uſing their liberties, or in eyre, allowance of them, elſe they are not juſtifiable.——Mo. 830. pl. 1116. S. C. and the Court held, that the preſcription remains, unleſs it be *altered by the charter*.—S. C. 2 Bulſt. 21. and there 24. per Williams J. If the charter be not *contrary* to the preſcription, it ſhall be good by way of confirmation. And by Crook J. as to the holding the court by preſcription and by charter, it may be good if it be only by way of confirmation. And Ibid. 25. S. P. But if the ſtyle had been with a (vel) viz. by preſcription (or) by charter, this had been clearly void. But where the charter is *in augmentation of the cuſtom by way of addition*, this is good, and may well be as a grant and confirmation, viz. a good grant to hold as before, with an addition thereunto as in the charter is expreſſed, and in this manner the charter, cuſtom, and preſcription, may well ſtand together.——S. P. agreed by the Court in a preſcription for common of turbary. Mo. 818. pl. 1107. Hill. 9 Jac. in the Star-chamber, Crew v. Vernon.

The *king by his charter cannot ouſt the common people of their right of inheritance which they have in the common law*. Br. Preſcription, pl. 82. cites 8 H. 4. 19. per Gaſcoign.—*As* where the *mayor and burgeſſes of Oxford have uſed* time out of mind *to have conuſance of aſſiſe before them, and of other pleas, and to hold plea by writ of right before them, and after the king grants to them conuſance of pleas by charter*, this is void for the cauſe aforeſaid. Ibid.—*And* it was ſaid, that becauſe they *in court of record had accepted the franchiſe by charter of conuſance of pleas*, they had *loſt the advantage to hold plea by writ of right by their*

their uſage.—S. P. that if a man has *liberties by preſcription, and after* takes thereof *grant of the king by patent*, this ſhall determine the preſcription; for writing ſhall determine contract and matters in fact. Br. Preſcription, pl. 102. cites 33 H. 8.—S. P. Br. Lect. Stat. Limit. 39.—S. P. Palm. 494.

Action againſt an abbot, where *the abbot and his predeceſſors* time out of mind have *uſed to find a chaplain in the church of J. N.* and *after by deed indented between them it was recited, where variance was between them, for the finding of the ſaid chaplain, and that becauſe the abbot had uſed as above*, &c. *the abbot and covent granted that they would find a prieſt*, &c. and for not doing it the action was brought, and made title in the count upon the preſcription; per Frowick Ch. J. and Fiſher, and Vaviſor J.'s the preſcription remains, becauſe the deed is *in affirmation of the preſcription, and of the ſame thing*, and not contrariant, and the deed recites the preſcription, ſo that it appears that *the intent of the deed is to perform the preſcription, and not to take away* the preſcription. Br. Preſcription, pl. 35. cites 21 H. 7. 5.—*Contra if* the grant had been *contrary to the preſcription.* Ibid.—*As* where the *preſcription* had been [for] *one day, and the grant had been* [for] 2 *days in a week.* Ibid.—*But* per Frowick, if the *preſcription* had been the *Wedneſday, and the grant* had been the *Friday*, the grantee ſhould have both. Ibid.—Br. Eſtoppel, pl. 210. cites S. C.—Br. Grants, pl. 56. cites S. C.—Fin. Law, 8vo. 59. cites S. C.—Palm. 494. cites S. C.—*Compoſition by deed* does not determine preſcription, if it *agrees with* the preſcription; and yet if A. has loſt common, &c. and takes *grant by patent* of it of the king, or of any other *by deed*, this determines the preſcription by Eſtoppel D. 153. b. Marg. pl. 13. cites Paſch. 38 Eliz. C. B. Sheldon v. Hodges.—And Br. N. C. pl. 206. 21 H. 7. 5.

D. 114. Marg. pl. 61. cites 28 Aſſ. pl. 4.

[6. A title gained by preſcription cannot be deſtroyed *by interruption of the poſſeſſion for* 10 *or* 20 *years.* Co. Litt. 114. b.]

[7. *But unity of poſſeſſion of as high and perdurable eſtate of the thing claimed, and of the land out of which* it is claimed by preſcription, will deſtroy the preſcription; becauſe it is in the right. Co. Litt. 114.]

[279] [8. In *writ of meſne*, if upon iſſue joined upon the acquittal, time out of mind, &c. *the jury find that the grandfather of the plaintiff was infeoffed by one Agnes, and that Agnes and her anceſtors were acquitted by the anceſtors of the defendant, time out of mind, but no acquittal had been after this*, yet the plaintiff ſhall have judgment upon this verdict, becauſe the title of acquittal being once veſted by preſcription, cannot be taken away by a *tortious ceſſor of late time.* 15 E. 3. Judgment, 133. 14 E. 3. ibidem, 155. Co. Litt. 114. b.]

[9. If a man, and all thoſe whoſe eſtate, &c. have paid a *modus decimandi* in lieu of certain tithes, *and after by* 20 *years laſt paſt he pays thoſe tithes in kind*; yet this does not deſtroy the preſcription; for it is not any waiver of the preſcription; and notwithſtanding the payment of tithes in kind for this time, yet the preſcription continues in right. Mich. 43, 44 El. B. R. between Nowell, plaintiff, and Hicks, vicar of Edmonton, adjudged in prohibition, Co. Litt. 114. b.]

And when a preſcription or cuſtom * Fol. 272. makes a title of inheritance, the party cannot alter or *waive* the ſame *in pais.*

[10. If a man has had a *common by preſcription, and takes a leaſe of the land, in which* it is to be taken, *for twenty years*, by which the common * is ſuſpended, yet after the years ended he may claim the common generally by preſcription; becauſe the ſuſpenſion was only to the poſſeſſion, and not to the right, and the inheritance of the common always continued. Co. Litt. 114. b.]

Co. Litt. ſ. 178. pag. 114. b.

(U) In what Cases.

1. A Man shall never prescribe for what the law gives him of common right; for usage is *only where there is a defect of common right*. Cro. E. 792. Mich. 42 & 43 Eliz. C. B. Pill v. Towers. Noy, 20. S. C.

2. A vill cannot prescribe *that part* of the vill, *or such a house in the vill is* deviseable, or *gavelkind, where the rest is guildable*. Br. Prescription, pl. 53. cites 40 Ass. 27. Br. Customs, pl. 27. cites S. C.

3. A parson prescribed, that he and his predecessors have been seised of the *tithes in such a place*, time out of mind; and admitted for a good prescription, quod nota; and this where the place was *not in his parish*; for where it is in his parish he need not prescribe. Br. Prescription, pl. 85. cites 14 H. 4. 17.

4. A man may prescribe *in rent-charge, and to distrain for it when it is arrear*, which appears in the case of assize of the Abbot of Stratford v. the Parson of Layton, for certain thread of cotton, wax, oil, incense, &c. to make taper, and the lamp in the church of L. and there per Danby and Prisot it shall be *intended rent service*. Brooke says, *quære* inde, *where no tenure is alleged*. Br. Prescription, pl. 84. cites 35 H. 6. 6, 7.

5. Where a man *justifies, or intitles himself to common appendant, or* to *a common way*, he need not to prescribe time out of mind; for these words common way and appendant *imply prescription* time out of mind. Br. Prescription, pl. 39. cites 21 H. 7. 53. Per Coningsby and Brudnell justices.

6. Nothing can be prescribed for, that cannot at this day be raised by grant; for the law allows prescriptions only *in supply of the loss of a grant*. Ancient grants happen to be lost many times, and it would be hard that no title could be made to things that are in grant, but by shewing of a grant. Therefore upon usage *temps dont, &c.* the law * *presumes* a grant, and a lawful beginning, and allows such usage for a † good title; but still it is but in supply of the loss of a grant; and therefore for such things as can have no lawful beginning, nor be created at this day by any manner of grant, or reservation, or deed that can be supposed, no prescription is good. Arg. Vent. 387. cites 11 H. 7. 13, 14. 13 H. 7. 16. per Keble 21 H. 7. 40. * S. P. Arg. 4 Rep. 86. Pasch. 43 Eliz. in Luttrel's case. —S. P. Skin. 239. Mich. 1 Jac. 2. B. R. per Herbert Ch. J. in the case of James v. Trollop. † [280]

7. Where the *common law will serve* a man, he shall not prescribe, as to remove a nusance. Br. Lect. Stat. Limit. 43, 44. S. P. Br. Prescription, pl. 71. cites 8 E. 4. 5. and that prescription cannot be to distrain for a rent-service. ——So a man cannot prescribe for *heriot custom*; because it is for his *own goods*. Br. Lect. Stat. Limit. 45.

8. A man shall never prescribe *to have a court baron within his manor*; because it is of *common right*, and cannot be by prescription; for it is incident to a manor. Cro. E. 792. Mich. 42 & 43 Eliz. C. B. Pill v. Towers. But he may by prescription *enlarge its authority*, as to hold plea above 40 s. and the like. Ibid. ——And though the prescription was laid *to hold it before the steward* of the manor, which is against common right, yet it is not good. Ibid.

(W) Failer of Preſcription.

1. A writ of meſne was brought by the tenant againſt his lord upon an *acquittal by preſcription;* iſſue was joined upon the preſcription, and the *jury found, that the defendant and his anceſtors*, and they whoſe eſtate the defendant has, *have acquitted the anceſtors of the plaintiff*, and thoſe whoſe eſtate he has, from time whereof memory, &c. *but not in the time of the plaintiff, nor of his grandfather;* the plaintiff recovered by this verdict; for the effect of the preſcription is found. This judgment was affirmed in error. Qui hæret in litera, hæret in cortice. Jenk. 12. pl. 21. cites 14 E. 3. Fitzh. Judgment, 155.

2. Upon a preſcription for a modus decimandi, way, or common, if the verdict *finds no modus, way, or common for twenty or forty years; but that before that*, from time beyond memory, *there was ſuch* modus, way, or common; this verdict finds for the preſcription. Jenk. 12. pl. 21.

So where a man preſcribes to have common in groſs, if he proves that he has common appurtenant, it does not maintain the iſſue; for it is not the ſame common. 10 E. 4. 17.

3. A. has *common for* 100 *ſheep*, as appurtenant to a houſe and 200 acres of land, and he purchaſes other land, and has common as appurtenant to that land *for* 100 *ſheep more;* theſe are two *diſtinct* commons, and in intitling himſelf, if he pleads preſcription intirely for a common appurtenant to both houſes and lands together for 200 ſheep, he has failed of his preſcription; for he *muſt make two ſeveral titles*, and preſcription for 200 *ſheep*, and not join both in one. D. 164. pl. 59. 4 & 5 Mar. Baſket v. Lord Mordaunt.

Cro. E. 563. Paſch. 39 Eliz. C. B. in caſe of Lovelace v. Reynolds. ——— Cites

S. C. cited by Popham, Cro. E. 405. in caſe of GRAY v. FLETCHER,

4. One preſcribed *to have pot-water* out of ſuch a river, &c. and the jury *found*, that *he ought to have it, paying* 6 *d.* every year. It was adjudged, that he had failed in his preſcription; cited by Popham Ch. J. 5 Rep. 78. in Grey's caſe, as a Devonſhire caſe.

where Popham ſaid he was of counſel in the cauſe. ——— S. C. cited by Popham, Win. 22. in caſe of Empſon v. Bathurſt. ——— *So* in treſpaſs quare clauſum fregit, the defendant preſcribes to have *common* in the place, &c. and it was *found* that the defendant had uſed to have the *common, paying a penny yearly* to the plaintiff; and if that iſſue is found for or againſt the defendant, was the queſtion; and adjudged againſt the defendant. The preſcription is intire, and the payment of the penny is parcel of that, and ſhall be intended as ancient as the common is. Noy, 59. Lovelace v. Reynolds.

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5. A. preſcribed to *grant an office alicui perſonæ*, or *cuicunque* perſonæ idoneæ voluerit; this preſcription will not warrant a grant to two perſons. Per Dyer. 3 Le. 33. Mich. 15 El. in C. B.

Mo. 359. pl. 490. adjudged. S. C. by name of Dorley v. Wood.

6. In treſpaſs the defendant juſtified as in his freehold; the plaintiff made title that the locus in quo, &c. was parcel of the manor of D. and *demiſable* time out of mind, &c. *by copy* either *in fee, tail, or for lives*, &c. and that it was granted to the plaintiff by copy in fee. This preſcription was traverſed. It was *found*, that the

the lands had been time out of mind *granted in fee, but never in tail;* the whole Court held, that it was found for the plaintiff; for the alleging that it had been demiſable in fee, in tail, or for lives, was but the conveyance to his title; and being found that it was demiſable in fee, and that it was demiſed in fee, that is the effect and ſubſtance of his title, which is ſufficient; wherefore the plaintiff had judgment. Cro. E. 431. Mich. 37 & 38 Eliz. B. R. Doyle v. Wood.

7. Where one preſcribes to have *common* appurtenant *to his houſe and* 20 *acres* of land, and it appears upon evidence that he *has but* 18 *acres*, or a leſs parcel, yet he has not failed of his preſcription; but if he had 20 acres, and 10 *acres are freehold, and* 10 *copyhold*, he there fails of his preſcription; for he cannot make one preſcription for both. So it is if *part was copyhold* 100 *years ſince, but now is freehold.* Cro. E. 531. Mich. 38 & 39 Eliz. C. B. Gregory v. Hill.

In replevin iſſue was taken, whether J. M. and all thoſe whoſe eſtate, &c. had uſed to have *common for all* their *b aſts levant and couchant upon* a meſſuage 200 *acres of land*, 50 *of meadow, and* 50 *of paſture in* 4 *towns.* The jury *find*, that the ſaid M. was ſeiſed of the ſame houſe, land, meadow, and paſture in the ſame 4 towns, but that he had his *common, as belonging only to* the meſſuage, and 200 *acres of land*, 20 *of meadow, and* 20 *of paſture in two of the towns*, and not to the reſt; whereupon judgment was given againſt the plaintiff, as failing in his preſcription. Hob. 209. Mich. 15 Jac. Mitchell v. Mortimer.

8. If A. preſcribes for *common for* 100 *ſheep*, and the jury find that he has common for 100 *ſheep and* 6 *cows;* this is no failure of preſcription; per Cur. but per Walmſley, if the jury had found common for 120 *ſheep*, and ſo more of the ſame kind than he had alleged, he had failed. Cro. E. 722. Mich. 41 & 42 Eliz. B. R. Buſhwood v. Bond.

S. P. Show. 347. Burgeſs v. Steers. — 12 Mod. 25. Bruges v. Seer. — *So* if a man preſcribes that he has *common for ſheep only*, and the *jury find* common *for ſheep and great cattle*, the common is found for the plaintiff. Per Nichols. Brownl. 178. Trin. 12 Jac. in caſe of Johnſon v. Thorowgood. — *So* if one claims *common all the times* of the year, *when the lands lie* fallow, *and* when it is *ſown* from ſuch a day unto, &c. and his cattle are taken in the year when it is ſown, or lies fallow, it is ſufficient for the plaintiff to preſcribe for common, either in the year when it is ſown, or when it lies fallow; and if the jury find all the common, it is ſufficiently found for the plaintiff. Ibid. — *So* if a man hath common *from ſuch a day to ſuch a day*, and the cattle are taken at a day between the days, and he preſcribes that he hath common in the ſaid time, quo, &c. and the jury find he had common before that time the ſame day and after, the verdict is found for the plaintiff; per Nichols, quod Warburton & Winch conceſſit. Ibid. — So where a man preſcribed *for common of paſture for all his ſheep* levant and couchant, &c. it was *found by verdict that he had common for ſheep and for all other cattle*, &c. The Court held that the action being only for impounding ſheep, the plaintiff might well *abridge the preſcription, as to them only, ſince nothing elſe was in diſpute*; and the finding that he had common for other cattle, does not falſify his preſcription, but ſtands with it; and the plaintiff had judgment. Carth. 219. Paſch. 4 W. & M. B. R. Burgeſs v. Searle. — *But* if a man preſcribes for *common for all cattle, &c. at all times in the year*, when it appears by the *evidence that ſheep were excepted for ſome time of the year*; this is a failure of the preſcription; therefore the preſcription *ought to have been ſpecially pleaded with this exception.* Reſolved per Cur. Carth. 241. Paſch. 4 W. & M. The King v. Inhabitants of Hermitage. — *So* where the defendant had preſcribed for common *for all ſheep levant and couchant*, &c. and the *evidence was*, that he had common *for his own ſheep only*; it was objected that the evidence did not maintain the preſcription; and of this opinion was all the Court, becauſe as the preſcription was laid, *ſheep agiſted* or otherwiſe levant and couchant ought to have common, which is not warranted by the evidence; for that is, that he has common for his own ſheep only. Palm. 362. Earl of Devon v. Eyre.

9. Lord preſcribes *to diſtrain the beaſts of his tenant for not doing ſuit* to his court; if he diſtrains the beaſts *of his undertenant*, this is not within the preſcription. Cro. E. 792. Mich. 42 & 43 Eliz. C. B. Pill v. Towers.

Noy, 20. Peli v. Towers. S. C.

A man preſcribed to *terber equos & boves* upon ſuch a baulk, this preſcription juſtifies his uſing it with *mares or cows*; for the horſe and the ox are but inſtances; and the defendant is not tied up preciſely to that kind of beaſts in his plea; for the main matter is, that the graſs there growing has been eaten by him. Clayt. 54. pl. 94. Sir Thomas Danby's caſe.

10. In replevin for *taking one horſe, one gelding, and two cows*, &c. the defendant avowed for damage feaſant; plaintiff in bar *preſcribed* in the place where, &c. for common appurtenant *pro omnibus equis, vaccis, &c.* Defendant demurred, becauſe this preſcription did not maintain the declaration; for *nothing is ſaid as to geldings*. And of that opinion was Anderſon; but the other Juſtices contra, and that the preſcription was good; for *equus* is a general term, and *comprizes both horſes and geldings, but not mares*. And the Court ſaid, that all the juſtices of Serjeant's-inn, with whom they had conferred about it, except one, were of the ſame opinion; wherefore it was adjudged for the plaintiff. Cro. E. 798. Mich. 42 & 43 Eliz. B. R. Stapleton v. Morſe.

Suggeſtion in a prohibition was, that the plaintiff, time out of mind, *had paid a modus of 2 s. for wool and lambs*, but *proves nothing of the wool*. And it was moved for a conſultation, becauſe the ſurmiſe is of a joint preſcription and modus decimandi for wool and lambs, and no proof being made of the wool, he had failed in all. But per Cur. *there is a difference between a ſuggeſtion to have prohibition*, and a preſcription comprized in it, *and a preſcription* made *in defence, or by way of plea in any original action*; for in the laſt caſe a joint preſcription made of two things, and failure in one deſtroys all because it is *by way of title*; but otherwiſe here, becauſe this prohibition is only to give juriſdiction to the court of King's Bench. Yelv. 55. Mich. 2 Jac. B. R. the caſe of prohibition.

11. A ſurmiſe for a prohibition was, that time out of mind he had uſed *to pay 4 s. per annum in diſcharge of all tithes*, and he *proved that he uſed to pay 4 s. 6 d.* per annum; but becauſe it appeared that no tithes in kind were due to the parſon, as he ſued for, but that it is a *modus*, though not in ſuch manner as the plaintiff ſurmiſed, a conſultation could not be granted. Cro. E. 819. Paſch. 43 Eliz. B. R. Beal v. Webb.

12. In an action of *treſpaſs* againſt G. he juſtifies by reaſon of a *common appendant* by preſcription *in* 500 *acres*. And it was found by verdict, that the *anceſtor had releaſed his common in five* of theſe acres; and by the Court he had failed in preſcription. The common by that is not extinct, becauſe it is diſcharged to be common by act of parliament for failure of preſcription. Noy, 67. Rotheram v. Green.——Cites D. 164. a. 284.

13. If a man preſcribes, *that every one who has 7 lambs, or under, ſhall pay to the parſon a halfpenny for every lamb*; and it is *found accordingly; and further, that if he has more* than 7, then *the parſon ſhall have one, and ſhall pay the pariſhioner an halfpenny*; he has failed in his preſcription, per Cur. See Trial, (K. g. 2.) pl. 30. Paſch. 7 Ja. 13. Caſtell v. Dodd.

Cro. J. 665. pl. 19. S. C. by name of Holbach v. Warner.—2 Roll. Rep. 288. Holbetts v. Warner. S. C.

14. In caſe the plaintiff declared that he was ſeiſed of a cloſe called Haye next the river O. and that the defendant was poſſeſſed of another called Grove-Mead-Cloſe on the other ſide of the river, and that he and all the *poſſeſſors* of Grove-Mead-Cloſe time out of mind *have uſed to make a hedge* on the bank of the ſaid river againſt the water, *which the defendant had not done*, by reaſon whereof the cattle paſſed over into the plaintiff's land from the other ſide ad damnum, &c. After a verdict for the plaintiff, it was moved in arreſt of judgment, that the preſcription is ill, becauſe

cauſe it ought to have been either by way of cuſtom in a vill, or in a perſon who may preſcribe and aver continuance, by reaſon of his eſtate; but poſſeſſors or occupiers are no ſuch perſons; for that may be poſſeſſion for an hour or leſs, which is no ground for a preſcription; and for this reaſon the preſcription was thought to be ill by Doderidge, Haughton, and Chamberlain juſtices, but Ley Ch. J. thought, that when *damages are only demanded* by the writ, it ſuffices to ſay, that the poſſeſſor *ſolet*; but *otherwiſe, where the land itſelf is demanded*, there he ſhall ſay *debet & ſolet*; [283] alſo where the land itſelf is demanded, he ought to make the tertenant a party; but where the demand is only to enjoy one's own land, without incumbrance by reaſon of another's land, it is ſufficient to charge the occupier, and the poſſeſſor ſhall be tenant to this purpoſe. Palm. 331. Hill. 20 Jac. B. R. Holbedg v. Warner.

15. In treſpaſs for feeding his paſture ground, &c. the defendant preſcribed, that he and all thoſe whoſe eſtate he had in the manor of Haſſop, had *common for all ſheep levant and couchant* on the ſaid manor; upon the trial the *evidence was*, that this *manor was purchaſed by the plaintiff of two coparceners*, and that he bought *the fee of one moiety firſt, and at the ſame time had a leaſe of the other moiety for years*, and *afterwards purchaſed the fee of that moiety*. It was moved, that he had failed in his preſcription, becauſe the purchaſe of the manor was by parcels, and he has made one intire preſcription for the common to the whole manor, whereas he ought to have made a ſpecial preſcription, becauſe the parcels were once ſevered. And Ley Ch. J. and Doderidge J. were of this opinion; for when by act of the party the manor is once ſevered, there, though it be re-united, yet he ought to make a ſpecial preſcription to the common; otherwiſe, had it been ſevered by act of law, as partition. Palm. 362. Hill. 20 Jac. B. R. Earl of Devon v. Eyre.

And Ley Ch. J. ſaid, that there is a difference when the *ſeverance* is *by moieties or three parts*; becauſe there is not any ſeverance or partition, but a divided moiety in the whole, and the common runs throughout the manor; ſo that the common

may be intire; otherwiſe if it were *by meets and bounds*. Ibid.—And Doderidge J. held the preſcription ill, becauſe it is uncertain whether it be common appendant or appurtenant; but as to this Haughton held the preſcription good; for he held the manor intire and re-united, and the preſcription ſhall be accordingly. Ibid.

16. In treſpaſs the defendant juſtified *for common from* the *carrying away of the corn till it was reſowed with grain*. The plaintiff replies, that at the time of the treſpaſs ſuppoſed it was *ſowed with turnips*. The opinion of the Court was, that it was not ſuch grain as was intended in the preſcription. Freem. Rep. 51. pl. 63. Mich. 1672. Bruerton v. Right, in C. B.

17. Treſpaſs. The defendant juſtified by a preſcription for a *way to a certain cloſe*; the plaintiff replied, that he *brought a load of hay along that way that grew upon another cloſe*; and the defendant demurred, and adjudged againſt him; for if a man hath a private way to a cloſe, he ſhall not enlarge it to other purpoſes. Freem. Rep. 247. pl. 259. Hill. 1677. Webſter v. Bach.

So where caſe was brought for diſturbing the plaintiff in the uſe of a way, the plaintiff declared that

he was ſeiſed in fee of a cloſe called L. and of a meadow called G. and ſo preſcribed *for a way leading through* a place called *B.-Lane to* a place called *L.-Lane, and thence to his ſaid cloſe called L.* and that the defendant had ſpoiled B.-Lane, with his carts and carriages; ſo that the way was of no uſe to the plaintiff, &c. The defendant pleaded, that W. V. was ſeiſed in fee of a cloſe called B.-Cloſe, and then lays a preſcription in the ſaid W. V. for a way through B.-Lane to the ſaid cloſe, and ſo back again,

and juſtified as ſervant the going thither with his carts, &c. the plaintiff in his *replication* confeſſed that W. V. was ſeiſed, &c. and had a way from the lane to the cloſe, but that the defendant, in uſing the ſaid way, did *go beyond that cloſe to another cloſe* called Warton Langdales, *and ſo back again*; the defendant rejoined as before, without alleging any new matter; and upon demurrer to the rejoinder, the whole Court reſolved that the defendant having preſcribed to a way only to B. Cloſe, he cannot juſtify the going beyond it into the other cloſe of W. V. called W. L. Judgment was given, but not entered upon the roll. Lutw. 111. 113. Trin. 7 W. 3. Laughton v. Ward. —— *So* where A. had a *way* over B.'s ground to *Bl. Acre*, and *drove his cattle* over B.'s ground to Bl. Acre, and *thence to another cloſe lying beyond*, it was urged, that when the beaſts were at Bl. Acre, the defendant might drive them whither he would. But it was anſwered, that by this means the defendant might purchaſe 1000 acres adjoining to Bl. Acre, and ſo the plaintiff would loſe the benefit of his land, and that a *preſcription preſuppoſes a grant, and ought to be continued according to its original creation*. And to this the whole Court agreed, and judgment was given accordingly for the plaintiff. Mod. 190. Mich. 26 Car. 2. C. B. Howell v. King.

18. In *reſcous* of 300 ſheep, the defendants pleaded, that the late biſhop of N. was ſeiſed in fee of the manor of N. and that the ſaid biſhop, and his predeceſſors, time out of mind, had *liberty of faldage and a fould-courſe for* 300 *ſheep in and upon the plaintiff's cloſes* at certain times of the year, *and ſo juſtifies the putting in his ſheep*, under a leaſe from the biſhop of the ſaid faldage and fould-courſe, and *that they were depaſturing there*, &c. The plaintiff in his replication made title to himſelf of the cloſes, under a grant from the biſhop, before the leaſe made to the defendants, and traverſed the preſcription of the liberty of faldage and fould-courſe; the defendants take iſſue upon the preſcription, and had a verdict; but it was moved in arreſt of judgment, that a preſcription to have a faldage and *fould-courſe can never extend to give a right of common*; becauſe the nature of faldage is to have other men's ſheep folded on my lands; and therefore the defendant having confeſſed the treſpaſs, and not made a good juſtification, the judgment was arreſted. 2 Lutw. 1249. Trin. 3 Jac. 2. Sharpe v. Bechenowe.

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19. In an action on the caſe for diverting a *water-courſe running to the plaintiff's houſe*, if, upon the general iſſue pleaded, it had been *proved, that the water did not always run to the plaintiff's houſe, but* that it *was uſually dried up in the ſummer, or drank up by the cattle of the defendant*, (by whoſe cloſes it paſſed, and where he had uſed to dig holes to hold ſome water for his cattle,) in ſuch caſe the plaintiff would have *failed of his preſcription*. Carth. 117. Paſch. 2 W. & M. B. R. Murgatroid v. Law.

20. Treſpaſs quare clauſum fregit; the defendant pleaded, that D. P. was ſeiſed in fee of a mill and a weare, and preſcribed *to have ingreſs into the plaintiff's cloſe to repair the ſaid weare* when it was in decay, and that he as ſervant to him entered for the purpoſe aforeſaid. The plaintiff in his *replication*, confeſſed the ſeiſin, and the cuſtom to repair, &c. but *that T. S. had extended the weare beyond the uſual place*, &c. upon which they were at iſſue. See 2 Lutw. 1515. the pleadings, but neither judgment nor argument. Paſch. 12 W. 3. C. B. Morgan v. Evans.

(X) Pleading a Preſcription againſt a Preſcription.

* S. P. per Cur. Freem. Rep. 210. pl. 27. Mich.

1. ONE preſcription may be pleaded againſt another, *where the one may ſtand with the other*; as for inſtance, where a copyholder of a biſhop preſcribed, that all copyholders within the

manor had been diſcharged of tithes. *But not where one* preſcription *is againſt another, as* where *one* preſcribes *to have* * *lights* to his houſe, *and the other* preſcribes *to ſtop them* up. Per Coke Ch. J. in the caſe of HUGHES v. KEENE. Godb. 183. pl. 262. cites the firſt point as adjudged in the caſe of Wright v. Wright. 16-6. in caſe of Hickman v. Thorny.

2. If A. has a *way over B.'s land* to his franktenement by preſcription time out of mind, &c. B. cannot allege a preſcription or *cuſtom to ſtop the ſaid way;* for it is a lawful eaſement, and one cuſtom is as ancient as the other. 9 Rep. 58. b. Mich. 7 Jac. Aldred's caſe. S. P. per Cur. Freem. Rep. 210. pl. 27. in caſe of Hickman v. Thorny.

3. The plaintiff preſcribed *for a fould-courſe for* 300 *ſheep*, in 70 acres of land in B. every year, from 14 days *after the corn carried away till Lady-day*, within the lands not ſowed again; the defendant *pleaded*, that there is *a cuſtom* within the ſaid town of B. *that any one may incloſe any part of his lands lying in the common field. But* the plea in bar was adjudged not good, becauſe he *does not traverſe the preſcription in the declaration;* for a preſcription cannot be pleaded againſt a preſcription. But the preſcription alleged in the count ought to be anſwered. Cro. C. 432. Hill. 11 Car. B. R. Spooner v. Day and Maſon.

4. The defendant avows for damage-feaſant in freehold; the plaintiff replies, that he was ſeiſed of a houſe and two acres of land in B. * and that he preſcribes *for common* belonging to the ſaid *houſe, and two acres of land in the field of D.* whereof the locus in quo was parcel. The defendant *rejoins*, that there was *a cuſtom* in the ſaid fields, *that any owner of lands might incloſe any parcel of land lying together in the ſaid field*, and exclude the commoners in the ſaid field. The plaintiff demurs and objects, that this rejoinder is naught; becauſe here is a preſcription pleaded againſt a preſcription, without traverſing the firſt preſcription which is † not good, according to ‡ ALDRED's caſe, 58. 1 Cro. 432. but the Court ſeemed to incline, that it may be well enough; for a *particular preſcription may be controlled by a general cuſtom*, though it cannot by another preſcription; for where a cuſtom is, which is of a greater extent and latitude than the preſcription, there it may be good without traverſing the preſcription; for if one or two men incloſe, yet the party has his common in the reſidue, and ſo it may ſtand with preſcription. The defendant conſented to pay coſts and amend. Freem. Rep. 210. pl. 217. Mich. 1676. Sir William Hickman v. Thorny. *[285] 2 Mod. 104, 105. Trin. 28 Car. 2. S. C. ſays, that Atkins J. doubted much of this caſe, becauſe the defendant had pleaded this cuſtom to incloſe in bar of a freeholder who had no land in the common field, but preſcribed to have ſuch right there as appendant to two acres of land which he had elſe-

where, for which reaſon the defendant prayed to amend upon payment of coſts. —— Freem. Rep. 211. S. P. per Cur.—† S. P. Carth. 116. Paſch. 2 W. & M. B. R. in caſe of Murgatroid v. Law.—‡ 9 Rep.

(Y) Pleadings.

1. IT was preſented, *that J. S. by reaſon of his tenure, had uſed to repair ſuch a bridge*, and did *not ſay, that he and thoſe whoſe eſtate he has*, &c. *have uſed*, &c. and per Cur. the preſentment is good when he ſays, *that by reaſon of his tenure*, &c. he ought to repair, &c. for this *implies title of preſcription.* Suliard ſaid, it is not good to ſay that he and his anceſtors have uſed, &c. And per Fairfax, this is true; for he *cannot be charged by the act of his anceſtor* As to bridges. Br. Preſentment in Courts, pl. 18. cites S. C.

ceſior without profit to be taken by it; contra of ſuch preſcription againſt an abbot; for the houſe and the thing continues, but by reaſon of tenure as above, this implies a profit. And this by the juſtices. Br. Preſcription, pl. 78. cites 21 E. 4. 38.

As to common. See pl. 17. in notis, 18. 20. 23. 31.

2. In treſpaſs the uſe and preſcription of *common appurtenant* was put in iſſue, and yet this *is in the right*, and the *action is in the poſſeſſion*. Br. Preſcription, pl. 89. cites 22 Aſſ. 63. and 30 Aſſ. 42. and 40 E. 3. 31. and 22 H. 6. 51. and 7 E. 4. 26. accordingly; and yet 40 E. 3. 10. he was put out of this plea.—*And* ſo by Finch. *in replevin*, where the *plaintiff juſtified for common appendant*. And he ſaid, that the preſcription ſhall be traverſed *in quo jure*, which is in the right. Br. Preſcription, pl. 89. cites 22 Aſſ. 63.

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Mod. 6, 7. pl. 20. S.C. by name of the Corporation of Derby, but not ſaid to be adjudged.—2 Lev. 246. Hill. 30 & 31 Car. 2. B. R. STABLES v. MELLON. The Court held, that it might well be common in groſs, and not appurtenant to any land, and cited 9 H. 6. 36. and 1 Rep. 87. As if a man grants common to a mayor and burgeſſes for all their cattle in

3. In treſpaſs, for trampling and feeding his graſs. The defendant pleads in bar, that the borough of D. is an ancient borough, and that the defendant tempore quo & diu antea was a burgeſs of the ſaid borough; that the *mayor and burgeſſes for themſelves, and for every burgeſs* of the ſaid corporation, *had common in the place where, for all their commonable cattle*, and that he put in the ſaid cattle to uſe his common. Upon demurrer it was objected by the court, that the defendant has preſcribed *for common in groſs ſans nombre*, when there is no ſuch common; for if it ſhould, then the corporation might ſurcharge the common, there being no reſtraint to the number of their cattle; therefore he *ſhould have preſcribed for all cattle levant and couchant within the vill*; to which it was anſwered, that there is no danger of ſuch common being ſurcharged, for in ſuch caſe the lord or owner of the ſoil may diſtrain, but that this being claim of common in groſs, and not appendant or appurtenant, it had been improper to preſcribe for * cattle levant and couchant. But it was adjudged, that the plea was ill, becauſe the defendant in his preſcription did *not aver, that the cattle were levant and couchant within the vill*, and that it had been good, if thoſe words had been put in; but Kelynge Ch. J. ſaid poſitively, that there could not be any † common in groſs ſans nombre. 1 Saund. 344. Mich. 21 Car. 2. B. R. Mellor v. Spateman.

ſuch a place it is good and in groſs, and not appurtenant, and gave judgment accordingly.—2 Jo. 115. S. C. by name of STAPLES v. MELLOR, where the preſcription was laid for the beaſts of every freeman of the vill, and the Court held the preſcription good, and judgment accordingly, and cited 21 E. 4. 66.——2 Show. 43. S. C.——2 Keb. 527. pl. 26. S. C. adjornatur.——2 Keb. 550. pl. 28. S. C. and per Cur. this is a void preſcription, yet may be good by way of grant. But adjornatur.—2 Keb. 570. S. C. adjudged.——† 2 Sid. 87. Trin. 1658. Stoneſby v. Muſſenden. S. P. but being after a verdict it was held good.——S. C. cited by Twiſden. Mod. 7. in caſe of the Corporation of Derby.

Double. See pl. 7. 44. 46.

4. *Appendency and preſcription*, or matter which proves appendancy and preſcription, ſhall be double. Br. Double, pl. 115. cites 11 H. 6. 11.

Br. Preſcription, pl. 96. cites S. C.—S. P. that it is double. Br. Double, pl. 136. cites 4 H. 6. 13.—S. P. Br. Preſcription, pl. 23. cites it as ſaid elſewhere.——But Br. Double, pl. 111. cites 13 H. 8. 15. contra.

5. In writ of *meſne*, the plaintiff *counted, that land is held of the defendant by the plaintiff abbot of E. in frankalmoign, and that the defendant and his anceſtors whoſe heir*, &c. *have acquitted the plaintiff and his predeceſſors time out of*, &c. and *iſſue taken upon the preſcription*; exception was taken, that it was jeofail by reaſon of the doubleneſs, viz. the *frankalmoign*, and the *preſcription*, where each of them is a good cauſe of acquittal. And per Choke, it is not double, becauſe the iſſue is taken upon the one, viz. the preſcription, and ſo he relies upon one to avoid the doubleneſs. But per Priſot, it is not double, becauſe the *frankalmoign is not ſufficient cauſe by itſelf; for he does not ſhew the gift* in frankalmoign, *and therefore it ſhall be taken a gift given before time of memory, and then he ought to preſcribe in the manner of acquittal*, and then the preſcription is the effect, &c. and ſo ſingle, and after it was awarded good, and the plaintiff recovered the acquittal. Br. Double, pl. 83. cites 39 H. 6. 29.

But it ſeems, that gift in *frankalmoign after time of memory*, and *preſcription* ſhall be double. Br. Double, pl. 83. cites 39 H. 6. 29.

6. If a *copyholder lays a preſcription in the* biſhop of W. *lord* of the manor *for himſelf and* his *tenants* to be diſcharged of tithes, *and then preſcribes for the copyhold*; though here is a preſcription upon a preſcription, one in the copyholder to make his eſtate good, and the other in the lord to make his diſcharge good, yet it was held that a prohibition lay for the copyholder. Yelv. 2. Paſch. 44 Eliz. B. R. Croucher v. Fryar.

Cro. E. 784. S. C.

7. In treſpaſs the *defendant claimed eſtovers appendant in the place where*, &c. and preſcribed that he and all thoſe whoſe eſtate, &c. have had eſtovers in the place, &c. appendant *to ſuch a houſe* time out of mind, and admitted for good, viz. the appendancy and preſcription. Br. Preſcription, pl. 87. cites 21 E. 3. 40, 41. ——But by 11 H. 6. 11. this is * *double*, and with this agrees 4 H. 6. 13. Ibid.

As to eſtovers.

* Br. Preſcription, pl. 96. cites S. C. *But* if he ſays, *that he and* Paſton, and *thoſe whoſe eſtate*, &c. *in a houſe in C. have had eſtovers in C.* this is well; per Cott. Martin; for this is not appendancy.

8. Preſcription in the defendant, *that he and all others tenuram illam prius habentes ought and uſed to cleanſe ſuch a ditch*, and therefore the writ was abated; for *it ſhould be, that he and his predeceſſors time out of mind, whoſe eſtate the defendant has*, &c. and becauſe not, &c. therefore the writ was *abated*. Br. Preſcription, pl. 16. cites 22 H. 4. 7.

How. See pl. 5. 27.

S. P. Br. Action ſur le Caſe, pl. 47. cites 12 H. 4. 7. [But it is miſcited in both places, and ſhould be 12 H. 4. 8. pl. 13.]

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9. In *annuity* the plaintiff counted by preſcription; the *defendant ſhewed, that it commenced by compoſition*, therefore he ought to count upon the compoſition. Judgment of the count. And per Newton and Paſton, if the compoſition be *before time of memory*, it cannot be tried, and therefore the count good; and if it commenced within time of memory, the jury ſhall try it. Br. Preſcription, pl. 22. cites 19 H. 6. 75.

Littleton ſaid, that anno 18 H. 6. *in annuity by preſcription, the defendant*, ſcilicet, *a ſpiritual man, pleaded, that the predeceſſor of the defendant in the time of E. 1. granted the annuity to the predeceſſor of the plaintiff, and to his ſucceſſors, without aſſent of the chapter*, abſque hoc, *that the plaintiff and his*

his predeceſſors were ſeiſed before this time, time out of mind; for otherwiſe the lay gents will not inquire of longer time than they themſelves can remember; and therefore this *ſpecial iſſue* was taken and admitted good. Br. Preſcription, pl. 5. cites 33 H. 6. 27.

10. In aſſiſe of common appendant, the *appendancy* is ſufficient without preſcription; for this *implies a preſcription*. Br. Preſcription, pl. 23. cites 22 H. 6. 10.

11. A man ſhall not ſay *in aſſiſe of rent, that he and all thoſe whoſe eſtate he has in a meſſuage have had* 20 *ſhillings rent iſſuing out of the land of the defendant time out of mind*, if he does not *claim ſuch as appendant* to the meſſuage, or by reaſon of the meſſuage. Br. Preſcription, pl. 26. cites 22 H. 6. 42.

12. In treſpaſs upon the caſe, the plaintiff preſcribed in himſelf and his predeceſſors *to have leet in D. with all profits of it once in a year*, ſcilicet, *ſuch a day after Eaſter*; and that he ſent his ſteward to hold leet there ſuch a day, &c. and the defendant diſturbed him. The *defendant, by proteſtation that he is lord of the vill, and that the plaintiff has not any ſuch leet there, pro placito ſays, that he and his predeceſſors have had leet there time out of mind, once in a year, ſuch a day after Michaelmas; and that the plaintiff has had leet there ſuch a day after Eaſter time out of mind, and has uſed time out of mind to give notice to the bailiffs of the defendant* 15 *days before the leet, and* that he ſhall be with him, and that the defendant ſhall have the moiety of the profits; and that if he will hold the leet there in other manner, then the defendant and his predeceſſors have uſed to diſturb them, &c. and becauſe he *did not give warning by* 15 *days*, &c. therefore he diſturbed, &c. Danby J. thought the *preſcription of the diſturbance* is void, for he *has not alleged that he ever diſturbed him*; and the preſcription cannot be without uſe, and uſe cannot be without matter in fact; and he has not alleged any diſturbance done in fact; quære, for it was well debated and adjourned without judgment, but none ſpoke to the preſcription but Danby. Br. Preſcription, pl. 41. cites 38 H. 6. 1[illegible].

Replevin, &c. the defendant avowed, for that he was *ſeiſed in fee of* the *rent, and* that he and all, &c. *had uſed to diſtrain for it in the ſaid land*, &c. It was held clearly per Anderſon and Glanvile, that the avowry was not good; for he preſcribes in the diſtreſs, and not in the rent itſelf. Cro. Eliz. 673. Paſch. 41 Eliz. C. B. Stephens v. Lewis.

13. If a man preſcribes *to have rent with diſtreſs*, it is no *plea, that the rent has been paid all times by coercion of diſtreſs*, becauſe the rent *has been continued* time out of mind, and cannot be avoided by coercion, though it commenced by tort; by all the Juſtices. Br. Preſcription, pl. 75. cites 13 E. 4. 6.

And the preſcription ſhall be *that the king and his progenitors have had*, time of mind, &c. of the vill, &c. *to the uſe of him who ſhall be ſheriff for the time*. Ibid.

14. The *ſheriff of W. preſcribed in* 5 *ſhillings rent in ſuch a vill for all ſheriffs*, &c. and *it was held no preſcription; for* he is *only* as a *tenant at will, by which he preſcribed, that it has been uſed time out of mind*, as above, *and that they have uſed to diſtrain for it*. And this was held good, and ſo the iſſue ſhall be taken upon the uſage. Per Littleton. Br. Preſcription, pl. 28. cites 15 E. 4. 29.

15. If

15. If a man will allege a preſcription or cuſtom, he ought to *ſet forth, that* it was *put in ure within time of memory.* Per Godfrey, Godb. 55. Mich. 28 & 29 Eliz. in Joyce's caſe.

16. If one preſcribes *to have the dying of the clothes in ſuch a place,* [288] he ought here of neceſſity eſpecially to *aver, that he is ſufficient* for to dye them; as the cuſtom which one hath at Torceſter, to have a *common bakehouſe*, he ought to *aver, that his oven there is ſufficient to ſerve them all;* and this was Sir GEORGE FARMER'S CASE v. BROOK. Per Coke Ch. Juſt. 3 Bulſt. 61. Mich. 32 & 33 Eliz. in B. R. Ball v. Collins.

17. A *copyholder* ſhall preſcribe *by an uſitatum eſt againſt* his *lord. But againſt* a *ſtranger* he ſhall preſcribe *in name of the lord* himſelf. Per tot. Cur. Mo. 461. Hill. 39 Eliz. Anon. Cro. E. 390. Paſch. 39 El. Br. R. Pearce v. Bacon.

S. C.—In treſpaſs for *taking turf in the waſte* of the plaintiff; the defendant juſtified, for that time out of mind *uſitatum fuit, that every tenant for years of an ancient tenement* in the ſaid manor *had common of turbary* in the waſte, &c. and that he was poſſeſſed of an ancient tenement and cloſe, &c. which was leaſed to him for a certain term of years, with all commons thereunto appertaining. But adjudged, that though this common was appurtenant to the meſſuage and cloſe, yet the leſſee cannot have it by this preſcription; for an *uſage ought to be perpetual*, which cannot be in this caſe, becauſe it is interrupted by every new leaſe; beſides, leſſee for years can never have right to a common by preſcription, becauſe there is a certain commencement and determination of his eſtate; and an uſage annexed to ſuch an eſtate cannot be good. 1 Bulſt. 17. Hill. 7 Jac. B. R. Grimes v. Peacock.——2 Brownl. 222. S. C. Argued, but adjourned.

18. In treſpaſs for chaſing ſheep, &c. the defendant juſtified, for that the place where, &c. was the freehold of John Theed; the plaintiff replied, and preſcribed *for common for* 60 *ſheep levant and couchant upon his tenements;* and avers, that he put in 60 ſheep, &c. to eat the graſs and uſe the common, &c. The defendant traverſed the preſcription, which was found for the plaintiff; and it was moved in arreſt of judgment, that the plaintiff * had *not alleged that the* 60 *ſheep* which he put in the place where, &c. *were levant and couchant upon his tenements;* and if they were not, then the defendant might lawfully diſtrain them damage feaſant; ſed non allocatur; for the defendant might have taken advantage of it by a demurrer or a rejoinder; but when he rejoined and traverſed the preſcription, which is found againſt him, the *want of an averment is aided by the ſtatute of jeofails.* Saund. 226. Paſch. 21 Car. 2. B. R. Stennet v. Hogg.

* Cro. J. 44. Mich. 2 Jac. B. R. France v. Tringer. S. P. Adjudged.—G. Hiſt. of C. B. 113, 114. cites S. C. and ſays, that the giſt of the bar is the right to burthen the plaintiff's ſoil; and when the plaintiff takes iſſue on that, and controverts that right, he admits there was not any treſpaſs in the caſe, and that the defendant had ſuch a right. He likewiſe admits, that the defendant has brought himſelf within that right, becauſe it would have been nugatory to have denied that right of preſcription, which, if it had been found, the plaintiff had not brought himſelf within it; and therefore the traverſe of ſuch giſt of the bar is waved, and an admittance of ſuch collateral circumſtances.

19. In replevin, the plaintiff preſcribed, ſetting forth, *that there are divers freehold and copyhold tenements in the manor, and that he is ſeiſed of a freehold tenement, and that he and the other freeholders, and all thoſe whoſe eſtate they have, time out of mind, ſimul-cum the copyholders have had ſolam & ſeparalem paſturam* of the ſaid place, omni anno omni tempore anni; and then he *pleads a cuſtom, that the copyholders ſimul-cum the freeholders, time out of mind, have had ſolam & ſeparalem paſturam* omni anno omni tempore anni, &c. The plaintiff Saund. 350. S. C. And the Court ſeemed to incline that the plea was good.

plaintiff demurred generally; exception was taken; 1ſt, That laying the preſcription in himſelf and all the freeholders is not good; for that every one ought to preſcribe by himſelf, and not he for himſelf and all the other freeholders. 2dly, He preſcribed for himſelf and all the freeholders, ſimul-cum the copyholders, and yet he laid a cuſtom for the copyholders, ſimul-cum the freeholders, and *ſo mixed a preſcription and a cuſtom together*, which cannot be, for the one is laid in the perſon and the other in the place; but that he ought to have ſaid, that he and all thoſe whoſe eſtate he has ſimul-cum the freeholders and the copyholders time out of mind, have had, &c. But the Court over-ruled the exceptions upon a caſe of KETTLEBOROUGH v. WELLS, Trin. 1654. where
[289] ſuch pleading was adjudged good. Lev. 268, 269. Trin. 21 Car. 2. B. R. Potter v. North.

20. In *treſpaſs* for *breaking his cloſe in L. in D.* on the firſt of *April*, 21 *Car.* 2. the *defendant pleaded a preſcription for common*, and *juſtified* the putting in his cattle *on the firſt of Auguſt*, 20 *Car.* 2. *quæ eſt eadem* tranſgreſſio, &c. and upon demurrer it was objected to this plea, that the plaintiff had laid the treſpaſs to be done on the firſt of April, 21 Car. 2. and the defendant juſtified on the firſt of Auguſt, 20 Car. which varies from the time in which the treſpaſs was laid in the declaration, whereas he ought to juſtify on that very time; but it was adjudged, that the plea was good in ſubſtance, becauſe the defendant had averred, that it is eadem tranſgreſſio of which the plaintiff complained; and the plaintiff having demurred generally to it, this is but matter of form, and not ſubſtance, of which no advantage can be taken upon a general demurrer. And the defendant had judgment. 2 Saund. 4. Hill. 21 & 22 Car. 2. B. R. Mellor v. Walker.

21. Where one pleaded, that *ſeiſitus fuit of an houſe and* 20 *acres of land*, this, it was ſaid, muſt be intended of a fee-ſimple; and when he afterwards ſays, *de jure habere debuiſſet common*, thoſe words amount to a preſcription. Arg. 4 Mod. 420. in the caſe of STRODE v. BYRT, cites Paſch. 33 Car. 2. B. R. Rot. 109. Brooking v. Bond.

22. The *plaintiffs intitle themſelves to each of them a mill*, and declare that they had uſed to repair the ſaid mills, and *preſcribe, that all the inhabitants* within the manor had *uſed to grind omne frumentum that they ſpent, &c. at their mills, or at the mill of one of them.* Two exceptions were taken on the declaration by the Court; for as this preſcription is alleged, poſſibly one of the plaintiffs might have no cauſe for action; for if A. has an ancient mill where the inhabitants uſed to grind, and B. erects a new mill in the ſame town, it may be truly ſaid, that the inhabitants are to grind at the mills of A. and B. or the mill of one of them, although they were not obliged at all to grind at the mill of B. per Hale Ch. J. but to intitle them both it ought to be alleged, that all the corn not ground at the mill of A. uſed to be ground at the mill of B. and that all the corn not ground at the mill of B. uſed to be ground at the mill of A. and then both had been intitled. (2d exception.)

They

They preſcribe to grind omne frumentum ſpent in their houſes, which is not good; for it may be, they ſpent corn and never ground it all; as what they give their pigs and hens, and make frumenty with, which they ſhall not be obliged to grind; but it ſhould have been ſaid, *omnia grana molienda;* and Twiſden cited AYLIFFE AND CHARLESWORTH'S caſe; where the preſcription was adjudged bad for this point. Judgment for the defendant. Freem. Rep. 20. pl. 22. Mich. 1671. Harvey and Corydon v. Willoughby, in C. B.

23. A man *hath an acre* of freehold *in a great field, to which common doth belong*, now he cannot in his *preſcription lay it*, that he hath common in the whole field, but *in ſuch a part* of the field, as in that *towards the eaſt part or weſt part of the field*, becauſe, if otherwiſe, he ſhould then extend his preſcription to his own land, which would not be good; and becauſe he had here laid his preſcription to the whole field, he was nonſuited, &c. Clayt. 19. pl. 32. Conyers v. Jackſon.

Freem. Rep. 210. cites Sir MILES CORBET'S caſe, 7 Rep. 5. that a man had lands lying intermixed in a common field, where he preſcribed for common; and he laid his preſcription *in all the field except his own lands.* The Court agreed that caſe, and ſaid, that that judgment was affirmed for good law in the caſe between the LORD CLARE and Sir THOMAS WILLIAMSON; which was the ſame caſe.

24. In treſpaſs for breaking his cloſe, and fiſhing in his ſeveral fiſhery; the defendant, as to the cloſe, pleaded that the earl of Warwick was ſeiſed in fee of the manor of H. whereof one acre covered with water was parcel and contiguous to the ſaid cloſe, and ſo preſcribes *to have a neceſſary eaſement to catch fiſh in the ſaid water, and* for that purpoſe *to enter into the ſaid cloſe and ſpread nets*, &c. That the earl granted this manor and cloſe to king E. 6. [290] from whom it came to queen Mary, who granted it to T. Lucy in fee, with all ways, emoluments, commodities, and hereditaments, &c. and ſo derives a title to himſelf from the ſaid T. Lucy, and juſtifies the entry in his own right, &c. Upon demurrer it was objected, that this plea was ill, becauſe the defendant has preſcribed for a neceſſary eaſement, but *does not ſay that it was neceſſary for catching fiſh;* it was anſwered, that the word *eaſement* is known in law, it *is a genus* to ſeveral ſpecies of liberties, which one may have in the ſoil of another, without claiming any intereſt in the land itſelf. And per Cur. it is a known term in law; but here the thing itſelf is ſet forth, (viz.) to catch fiſh, &c. and certainly no inſtance can be given of a preſcription for ſuch a liberty, by ſuch a word or name; therefore a rule was made to ſet the preſcription right, and try the merits. 4 Mod. 362. Mich. 6 W. & M. B. R. Peers v. Lucy.

25. *De antiquo* in a count is a preſcription. Per Holt. Ch. J. Skin. 621. in the caſe of Stroud v. Birt.

26. Where one intitles himſelf to a *duty and remedy* by preſcription, he muſt *ſet out his remedy wholly*. Indeed if you preſcribe to a *duty*, you may have *debt* for it without preſcription, but you cannot *diſtrain* without it; and if you preſcribe for a duty and diſtreſs,

Allege ſeiſin.

diſtreſs, you cannot by virtue thereof *ſell*, without a preſcription for ſelling too; becauſe a preſcription may be to diſtrain without ſelling. Per Holt. 12 Mod. 329.

It is a good title *in aſſiſe of rent that the plaintiff and all ſeiſed of the manor of D. have been ſeiſed of the rent time out of mind, as parcel of the manor.* Per Hull quod Hank. conceſſit. Br. Preſcription, pl. 16. cites * 22 H. 4. 7.

27. A man, *in replevin*, preſcribed that the plaintiff and his anceſtors, and thoſe whoſe eſtate he has, have had *common* in his land where, &c. *and that the plaintiff and his anceſtors have uſed to pay* 10*s. rent per ann.* to him and his anceſtors *for the ſame common*, and ſo *avowed for* 10*s.* and good, notwithſtanding that he *did not preſcribe that he and his anceſtors, &c. have had the rent*, but that the other has paid it, and is all one, per Cur. quod nota, and this is not rent, but annuity; for he cannot have aſſiſe; becauſe he cannot have rent out of his own land, and yet a good preſcription, per Cur. But he *ought to allege ſeiſin*, per Cur. and ſo ſee preſcription *to diſtrain in his own land*. Br. Preſcription, pl. 1. cites 26 H. 8. 5.

* It ſhould be 12 H. 4. 8. pl. 13.

28. Action upon the caſe, that whereas betwixt the plaintiff's houſe and the defendant's, there was a little *piece of ground*, called a Twitchell, *upon which he, and all thoſe whoſe eſtate he hath, had uſed to ſet their ladders to repair their houſe*, and *ſays, that he poſſeſſionatus eſt* of the ſaid houſe, &c. and that the defendant erected a wall there, per quod he could not ſet his ladder; and per Curiam, the plaintiff hath not well preſcribed, for he hath laid the preſcription in himſelf, and thoſe whoſe eſtate he hath, and ſays, that he *poſſeſſionatus fuit*, which cannot be *intended but of a particular eſtate*, as a leaſe for years, and a leſſee ought not to preſcribe in his own name; Rainsford ſaid, if he had ſaid ſeiſitus, it might have been well enough. Wylde ſaid, it muſt have been *ſeiſitus in feodo*, or elſe it might have been but an eſtate for life; but if he had laid it in the *occupiers*, perhaps it might have been good, being but an *eaſement*. Freem. Rep. 357. pl. 453. Mich. 1673. Matches v. Broughton.

2 Show. 195. pl. 196. Paſch. 34 Car. 2. B. R. S. C. Stayed till moved on the other ſide. S. C. that judgment was arreſted † for not ſhewing how ſeiſed; for unleſs he was ſeiſed in fee; he could not preſcribe. And upon being moved again by Tremain, the Court held their former opinion. Skin. 36. pl. 3. Paſch. 34 Car. 2. B. R.

29. Plaintiff declared, that he was ſeiſed of a tenement, and that he and all thoſe whoſe, &c. had uſed *to fetch pot-water* from the defendant's cloſe; iſſue was taken upon the preſcription, and found for the plaintiff; but the Court held the declaration was ill, becauſe the plaintiff did *not ſet forth that he was ſeiſed in fee;* for a preſcription cannot be annexed to any thing but to an eſtate in fee; therefore this is a defect in ſubſtance, and not aided by a verdict. And the judgment was arreſted. 2 Mod. 318. Tr. 30 Car. 2. B. R. Scoble v. Skelton.

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Not ſaying time out of mind.

30. In caſe the plaintiff declared, that the office of poſt-maſter was an *ancient office, to which ſeveral fees were belonging* for carrying letters; but did *not ſay*, they had belonged *time out of mind;* and it was held well enough, for being alleged to be an ancient office,

office, and that ſuch fees did belong to it, he need not preſcribe for them. Latch. 87. Lord Stanhope v. Ecqueſter.

31. One preſcribed, that all the *occupiers* of B. *habuerunt & habere conſueverunt common* in ſuch a town in C. *ratione vicinagii*, but did *not allege time out of mind;* which the Court held to be ill, becauſe the preſcription *is the foundation for common of vicinage;* but it is *otherwiſe*, where a man claims *common appendant;* for in ſuch caſe the plea would be * double, if the defendant preſcribed to it. Latch. 161. Jenkins's caſe.

* Orig. is (doubt).

32. Treſpaſs for taking and carrying away his cheeſes, defendant juſtified for that he was *ſeiſed* in fee of Chipping Sudbury, and *of an ancient market* there held every Thurſday, and that he and all thoſe whoſe eſtates he hath, had *uſed to have a penny for every hundred of cheeſe expoſed to ſale* in the market, in the name of the *pitching penny;* and upon denial, to diſtrain, &c. and that a hundred of cheeſe being expoſed to ſale, and 1d. being demanded and not paid, he diſtrained. Upon demurrer it was objected, that the defendant had not made a ſufficient title, not having laid an uſage time out of mind, but only by que eſtate he hath, and the whole Court was of that opinion. And judgment for the plaintiff.—2 Jo. 227. Mich. 34 Car. 2. B. R. Goodwin v. Brooks.

33. Caſe, and declared, that he was ſeiſed of ſuch lands, &c. And *that he and all thoſe*, whoſe eſtate he had *ſimul-cum quibuſdam aliis tenentibus*, tenants by copy of court-roll, *de manerio in J. time out of mind, have had ſolam paſturam* in ſuch a cloſe, and the defendant had diſturbed him; and upon demurrer, it was objected to the preſcription, that (cum aliis tenentibus) is *uncertain*, both as to their kind and number; and that de manerio in J. is uncertain alſo what manor is intended, and every manor has a name, and there may be ſeveral manors in one vill; for which reaſons the Court held the declaration ill, and gave judgment for the defendant. 2 Lev. 178. Mich. 28 Car. 2. B. R. Underwood v. Saunders.

Uncertain.

34. The declaration was, that he was *ſeiſed of a meſſuage or tenement, and that he and all, &c. by himſelf or ſervants had fetched water, &c.* Exception was taken that meſſuage (*or*) tenement is uncertain, and ſo (by himſelf or ſervants) but non allocatur. Skin. 36. pl. 3. Paſch. 34 Car. 2. B. R. Scobell v. Skelton.

2 Show. 195. S. C. & S. P. as to meſſuage (or) tenement, was held well enough; becauſe every meſſuage is a tenement. And that the other exception was, becauſe it was for *him and his ſervants*, whereas his ſervants had no eſtate; but held well enough.

35. In an action for toll, a preſcription was laid *to have a quart de quolibet ſacco*, Angl', a ſack of corn, *for toll*, and moved in arreſt of judgment, becauſe a *ſack* was a *meaſure not known in law*, and therefore it ought to have been explained, or otherwiſe it is uncertain; but Dolbyn ſaid, a ſack was a meaſure very well known in that county, and was there as certain as a buſhel; and ſo he and Jones diſallowed the exception, cæteris abſentibus.—Freem. Rep. 483. pl. 662. Mich. 1680. Wincombe v. Colborne.

36. Caſe,

36. Caſe, &c. wherein the plaintiff *declared, that* the *provoſt and ſcholars of King's College* in Cambridge *were ſeiſed in fee of a meſſuage* in Granceſter in C. *and* 160 *acres of arable* land, lying *in the common fields of Granceſter* aforeſaid, and *that they, and all thoſe whoſe eſtate* they had in the ſaid tenements, have time out of mind, &c. for themſelves, their farmers, &c. *had libertatem faldagii of all ſheep* (except, &c.) going and *depaſturing on the common fields &* * *territoria of Granceſter* upon the ſaid 160 acres, and ſets forth a title under the ſaid provoſt, &c. and *that the defendant* did *put in* 200 *ſheep* into the ſaid common fields of G. *and depaſtured them* there for a certain time, *but them*, in or upon the ſaid 160 acres or any part thereof, *minime faldavit ſicut ipſe debuit, nec permiſit* ipſum *querentem habere beneficium faldagii earundem*, and ſhews how the defendant was not within the exception. The Court held the declaration inſufficient, for the uncertainty of the word *faldagium;* and if the word did imply as the plaintiff had inſiſted, it ſhould have been ſet forth, viz. that the plaintiff had ſet up a fold where the ſheep were to have been folded, he being to do the firſt act; and *ſicut debuit* is not ſufficient here for the obſcurity of the word (faldavit) ſo that it appears not to the Court what ought to have been done on the defendant's part; and to ſay, *non permiſit* the plaintiff *habere beneficium faldagii* was not good, without ſhewing how he diſturbed him, as 8 Co. in FRANCIS's CASE. But nota that was upon demurrer, but here it is *not ſaid non permiſit* the plaintiff *habere faldagium*, or *non permiſit eum faldare*, but *non habere beneficium faldagii;* ſo that it was not certain what was meant, for the ſheep might be folded, and yet he might be deprived of the benefit of the foldage; and for theſe reaſons the judgment was ſtayed by the opinion of the whole Court. 2 Vent. 138. Hill. 1 W. & M. C. B. Dickman v. Allen.

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* The Ch. J. ſaid here that the preſcription is laid to have the ſheep going infra communes campos & territoria de Granceſter, to be folded, and territoria is a word unknown in the law, ſo no certainty in the preſcription. Ibid.

In whom.

37. In treſpaſs, the *defendant juſtified* in F. *becauſe he, and all his predeceſſors, and all their tenants at will of the manor of D. have had common of turbary in the place where*, &c. time out of mind, and no preſcription; per Cur. for the *lord cannot preſcribe in himſelf and his tenants at will;* for tenants at will cannot preſcribe; *but* the lord ſhall preſcribe *in himſelf and his predeceſſors, or* his *anceſtors, or thoſe whoſe eſtate*, &c. *for them and their tenants at will;* and this is well. Note the diverſity. Br. Preſcription, pl. 3. cites 9 H. 6. 62.

Traverſe, ſee pl. 2. & 18.

38. Treſpaſs againſt *ſeveral, ſuppoſing the treſpaſs to be done in B. and the bailiff of C. demanded conuſance of the plea*, becauſe they and their predeceſſors time out of mind have had conuſance of pleas in B. by which, &c. and *the title of the preſcription traverſed.* 7 H. 6. 45. b. pl. 287.

Br. Preſcription, pl. 18. cites S. C. and ſays, [ſomewhat obſcurely] quod miror; for it ſeems that a man may *preſcribe to hold* pleas, but *not to have conuſance of pleas*, but *ſhall ſhew charter.*

39. In treſpaſs, the defendant preſcribed in *him and his anceſtors, and in thoſe whoſe eſtate he has in ſuch a houſe and land in D. to be keeper*

keeper of the wood of D. taking yearly of every commoner there 12*d.* The *defendant pleaded grant to him for a certain time expired, and traversed the prescription*, and well, though it was in trespass, and the prescription admitted in him and his ancestors, and in those whose estate, therefore it is not double, as it seems. Br. Prescription, pl. 95. cites 11 H. 6. 2.

40. In trespass, the *defendant in jure uxoris prescribed, that she and her ancestor, whose heir*, &c. *have had rent of* 20*s. per annum* time out of mind of the premises, *and that they have used to distrain for it* when it was arrear, by which he took as distress for so much arrear. The *plaintiff said, that the feme and her ancestors have not been seised* of this rent *time out of mind*; prist; and the others e contra, &c. and so see prescription *traversed in trespass*, and yet this *goes to the right*, but there are several cases of this in the Book of Entry of Pleas. Br. Prescription, pl. 20. cites 19 H. 6. 34.

41. *Presentment was, that the prior of D. ought to scour such a way in D. by reason of his land in D. and that he and his predecessors*, &c. *have used to scour it*, and it is not held double, and therefore the defendant was compelled to *traverse both* the points; quod nota. Br. Double, pl. 106. cites 21 E. 4. 73.

42. Where prescription is *alleged in a rent or common*, and the *other alleges unity of possession* of the rent or common, and the land out of which, &c. this is a good plea *without traversing the continuance of the prescription*; per Hussey. Br. Traverse per, &c. pl. 185. cites 5 H. 7. 11, 12. [293]

43. In trespass quare clausum fregit in C. the defendant pleaded, that the manor of C. is an ancient manor, and that within the said manor is a custom, that *every tenant haberet a way* over the place where, &c. Upon which the plaintiff demurred; and judgment was given for the plaintiff that the plea is ill. Sid. 237. Hill. 16 & 17 Car. 2. B. R. Cornelius v. Taylor. Ways.

44. In *assise of rent*, he who prescribes in him and his ancestors, and in those whose estate he has, ought to shew deed of the rent; for *que estate cannot be of a rent without deed*, by which the *plaintiff shewed deed of grant* of the rent to his ancestor, *but* did *not* shew *deed of commencement of the rent*, and therefore ill by the best opinion; for a man may prescribe in him and his ancestors, &c. without shewing deed, but not in a que estate of a thing which cannot be granted without deed, unless he shews deed thereof; *contra of acquittal* in him and those whose estate the lord has in the seigniory, or of *common appendant*, or estovers appendant, &c. there he may prescribe by que estate without shewing deed. Br. Prescription, pl. 29. cites 24 E. 3. 23. 39. Without shewing deed.

S. P. Br. Prescription, pl. 47. cites 22 Ass. 53. —— *But a man may prescribe in rent parcel of or appendant to a manor without shewing*

specialty. Br. Prescription, pl. 47. —— *And in rent reserved for equality of partition*. Br. Prescription, pl. 47. —— *And the reason* why rent may be prescribed for without shewing deed, where it is parcel or appendant to the manor or land, *is, because the manor or land may pass by livery without deed*, and then the rent passes with it as annexed to it. Br. Prescription, pl. 47. cites 22 Ass. 5. —— Br. Monstrans, pl. 91. cites S. C. —— But Br. Prescription, pl. 48. cites 23 Ass. 6. Contra, that in *assise of rent* the *plaintiff prescribed in him and his ancestors, and in those whose estate his ancestors had time out of mind*, and it was adjudged a good title without shewing specialty of the que estate or otherwise, and

and the ſame judgment affirmed in B. R. in writ of error. Br. Preſcription, pl. 48. cites 23 Aſſ. 6. ——Br. Monſtrans, pl. 94. cites S. C.

45. A man cannot *preſcribe in him and his predeceſſors, and in all thoſe whoſe eſtate he has in a hundred*, without ſhewing *deed of the que eſtate*; per Hill. Br. Preſcription, pl. 15. cites 11 H. 4. 15.

(Z) Equity.

1. THE conſtable of the Caſtle of Glouceſter exhibited a bill againſt a brewer, ſetting forth, *that he and all his predeceſſors*, conſtables, &c. *have uſed to have* 12*s. of every brewer within the city* of Glouceſter, and that the defendant refuſed to pay it. And Noy *demurred, becauſe no conſideration was laid* in the bill, by which it might ariſe and commence. But the bill was ruled by the Court to be good. Litt. R. 103. Trin. 4 Car. in the Exchequer. The Conſtable of the Caſtle of Glouceſter v. a Brewer.

2. The lieutenant of the Tower of London exhibited a bill as to certain *wine claimed by him of every ſhip laden with it*, and he was relieved. And it is ſufficient to maintain the preſcription, that *it might have a lawful commencement though now the cauſe and conſideration is not known*. For in many caſes the conſideration is tranſitory, as payment of ſuch a ſum, &c. Litt. R. 103.

3. It is a common caſe in Chancery, where a man has *uſed to have a rent out of ſuch a manor time out of mind, but knows not by whom* he has it, *or what rent it is*, whether rent-ſervice, rent-charge,
[294] &c. *or for what* he has it, but only that he has uſed to have it, if it be detained, to ſue there for it: per Walters. Litt. R. 103. in the caſe of the Conſtable of the Caſtle of Glouceſter v. a Brewer.

For more of Preſcription in general, ſee Chimin or Ways, Common, Cuſtom, Due Eſtate, and other proper titles.

[Preſentation.] Parſon. Patron.

Fol. 334.

(A) Vicarage. [*Who might create a Vicarage.*]

[1. THE *ordinary* cannot create a vicarage without the *aſſent of the patron.* 16 E. 3. Quare Impedit, 145. 5 E. 2. Quare Impedit, 195. per Paſt. 16 E. 3. Monſtrans de faits, 166. per Paſt.]

Watſ. Comp. Inc. 8vo. 344. cap. 17. —— A vicarage cannot be created without the aſſent of the patron; per Doderidge. Roll. R. 464. Trin. 14 Jac. in Cam. Scacc. in caſe of Colt v. Glover.

[2. The *parſon, patron, and ordinary*, may create a vicarage, *without the aſſent of the king*, though the vicar ſhall be a corporation; for this is a corporation by the common law. Contra 17 E. 3. 51. Admitted.]

[3. A *parſon appropriate and the ordinary* might *before the ſtatute of diſſolutions*, create a vicarage; for the parſon was parſon and patron. 8 R. 2. Annuity, 53. 17 E. 3. 51.]

Watſ. Comp. Inc. 8vo. 345. cap. 17. ſays, if the appropriation be duly made when the church is full, he ſuppoſes a vicarage may then be created, at leaſt if the incumbent conſent; but not ſo as to bind or leſſen the profits of the preſent incumbent; however, it is clear, that the patron and ordinary alone may create a vicarage. Cites 8 R. 2. Annuity, 53.

[4. If a *dean and chapter, or other ſuch corporation, as nuns, &c. had parſons appropriate*, they might *with the ordinary* create a vicarage, though they themſelves had not the cure of ſouls. Com. Grendon, 497.]

Watſ. Comp. Inc. 8vo. 345. cap. 17

[5. *In time of vacation* the *patron of the parſonage and the ordinary* may create a vicarage. 8 R. 2. Annuity, 53. per Belk.]

6. The patron *by lapſe*, though it be the king himſelf, is not ſufficient patron to aſſent; for the patron by lapſe *has no intereſt*, but a neceſſary function to preſent one to ſerve the cure. Per Hobart Ch. J. Mo. 903. pl. 1262. Mich. 10 Jac. in caſe of Colt v. Glover.

* [B] Vicarage. *Endowment.* [*By whom, &c.*]

* There is no letter to this in Roll, and this plea is there marked (6). Endowment

[1.] [40 E. 3. 28. AN endowment is pleaded to *be by parſon and ordinary.*]

ſhall not be of a vicarage without *the aſſent of the patron.* Per Dodderidge J. Mo. 900. Mich. 10 Jac. C. B. in caſe of Colt v. Glover. Cites 5 E. 2. Quare Impedit, 165.

* [C] † Vicar. Endowment.

* There is no letter to this in Roll.

† Vicar is he who hath that ſpiritual living called a vicarage, being no other than a certain part or portion of a parſonage, allowed to the miniſter for his maintenance, introduced at that time when impropriations firſt began, both which livings, as they are commonly called the church, ſo both ſuch as ſerve in them are called the patron's clerks. The vicar is uſually appointed and allowed to ſerve the cure, by ‖ him who hath the impropriation of the parochial tithes; for at the original of ſuch impropriations a certain portion of the parſonage was allotted and ſet apart from the reſt, to maintain the vicar who was to ſerve the cure; ſo that now the prieſt of a parochial church, where the predial tithes are impropriated, is called the vicar, h. e. vice rectoris. And it ſeems anciently they did ſometimes ſtyle themſelves perpetual vicars, becauſe every vicarage, corporation-like, hath a conſtant ſucceſſion. Godolph. Rep. 196. cap. 18. ſ. 1.——‖ S. P. Per Davenport, Arg. Palm. 113. Mich. 18 Jac. B. R. in Britton and Ward's caſe. Cites Com. 497.——Vicar is but *ke qui gerit vicem perſonæ*, to ſupply his place in his abſence. Per Popham. Arg. Le. 182. Trin. 31 Eliz. B. R. in caſe of Slug v. the Biſhop of Landaff.

Vicarages were not at common law in churches appropriated, but they commenced in 20 H. 3. by the conſtitution of pope Othobon, which provided that from thenceforward in churches appropriate, a vicar ſhould be endowed under a penalty, but at common law they were removeable, and not perpetual; and ſince this conſtitution vicars are ſpiritual in their inſtitution and indowment, and not of temporal conuſance; per Damport, Arg. 2 Roll. Rep. 98. in caſe of Britton v. Ward.—S. P. Arg. 4 Mod. 184. in caſe of Wharton v. Liſle.

At the common law no juris utrum lay for their poſſeſſions, but their poſſeſſions might be increaſed and decreaſed at the will of the ordinary. And there were no endowments of vicars till the 11th of king John. And no quare impedit lay for the advowſon of a vicarage till Weſt. 2. cap. 5. Nor any juris utrum for the poſſeſſions of a vicar, till 44 E. 3. cap. 17. Arg. Palm. 113. Mich. 18 Jac. B. R. in Britton and Ward's caſe.——But it was ſaid by Noy, Palm. 114. that vicarages were long time before king John, and that in Oxfordſhire there are 4 vicarages which were much more ancient than his time. And that in 4 *H.* 2. a vicarage was *made by Alexander the 3d.*——But Cro. J. 518. Noy ſaid, that if the beginning of vicarages be known, it was 8th H. 3.——But Moreton J. ſaid, that vicars came in in the 17th year of king John. Mod. R. 12. in caſe of Clerk v. Heath.

‡ Fol. 335.

[1. IF a vicar *had uſed by preſcription*, time whereof memory, &c. *to have all tithes* within the pariſh, (*except corn*, which the parſon appropriate uſed to have,) *viz. of hay, and alſo* of *hops, from the time that they came into England*, ſcilicet, in the time of H. 8. and of woads, (which is a dying plant,) *and now rape-ſeed is ſown within the pariſh*, there *never having been any ſuch ſeed ſown there before, nor in England till of late time*, yet the vicar ſhall have tithes of this rape-ſeed, and not the parſon appropriate, becauſe this is within the preſcription, though it be *a new thing*, for which he cannot preſcribe ſingly, inaſmuch as the parſon is excluded of all, except corn, and this is within the *general preſcription to have all tithes, except corn.* P. 7 Car. B. R. between

Reſolved per Curiam, upon evidence at bar in a caſe which concerns the parſon and vicar of the pariſh of in Kent, and that there was not any difference as to this, between ſuch endowment which was ‡ granted of the other part, and ſuch preſcription; for the preſcription preſumes an endowment precedent.]

§ Minutis decimis. Cro. El. 578. —¶ Orig. is (exceptant).—— Upon endowment of the vicar, it was appoint-

[2. If a vicar be endowed out of a parſonage *of all* § *white tithes growing* and renewing within the pariſh, *upon all the land of the pariſh*, the vicar ſhall not thereby have tithes of the *glebe* of the parſon; for he himſelf is ¶ excepted.]

[3. If a vicarage was endowed before time of memory out of a parſonage *of all the white tithes growing* and renewing within the pariſh, upon all the land of the ſaid pariſh, the vicar ſhall not now

now have tithes of the *land which at the time of the endowment was parcel of the glebe, but now ſevered* from the glebe, inaſmuch as at the time of the endowment this land was exempted out of the endowment. Trin. 38 El. B. R. between BLENCO AND MARSTON. Reſolved, and prohibition granted accordingly; and there by Cook * it is ſaid, that this was one † YOUNG's caſe, vicar of the pariſh of HOPTON in Wiltſhire, adjudged and prohibition granted.]

ed that he ſhould have the *ſmall tithes of all lands in the pariſh*, yet he ſhall not have tithes of the *glebe of the parſon* becauſe ec-

cleſia eccleſiæ decimas ſolvere non debet. Mo. 910. pl. 1281. Trin. 38 Eliz. Blinco v. Marſton (vicar). ——*But* if the *parſon leaſes the glebe*, the vicar ſhall have minutas decimas of the leſſee, and leſſor ſhall have the great tithes; but if the *endowment has ſpecial words*, that the vicar ſhall have *minutas decimas of the glebe*, then he ſhall have them; but then it ought to be ancient glebe at the time of the endowment. Mo. 910. S. C.——Cro. Eliz. 479. pl. 10. Trin. 38 Eliz. S. C. by name of Blunco v. Marton.——Cro. E. 578. Mich. 39 & 40 Eliz. B. R. S. C. Blinco v. Barkſdale.—— † Mo. 910. Cites it as the caſe of Young and the Parſon of Foxley in Wiltſhire.——Cro. E. 479. cites S. C.

* [296]

[4. If a *compoſition* be *between parſon and vicar*, that the parſon ſhall have *all tithe corn and hay, and the vicar all other tithes*, and after the pariſhioners *ſow certain arable land with ſaffron, or, &c.* the parſon ſhall not have the tithes of the ſaffron, but the vicar. Trin. 7 Ja. B. per Coke ſaid to be adjudged.]

[5. If the vicar be endowed *de minutis decimis* by preſcription, and afterwards *land which had been arable time whereof memory, is converted* from arable, and there grow minutæ decimæ, the vicar ſhall have them; for his endowment does not go to the land, but to the ſmall tithes in any place within the pariſh. P. 38 El. B. R. between BEDINGFIELD AND FREAKE.]

Cro. E. 467. (bis) S. C. —Mo. 909. pl. 1277. S. C.—— Goldſb. 149. pl. 75. S. C. ——S. C. Cited Hutt.

78. as adjudged. Paſch. 3 Jac. in B. R. and ſays that the field, planted with ſaffron, contained 40 acres. And in the principal caſe there, which was UVEDALL v. TINDALL, Hill. 1 Car. it was ſaid that all theſe new things, as ſaffron, hops, woad, &c. if it does not appear by material circumſtances to the contrary, ſhall be taken as minutæ decimæ; and accordingly judgment in that caſe was given for the defendant.—— Cro. C. 28. S. C. and there cites the principal caſe of Bedingfield and Feake, by name of THE DEAN AND CHAPTER OF NORWICH'S CASE. Paſch. 43 Eliz. adjudged.

[6. If a vicar be endowed *of a third part of all the tithes growing and coming within the manor of D.* he ſhall have the tithes of the *franktenants*, as well as of the copyholders; for all make the manor. P. 38 El. B. R. between HIGHAM AND BEST adjudged.]

A vicar was endowed by theſe words, (viz.) *habebit tertiam partem decimarum bladorum & fœni, quomodocunque pervenientem de maneriis de B.*, &c.

The queſtion was, if by this endowment the vicar ſhould have the third part of the tithes growing upon the land of the freeholders within the manor. The Court ſaid, that a manor cannot conſiſt without freeholders, and ſince they are to be charged with the payment of tithes, one and the other together ſhall be ſaid to be the tithes of the manor: and ſo it was adjudged that the vicar ſhould have tithes of the third part of the land. Ow. 58, 59. Trin. 36 Eliz. Higham v. Beaſt. —— Ow. 74. S. C. by name of HIGHAM v. DEFF; and Tanfield ſaid, that the word manor extends to the precincts of the manor, and not to the demeſnes and ſervices only.——S. C. Cro. E. 462. (bis). Paſch. 38 Eliz. B. R. HEIGHAM v. BEST. Adjudged by Popham and Fenner, the other juſtices not being in court, that the vicar ſhould have all the tithes, as well of the freeholders as of the demeſnes; for this does not create a new charge, but is diſpoſing of the ancient, which was due by the tenants, and runs through the limits of the manor; but if this had been made before the council of Lateran, it would not have charged the freeholders but the demeſnes only; and adjudged accordingly for the vicar.

[7. If a vicar was endowed *in time of H.* 3. by the parſon appropriate, among other things *de decimis garbarum*, growing within a hamlet within the pariſh, and *always after* this endowment, *the*

Cro. E. 633. S. C.—— Though vi termini *tithe*

vicar had uſed to have the tithes as well of hay as of corn, though now at this day garba ſignifies a ſheaf of corn, and as the civilians ſay *garba ſignifies* ſuch thing as is bound together by a bond, and in their books is uſed for corn and not for hay, yet becauſe it is an ancient endowment, and the uſage always after has been ſuch as is aforeſaid, the vicar ſhall have tithes of hay; for it ſhall be *preſumed* that in the time of H. 3. hay might be compriſed within the word garba, and that at this time the uſe was to bind hay in bundles; for ſuch ancient grants are not to be expounded according to the law uſed at this day, but as may be intended that it was uſual at the time of the grant. Mich. 40, 41 El. B. BARKSDALE v. SMITH AND BLINCO adjudged.]

hay is not included in the words *decimis garbarum* at this day, yet for the *continual uſage* it ſhall be taken that then they uſed this word to ſuch intent. Palm. 115. —* S. C. cited by Noy in caſe of Britton v. Ward. 2 Roll. R. 161. cites Barſdale v. Smith. —— Litt. R. 263. Anon.

* [297]

[8. If a vicar be endowed *de minutis decimis*, and he *has uſed* by force of this endowment by a long time *to have tithes of wood, which is but of the annual value of 6s. 8d.* By reaſon of the ſmall value of the wood and the uſage, the wood ſhall paſs by words of minutis decimis. Mich. 10 Ja. B. R. between REYNOLDS AND GREEN, per Curiam. Adjudged upon evidence at the bar, though wood in its nature be great tithes.]

2 Bulſt. 27. S. C. The Judges all agreed in this, that by the words alteragia & minutæ decimæ, by uſage, tithe wood may well paſs; and ſo hath the opinion of all the civilians been. But per Williams J. by the word alteragia, without uſage, it ſhall not; but if the vicar time out of mind has uſed to have the ſame, then it is good, and ſhall paſs by the words of minutæ decimæ. And per Fleming Ch. J. accordingly, the tithe wood being of ſmall value; and that by thoſe words tithe wood may paſs, though the law be againſt it. —— S. P. Het. 135. Wood v. Green. —— Litt. R. 243. S. C.

9. Though the tithes of a field have been paid to a parſon, yet it being *converted to another uſe*, whereof no great tithes do come, the vicar ſhall have the tithes. And ſo if *arable* land be converted *into an orchard*, the vicar ſhall have the tithes of the apples; and ſo if the orchard be *changed* into arable, the parſon ſhall have tithes. Per Popham, quod Fenner conceſſit. Owen, 74. Paſch. 38 Eliz. B. R. Dean and Chapter of Norwich's caſe.

10. A vicar libelled againſt the parſon for *tithes of the glebe*. The parſon brought prohibition, and adjudged maintainable. And if *ſpecial cuſtom* be after the endowment of the vicarage, this is *iſſuable*. Mo. 457. pl. 627. Trin. 38 Eliz. Blenco v. Marſon.

11. The parſon cannot *preſcribe* againſt the firſt endowment. Noy, 3. Trin. 2 Jac. B. R. Pringe v. Child.

Mo. 780. Paſch. 4 Jac. S C. And ſays an injunction was granted the vicar, to ſtay the ſuit of the parſon for the tithes limited to the vicar on the compoſition. —Mo. 761. S. C. by name of Spring's caſe.

12. A *modus between the parſon* and a pariſhioner, will not diſcharge the payment of tithes as to the vicar. 3 Bulſt. 221. Mich. 14 Jac. Wintel v. Child.

13. *As long as the vicar occupies his glebe land in his own hands, he ſhall pay no tithes*, but if he demiſe it, the *leſſee* ſhall pay tithes to the parſon that is impropriate. Brownl. 69. Harris v. Cotton.

If a vicar be endowed with certain glebe out of the parſonage, the ſame glebe ſo aſſigned ſhall be diſcharged of tithes of corn, in conſideration that the vicar is bound to ſerve the cure; but if a parſon leaſes parcel of his glebe to another for years, life, or makes feoffment in fee, the leſſees or feoffees ſhall pay the tithes, unleſs ſome conſideration diſcharges them of tithes.

Per

Per Manwood Ch. B. Shute Baron, and Gerrard Attorney-general. Sav. 3. pl. 8. Mich. 22 & 23 Eliz. in the Exchequer-chamber. Vicar of Sturton v. Grieſley.

14. Vicar *ſows the land and dies; his* executor takes away the corn, and ſets not forth the tithe; the parſon brought debt on the 2d Ed. 6. and the Court ſeemed to incline it would lie. Brownl. 69. Harris v. Cotton.

15. On a queſtion about a piece of land, parcel of the glebe, it was offered in *evidence that indowment* was of this church in *H. the IIId's time*, and in that *no land was mentioned*, but it was anſwered that always in thoſe endowments liberty was reſerved to increaſe the maintenance of the church; and it was urged farther, that no land was in the valuation of this church in time of H. 8. when the churches were valued; but it was anſwered that lands were not in thoſe valuations, and omiſſions alſo of many particulars were, and the vicarage houſe in this caſe was omitted, and yet never queſtioned but it did belong to the vicarage. Clayt. 9. 8 Car. Coyne's caſe.

16. The king cannot make a *licence of appropriation* without a matter of record, and it *ought to be with a condition to endow a vicar*, and the *endowment may be by a diſtinct inſtrument* from the appropriation, ſo that it be made at the ſame time that the appropriation was. [298] Sty. 156. Mich. 1649. per Cur. in a trial on the caſe of Cave v. Orby.

17. *Bill* for vicarage tithes in ſome towns in Kent, and the plaintiff *did not ſet forth how they became due* to him, *whether by preſcription or endowment*; and after an anſwer, and depoſitions taken, this was objected, at the hearing the cauſe; but the exception was overruled, becauſe the defendant, by his anſwer, admits him to be vicar, and that the tithes in queſtion are his due, but inſiſts only upon payment and ſatisfaction; quod nota; for it has been often ruled contrary, it being the ground and foundation of the plaintiff's title; but the bill was afterwards diſmiſſed upon the merits with 40*s.* coſts. Hard. 130. Mich. 1658. in the Exchequer. Button v. Honey.

18. The vicar of G. brought bill for tithes of the manor of Uxbury and other lands belonging to the impropriate rectory of G.—C. demanded them for 8 years laſt paſt, and ending in 1661. It appeared upon the hearing, that ſeveral vicars of G. his predeceſſors had enjoyed theſe tithes; but an endowment was now produced, dated 7 March 1362, made by archbiſhop Iſlip, and preſerved in his regiſter, by which it did *not appear that the vicar was endowed with any tithes of corn or grain, neither was* there any *liberty* therein *reſerved* (as uſual) *to augment or diminiſh*; whereupon it was inſiſted that the vicar ought not to have theſe tithes; but the Court held, that where the vicars had took tithes for a long time he ſhall not be concluded by their not being expreſſed in the endowment, and that it had been often ſo held and ruled; and that by ſuch *long poſſeſſion it ſhall be preſumed*, that the vicarage hath at ſome time or other been augmented therewith; and the not reſerving ſuch power is not material; for an augmentation may have been

notwithſtanding, with aſſent of, or citing all parties, but not without notice or citation. Hardr. 328. Trin. 15 Car. 2. in the Exchequer. Twiſſe v. Brazen-noſe College & al.

19. A vicar *may pay tithes*; as where an abbot or other had a portion of tithes out of a vicarage, which is now come to the plaintiff. Lev. 141. Mich. 16 Car. 2. B. R. Wright v. Beal.

Sid. 443. S. C. accordingly; and that hops were but of late time, notwithſtanding the records cited by Lord Coke to the contrary. But it was ſaid, that if the ſuggeſtion for the prohibition had been to pay ſo much in lieu of all ſmall tithes, prohibition ſhould go; becauſe hops, oade, and ſuch ſmall things of new invention, are minutæ decimæ, but the ſuggeſtion being not ſo, the prohibition was denied.—2 Keb. 612. S. C.

20. Vicar libelled in the ſpiritual court for tithe *hops*. It was ſuggeſted for a prohibition, that they *had paid time out of mind to the parſon ſo much an acre for all tithe hops*; but the prohibition was denied; for no ſuch compoſition could be time out of mind, hops not being known in England till Q. Elizabeth's time, when they were firſt brought out of Holland; but the Court ſaid, that perhaps the vicarage was endowed time out of mind of the ſmall tithes, of which nature hops were; and then the preſcription of paying a modus to the parſon ſhall not take them from him; for *it ſhall be taken to have commenced ſince the endowment*. Vent. 61. Hill. 21 & 22 Car. 2. B. R. Crouch v. Riſden.

21. The tithe of *clover graſs* belongs to the vicar who has the tithe hay, except only ſuch clover as was neceſſarily cut amongſt the corn where it did grow. Cited by Gregory J. as adjudged in the Exchequer when he was baron. Carth. 264. Hill. 4 W. & M. B. R. in the caſe of Wharton v. Liſle.

22. If the *endowment* of the vicarage be *loſt*, the tithes muſt be paid according to cuſtom. Per Cur. 3 Salk. 379. Anon.

[299] (D) Vicarage. Patron. *Who* ſhall be *Patron of Common Right*.

And it is upon this account, that if a *parſon* be patron of a vicarage, and *leaſes the parſonage* to another, the *patronage of the vicarage ſhall paſs as incident* thereunto. Watſ. Comp. Inc. 8vo. 107. cap. 7. cites 2 Roll. Abr. 59. And ſays, that upon the ſame account the rector of common right is ever patron of the vicarage, though by ſome ordinance or compoſition it may be appointed and ſettled otherwiſe.—Watſ. Comp. Inc. 8vo. 345. cites S. C. But ſays quære, how one perſon can be parſon, viz. appropriate, and another ſaid to be patron of the parſonage appropriated, ſeeing, as is ſhewed, the inheritance of the advowſon of a church appropriated muſt be in the ſpiritual corporation, to whom the appropriation is made; in which caſe it is clear, that the parſon appropriate, creating a vicarage, is patron thereof, and cites 17 E. 3. 51. and it is ſaid that a parſon appropriate is patron of the vicarage, and cites 17 E. 3. 51. b. 11 H. 6. 18. b. As where an abbot or prior is parſon appropriate, cites 19 E. 2. Quare Impedit, 178.

[1. THE *parſon, and not the patron of the parſonage*, of common right is patron of the vicarage; becauſe it is derived out of the parſonage. Dubitatur, 17 E. 3. 51. b. Contra, 5 E. 2. Quare Impedit, 165. per Paſt.]

Where *appropriation* of a benefice *is made, and vicar endowed*, the *firſt patron* ſhall be patron of it, and not the ordinary. Quod nota. Br. Preſentation, pl. 10. cites 50 E. 3. 25.

[2. If a *parſon appropriate* creates a vicarage, he ſhall be patron of it. 17 E. 3. 51. (He is patron and parſon.)

3. The

[3. The chuſing of a vicar belongs de jure to the prieſt, viz. to the parſon; but if the *pariſhioners* can *preſcribe to elect him*, it then belongs to them. 2 Roll. R. 304. by name of Code and Hulmed. [But that ſeems not to be the name of the caſe. It was in a prohibition.]

3. It was denied by the Lord Chancellor, that the parſon de jure has the nomination of the curate, and more eſpecially where the *parſon* is of *a lay fee*. Vern. 42. pl. 42. Paſch. 1682. Mallet v. Trigg.

The caſe was, a *prebendary* had *demiſed for* 3 *lives the corps of his prebend, which conſiſted of two impropriations*, and ſo now by the ſtatute were become lay-fee; in the leaſe were as general words as was poſſible, and particularly that the ſaid leſſee ſhould *find two vicars* for the aforeſaid impropriations, and pay to one ſo much, and to another ſo much; but the Lord Chancellor ſaid, that by finding, was *meant maintaining* only, and not electing or chuſing; and he ſaid there was a great difference as to the parſon's right of naming or chuſing his vicar, where the parſon was of lay-fee, and where he had a cure of ſouls; for in the latter caſe there was reaſon he ſhould approve of the man who was to act under him in ſo high a truſt. And the curate, that came in by oppoſition to the leſſee, was eſtabliſhed by the Lord Chancellor, and the charity decreed to him. 1 Vern. 42. Paſch. 1682. Mallet v. Trigg.—This caſe came before the Chancellor, upon exceptions to a decree of the commiſſioners of charitable uſes. One exception was, that by the ſtatute of the 29th of this king, none but eccleſiaſtical perſons could augment poor vicarages, ſo as to be eſtabliſhed as a charitable uſe within that ſtatute; and that the leſſor, in this caſe, who was only a prebendary, was not within that ſtatute. Sed non allocatur. Ibid.

(E) Parſon. Vicar. Who *may be* Patron. [And of their being Appendant, pl. 5.]

[1. A *Layman* may be patron of a vicarage. 11 H. 6. 19. Contra, 39 E. 3. 33.]

Watſ. Comp. Inc. 8vo. 345, 346. cites S. C.

[2. A *layman* may be patron *of the parſonage, and alſo of the vicarage*. 11 H. 6. 19.]

Watſ. Comp. Inc. 8vo. 345, 346. cites S. C.

[3. A *parſon appropriate* may be patron of the vicarage.—— 11 H. 6. 18. b. 17 E. 3. 51. b. 39 E. 3. 33. where abbot or prior is parſon. 19 E. 2. Quare Impedit, 178.]

See (D) pl. 1.

[4. The *king* may be patron of a vicarage. 11 H. 6. 18. b.]

Watſ. Comp. Inc. 8vo. 345. cites S. C.

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[5. The vicarage *may be appendant to a manor by preſcription, though of common right it appertains to the parſonage*; for it might be granted over by the parſon before time of memory, or by compoſition. My Reports, 13 Ja. between the KING AND SACKER. Adjudged. Mich. 14 Ja. B. between the DEAN AND CHAPTER OF EXETER AND CORNISH. Adjudged.]

3 Bulſ. 88. S. C.—Vicarage may be *appendant to a manor*, and I have ſeen one ſo; but 5 R. 2. quare impedit is adjudged contra; per Coke. Roll. R. 237. Mich. 13 Jac. S. C.—Though the *advowſon* of the vicarage uſually *appertains* to the parſonage, yet it is not of neceſſity, and it may be appertaining *to a manor*. Cro. J. 386. the King v. Biſhop Norwich, Cole, and Saker.—Watſ. Comp. Inc. 8vo. 107, 108. cap. 7. S. P. and cites ſame caſes, and Mo. 894. [pl. 1258.] Mich. 16 Jac. that in this caſe, though the right of appropriation be not extant, yet the uſe of preſenting time out of mind is a ſufficient evidence of the appendancy to the manor, &c. contrary to common right. Sir Geo. Shirley v. Underhill and Burſey.

See (T). (E. 2) Patron. *Who ſhall be ſaid* to be a Patron.

For this is a grant of the patronage, and the grantee ſhall have qua. imp. upon it. Br. Grants, pl. 121. cites 24 E. 3. 69. —*He that names the clerk* is patron, and not he who is to preſent him. Br. Quare Impedit, pl. 56. cites 4 H. 4. 10, 11. [but it is miſprinted, and ſhould be as in the other editions, 14 H. 4.]

1. IN qua. imp. if a man grants to me *that I ſhall have the nomination of a clerk, and he will preſent* him to the ordinary, there I am patron; *e contra* where he grants to me *that I ſhall name two and he ſhall preſent one of them*, there he is patron; for he has election; per the Juſtices; and a grant of the nomination, or of the preſentation is all one; and per Littleton, a *grant of the free diſpoſition of the church of* E. is a good grant of the preſentation. Br. Grants, pl. 101. cites 14 E. 4. 2.

2. *Grantee of the next preſentation* is patron, pro illa vice. Br. Grants, pl. 112. cites 7 H. 4. 2.

(F) Vicar. Endowment. The *Intereſt of the Vicar* in the Things whereof he is endowed.

In Raſtal this is 14 E. 3. ſtat. 1. cap. 17. which enacted, that *parſons, vicars, wardens of chapels, and provoſt wardens, and prieſts of perpetual chanteries, ſhall have their writs of juris utrum of lands and tenements, rents and poſſeſſions, annexed and given perpetually in alms to vicarages, chapels, or chanteries, and recover by other writs in their caſe, as far forth as parſons of churches and prebends.*

In juris utrum it was agreed, that *for land between parſon and vicar, of which the vicar is endowed by the ordinary*, action did not lie at common law between them, but the defendant might plead to the juriſdiction in an action brought againſt him by the vicar, but of all other lands the vicar might implead the parſon at common law, but not of the endowment; for of that the *franktenement remained in the parſon*; for it is done only by the ordinary by aſſent of the parſon, and therefore no franktenement paſſed as it is ſaid there; and yet by endowment of a feme ex aſſenſu patris franktenement paſſes, and ſome ſaid there, that a vicar of his *ancient endowment* may have * action at common law againſt the parſon; quære; for Fynche ſaid, that in ancient time it was the opinion, that as vicar ſhould not have action againſt the parſon at common law, but contra by him at this day, which is the beſt order as he ſaid. Quære. Br. Juriſdiction, pl. 5. cites 40 E. 3. 28.—Br. Dean and Chapter, pl. 2. cites 40 E. 3. 27.—Br. Juris Utrum, pl. 2. cites S. C.—Br. Precipe, pl. 26. cites S. C.—* S. P. Br. Precipe, pl. 28. cites 12 Aſſ. 4. 14. But Brooke ſays, ſee now the ſtatute 14 *E.* 3. *cap.* 17. which gives action to the vicar.—Godolph. Rep. 197. cap. 18. ſ. 2. ſays, that now it ſeems the freehold of the glebe of the vicarage is in the vicar himſelf, and not in the parſon; for that the poſſeſſions of the vicar and parſon are ſevered, and each of them ſhall have ſeveral † writs concerning their reſpective rights, and ſhall not join in one writ; and the vicar ſhall have and maintain juris utrum againſt the parſon, who is the patron of the glebe of the vicarage for the ſame glebe.

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He was not ſuch a tenant of the franktenement, againſt whom the land of the vicarage might be demanded. Br. Deane, &c. pl. 13. cites 8 Aſſ. 36. and that it was ſaid 9 Aſſ. 3. that the vicar was *not tenant of the franktenement*, and ſo it ſeems that the franktenement thereof was in the parſon. Quod nota bene.

[1. BEFORE the ſtatute of 14 *E.* 3. *cap.* 16. *a vicar had not any franktenement in the glebe of the vicarage.*]

[2. *For* he *could not have a juris utrum* for the glebe of his vicarage. 9 E. 3. 50.]

[3. A *præcipe* could not be brought for the *glebe* of the vicarage againſt the vicar without *naming of the parſon*. 3 E. 3. 17. 6 E. 3. 50.]

See (H. 2) pl. 3. [4. The vicar ſhall have *aid of the parſon, patron, and ordinary.* 9 E. 3. 8. b.]

5. The

5. The plaintiff being inducted to a parſonage, [vicarage,] the defendant notwithſtanding *kept the poſſeſſion by force*, whereupon the plaintiff [the vicar] was forced to file his *bill in Chancery*, but the defendant *demurred, becauſe the vicarage is his freehold and inheritance, and ſo properly determinable at law*; yet the demurrer was overruled. Toth. 171. cites 5 Jac. Webb v. Smart.

(G) *Parſon.* The * *Intereſt* of the Parſon *in* the *Church and Church-yard.*

Fol. 337.

See (K) pl. 3.— Church-yard.

[1. THE parſon may *leaſe* the church and church-yard *by leaſe of the parſonage*. 8 H. 6. 9. Admitted.]

* The parſon has a right to the poſſeſſion of the church and glebe, having the freehold in himſelf, and may receive the profits, tithes, oblations, obventions, and offerings to his own uſe, without the patron's or ordinary's conſent, who, without his conſent and agreement, can do nothing during his incumbency to charge the church or his ſucceſſors; and not only is the freehold of the church in the parſon, but he has alſo the right of the church-yard and glebe in him, whereof if he be put out of poſſeſſion or diſſeiſed, he may have an aſſiſe, or if he be ejected he may have treſpaſs, and ſo may the vicar have againſt a ſtranger, if he be diſſeiſed of the church-yard, but not againſt the parſon himſelf. For the parſon ſhall have an aſſiſe, or action of treſpaſs of ſuch things as are annexed to the church or glebe, or for cutting down of the trees, or doing of treſpaſs in the church-yard or glebe, the right and intereſt thereof being in the parſon. But if the bells in the ſteeple, the ornament of the church, or the like, be taken away, in that caſe the action does not belong to the parſon, but to the churchwardens. Notwithſtanding the parſon's right and intereſt as aforeſaid, yet he cannot cut down the trees growing in the church-yard of his pariſh, ſave for the repair of the church. Or if a mere ſtranger cut them down, no ſuit can be thereon in the ſpiritual court for damages; for if ſuit be there commenced in the caſe for damages, no conſultation ſhall be. Nor can the parſon have actions for ſeats in the church taken away by a ſtranger, becauſe they are not fixed to the freehold; but the churchwarden may have action in that caſe. Godolph. Rep. 186, 187. cap. 17. ſ. 3.

[2. 8 H. 6. 9. The *leſſee at will of the parſon brought treſpaſs of his cloſe and houſe broke*, which was of the church and church-yard, and admitted maintainable. (It ſeems by the book that it was *for coming there not in time of ſervice*, or ſuch like, but at another time.)]

Br. Dean and Chapter, pl. 7. cites S. C.— Br. Treſpaſs, pl. 121. cites S. C.

[3. If there be a *parſon appropriate of a church, and* alſo *a vicar endowed thereof*, the *trees in the church-yard* belong to the vicar, and not to the parſon; for it ſeems that the vicar ought to *repair the church*, and he who ought to repair the church ſhall have the trees. Dubitatur, Mich. 13 Ja. B. R. BELLAMIE's caſe.]

Roll. R. 255. S. C. and per Coke and Doderidge, a parſon of church cannot cut trees growing in the church-yard, unleſs to repair the church. But Coke cited a ſtatute, and ſaid, that in the end thereof it is ſaid, (after ſpeaking of cutting of trees growing in the church-yard for reparation of the church,) et ſi non præcipimus, tamen factum non condemnamus.

4. Where there is a *perpetual vicarage endowed*, and the vicar *comes in by admiſſion, inſtitution, and induction, performs divine ſervice, pays the ſynodals and procurations, and repairs the chancel*, it has been adjudged, that ſuch a vicar ſhall have the trees in the church-yard. Arg. Vent. 15. Paſch. 21 Car. 2. B. R. in caſe of Heath v. Prin.

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(G. 2) *Actions. What* Actions *he may have* for Treſpaſs, &c. done.

And he may have *aſſiſe of his rectory, church-yard and glebe,* against a ſtranger who has not colour, or who is a tort-feiſor therein; for it is his franktenement. Ibid. ——*And* he ſhall have *treſpaſs of taking his tenths.* Ibid.

1. IF a man *ejects a parſon without colour*, he ſhall have treſpaſs. Br. Dean and Chapter, pl. 12. cites 28 H. 6. 19. per Markham; quod all the Juſtices conceſſerunt.

2. A parſon may have *juris utrum* after recovery by action tried againſt his predeceſſor; and he may have *ceſſavit, writ of eſcheat*, and *quod permittat*. Br. Dean and Chapter, pl. 27. cites F. N. B. tit. Juris Utrum.

3. A parſon ſhall *not* have *ingreſſus ad terminumqui præteriit*, but juris utrum; for he has not properly fee-ſimple, and this writ of entry ought to be brought only by him who has fee-ſimple. But writ of entry ſur diſſeiſin is otherwiſe. Br. Dean and Chapter, pl. 28. cites F. N. B. tit. Ingreſſus ad Terminum.

See (H. 2).

(H) Parſon. Vicar. *Re-united. Enlarged.*

Ley. 14. S. C.—For if the ordinary doth unite, annex, and conſolidate the vicarage to the rectory or parſonage out of which it was endowed, to be holden by the corporation ſpiritual, and his or their ſucceſſors, that were parſons of the appropriated church, together with that wherewith it was endowed, to his or their proper uſe, ſo that the appropriator ſhould have and take care of the ſouls which the vicar had, and the patron who is the appropriator doth concur thereto, this is ſaid to be a diſſolution and reſtitution of the vicarage to the parſonage, and good, and *is not ſuch an appropriation* of the vicarage *as is made void by the ſtatute of* 4 *H.* 4. *cap.* 12. as was admitted by the Juſtices upon reference out of the court of wards. Mich. 7 Jac. B. R. Stafford's caſe. *But* then this reſtitution *muſt be made upon the reaſon, that the appropriator is become poor*, and doth want ſuch reſtitution, 40 E. 3. 28. And ſuch diſſolution and reſtitution of the vicarage may be as well *made when* ſuch vicarage is *full, if it be ſaid, that it ſhall be after the* * *death of the incumbent*, as when it is void; and ſuch vicarages as were held from the time that the reſtitution was to take effect by the reſpective appropriators with the parſonage, as one intire church without any vicar, until ſuch time as they came to the crown by the diſſolution of the monaſteries, cannot now be preſentable, but the king or his patentees ſhall enjoy them as free as the appropriators had or held the ſame; and *although* that *ſuch* like *reſtitutions* or unions *had been* any way *defective at the time* of the making the ſame; *yet being good in reputation, the ſtatute of diſſolution* of monaſteries *hath fully ſettled them* in the crown. Watſ. Comp. Inc. 8vo. 349, 350. cap. 17. cites Ley. 14. Mich. 1609. Stafford's caſe, and 4 E. 3. 27. and Cro. J. 517. in Britton and Wade's caſe, and Cro. E. 873. Hill. 44 Eliz. Robinſon v. Bedle, and Palm. 113. 219. Mich. 18 Jac. Britton and Ward's caſe.—*But* there was a *difference taken* (by Moubray), *when a layman gives land to* one that is *a vicar, and when* the *vicar is endowed by the ordinary of the parſon's land*, &c. For in the firſt caſe, the ordinary hath no power to diſſolve the vicarage as to the land, though he hath in the other. Watſ. Comp. Inc. 8vo. 351. cap. 17. cites 4 E. 3. 27. See 20 E. 3. Annuity, 32. 16 E. 3. Annuity, 24. and 40 E. 3. 28. b.—* S. P. *Or* after *reſignation.* Br. Appropriation, pl. 2. cites 50 E. 3. 26.——If parſon and vicar are in one church, and the vicarage void, and A. B. *preſents C. to it as parſon*, this makes C. parſon, and writ lies againſt him accordingly. Br. Deane, &c. pl. 24. cites 11 H. 6. 18.

[1. IF there be a vicar and a parſon appropriate, *the ordinary and the parſon appropriate may, in time of vacation of the vicarage, re-unite* the vicarage to the parſonage. M. 7 Ja. B. R. Stafford's caſe upon reference out of the court of wards. Admitted by the Juſtices.]

[2. If there be a *parſonage appropriate in an eccleſiaſtical perſon, which never came to the king by the ſtatute of monaſteries*, and a vicarage endowed there alſo, and the parſon makes a leaſe of the parſonage for lives, according to the ſtatute of 32 H. 8. *the vicar may* well *ſue* in the eccleſiaſtical court againſt *the parſon and his leſſee*, who comes in by the ſtatute, *for addition of maintenance*, and the ordinary may well compel them to increaſe his maintenance; for, *upon all appropriations, ſuch power* to increaſe the maintenance of the vicar *was reſerved to the ordinary, and the leſſee comes in ſubject to this charge*. Hill. 9 Car. B. R. between HITCHCOT plaintiff, and THORNBURROUGH and HITCHCOT defendants; the plaintiff being vicar of the pariſh of Preſhut in comitatu Wilts, and Thornburrough parſon, the church being appropriated to the maſter of the choriſters in the cathedral church of Sarum, he being maſter, and the other defendant being his leſſee. And upon ſuch ſuit againſt the defendants by the vicar in the eccleſiaſtical court, a prohibition denied being moved by Maſter Maſon.]

When the rectory is in the hands of a *lay impropriator*, the ordinary cannot *diſſolve the vicarage*, or *augment* it. 2 Vent. 35. cites 2 Cro. 518. Parry v. Bankes. And 2 Roll. 339.

There ſeems to be a difference where a vicar ſues a *lay impropriator*, and where the impropriator is a *ſpiritual* perſon; for, in the laſt caſe, it is probable he may ſue for an augmentation; and in ſome caſes where the impropriation is not a lay fee, as in the caſe of the *choriſters of Saliſbury*, where the appropriation of a parſonage was made to them before the ſtatute, and continues ſo ſtill; and in ſuch caſe, the biſhop may make an augmentation if that power is reſerved; for the perſons are ſubject to his command. 3 Salk. 378. Lutten v. King.

3. If *an advowſon* be *appropriated to the abbot*, and *A. B. brings writ of right of advowſon by elder title than the appropriation is, and recovers* the advowſon of the parſonage, where a *vicar* is *endowed*, there he ſhall recover both the vicarage and the parſonage. Br. Judgment, pl. 138. cites 16 E. 3. And Fitzh. Grants, 56.

Brook ſays, the reaſon ſeems to be, inaſmuch as *before the appropriation there was no vicarage*, for the vicar was made and endowed when the appropriation was made; and by *recovery by elder title than the appropriation* was, it is now made a parſonage again alone, and the *vicarage diſſolved by this judgment*. Br. Judgment, pl. 138.

4. In treſpaſs for taking certain loads of wood ſet out for tithes, the defendant pleaded not guilty. The plaintiff for evidence ſhewed, that in the time of king E. 3. the rectory was impropriated, and the vicarage then endowed; and (inter alia) the tithes of wood were allotted to the vicar. The defendant ſhews, that *for 160 years laſt* paſt, *there had not been any vicar preſented there*, until the plaintiff obtained a preſentation from the queen by colour of lapſe; and ſo pretended, that in regard it had continued ſo long in this manner, that it re-united again to the rectory. But the Court informed the jury, that although a vicarage is always taken out of the parſonage, and for the neceſſity thereof may be re-united to ſupply the parſonage, *yet*, by continuance of time in not preſenting a vicar, which is the default of the parſon himſelf, *it ought not to be adjudged* to be *a diſcontinuance of the vicarage, but ſomewhat ought to be ſhewn of the re-uniting* thereof; wherefore, by the Court's direction, the jury found for the plaintiff. Cro. E. 873. Hill. 44 Eliz. C. B. Robinſon Vicar of the Church of Kimbolton v. Bedel.

Watſ. Comp. Inc. 3vo. 350. cap. 17. cites S. C.

5. A parſonage was appropriated to the deanry of St. A. in 24 H. 8. and a vicarage endowed; and afterwards the biſhop, in 24 Eliz. diſſolved the vicarage, and Parry pretending that this vicarage

S. C. cited Godolph. Rep. 197. cap. 18. ſ. 2.

S. C. cited 2 Vent. 35. S. C. cited Watſ. Comp. Inc. 8vo. 351. cap. 17.

vicarage was not diſſolved, but that it was in the king's hands by lapſe, obtained a preſentation. And it was reſolved by the Barons of the Exchequer, that *after the ſtatute of* 31 *H.* 8. *which made parſonages lay-fees, the ordinary may not diſſolve the vicarage when the parſonage is in a temporal hand,* for that ſhould be to deſtroy the cure. But being in this caſe *appropriated to the dean of St. A.* it ſo remaining in his hands, may very well be diſſolved. And according thereto was the opinion of Doderidge J. Cro. J. 518. Mich. 16 Jac. B. R. in the caſe of BRITTON v. WADE cites it as the caſe of Parry v. Banks.

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S. C. 2 Roll. Rep. 127. Mich. 17 Jac. B. R. And the Court declared their opinions, that the ſtatutes of 15 R. 2. and 4 H. 4. do not extend to appropriations made afterwards; for the words of the ſtatute are in the future tenſe

6. The prior of D. was *ſeiſed of the advowſon* of N. appropriated to his priory, *and alſo of the vicarage of N. endowed with the altarage and ſmall tithes.* The appropriation and endowment were *both in the time of king John,* and continued until the time of H. 6. when the pope, in regard the priory was poor, granted by his *bull, that the prior ſhould appoint one of his monks to officiate the cure, who ſhould be removable ad nutum prioris.* The queſtion was, whether the vicarage was diſſolved? Reſolved, that a vicarage perpetual could not be diſſolved after the ſtatute of 4 H. 4. and that the pope could not make any ordinance againſt that ſtatute which was in the affirmative, and cited 11 H. 4. that the pope cannot diſpenſe by his bulls with the temporal law, though they tend in ordine ad ſpiritualia; and there were no words that amount to a diſſolution, but the words only are, that the vicar ſhould be ad nutum prioris.—Cro. J. 515. Mich. 16 Jac. B. R. Britton v. Wade.

(that from henceforth, &c.) and further they held, that the inſtrument of the pope had diſſolved the vicarage; for the conſtant uſage and reputation ſubſequent (which are the beſt expoſitors of the act) declare the validity, intention, and force of the inſtrument made by the pope, viz. that it amounts to a diſſolution; and Mountague Ch. J. founded a 2d reaſon thereupon, for inaſmuch as always after 29 H. 6. until 31 H. 8. it remained in reputation to be an impropriation without vicarage, becauſe the ſtatute of 31 H. 8. gave it to the king in the ſame manner as then it was; and all the juſtices ſaid, that great inconveniencies would follow, if ſuch *ſleeping vicarages* ſhould revive after ſo long a time; for there are ſeveral impropriations in England, for which men have given valuable conſiderations to the king, diſcharged of vicarages. But Doderidge and Haughton J. held, that admitting the impropriation had been within the ſtatute of 15 R. 2. and 4 H. 4. then the biſhop is reſtrained and the pope alſo from diſſolving the vicarage, for otherwiſe the ſaid ſtatutes might be eaſily eluded; for when the impropriations are made, and the vicarage endowed, according to the words of the ſtatute, the biſhop will immediately diſſolve it, which would be contrary to the intent of the ſtatute.——Godolph. Rep. 202. cap. 18. ſ. 17. cites S. C. that the vicarage was not diſſolved.——S. C. cited Watſ. Comp. Inc. 8vo. 350. cap. 17. and ſays, that the words are not ſufficient to make a diſſolution, nor do amount to ſuch; nor do they ſo much as give the prior power to take the profits.

See (H).

* (H. 2) Parſon. Vicar.

* There is no letter to this in Roll.

Br. Dean, &c. pl. 25. cites S. C. by Hengſton and Yelverton.—Godolp. Rep. 199. cap. 18. ſ. 11. cites S. C.——

[1. IF the *vicarage be diminiſhed,* it ſhall *have more of the parſonage,* if the remnant be not ſufficient. 31 H. 6. 14.]

[2. If the *parſonage be impoveriſhed* and ſo much decayed *that the parſonage* by itſelf, *nor the vicarage, have ſufficient to ſuſtain them,* then the vicarage ſhall be determined and *reſtored to the parſonage;* and the doctors agreed thereto. 31 H. 6. 14.]

Watſ. Comp. Inc. 8vo. 357. cap. 17. cites S. C, and 40 E. 3. 28. [Infra pl. 7, 8.]

But

But this is now to be underſtood of a parſonage in an eccleſiaſtical perſon, which never came to the king by the ſtatute of monaſteries; and if the parſon hath made a leaſe for lives, according to the ſtatute 32 H. 8. the vicar may well ſue in the eccleſiaſtical court againſt the perſon and his leſſee that comes in by the ſtatute for addition of maintenance; and the ordinary may compel them to increaſe his maintenance; for upon all appropriations ſuch power of increaſing the maintenance of the vicar was reſerved to the ordinary by the common law. March. 87. 3 E. 2. 74. —— Mar. 87. pl. 140. ſays, that this power augendi vel minuendi was for the general cure of ſouls.

[3. If a *charge be riſing upon the vicarage*, it ſhall be *recompenſed out of the parſonage*. 31 H. 6. 14.] Fol. 338.

For being originally endowed out of the parſonage, the vicar was to have aid of the parſon if he were impleaded for any thing touching the vicarage, and the parſon was ſubject to every charge of the vicarage. Godolp. Rep. 197. cap. 18. ſ. 2. cites 31 H. 6. 13. by Yelverton.

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[4. If a *parſon appropriate, who is patron* of the vicarage of the ſame church, *by agreement between him and the ordinary, preſents* * *the vicar* to the parſonage, this *unites* the parſonage and vicarage together. 44 E. 3. 33. b. Admitted, 44 Aſſ. 37.] See pl. 10. in the notes. Godolph. Rep. 199. cap. 18. ſ. 11. cites S. C.

Watſ. Comp. Inc. 351. 8vo. cap. 17. cites S. C. and ſays, ſo that the preſentee ſhall have all the tithes and profits of the church.

[5. *But* if the *leſſee of the parſonage preſents* the vicar to the parſonage, this union ſhall not bind the leſſor. 44 E. 3. 33. b. 44 Aſſ. 37.]

[6. And if they *are united* the *endowment is come to the parſon again*. 20 E. 4. 6. b.]

[7. If the *parſonage* become *much impoveriſhed*, the ordinary may ordain, that the parſon ſhall be *reſtored to that whereof he endowed the vicar*. 40 E. 3. 28. b.]

[8. *But* he cannot do this, *unleſs for the poverty of the parſonage*. 40 *E.* 3. 28.] But it was ſaid by Compton Doctor of the Civil Law, that union made upon a ſuppoſed and pretended poverty, which appears to be falſe, is void. Cro. E. 501. Mich. 38 & 39 Eliz. B. R. in caſe of Auſtin v. Twine.

[9. *But if ſtranger gives land to the vicar* and his ſucceſſors, the ordinary cannot meddle therewith. 40 E. 3. 28. b.] Br. Juris Utrum, pl. 2. cites S. C. Per Mombray.

[10. If an *abbot, being a parſon appropriate, be patron* of the vicarage, *and preſents* to the vicarage *by name of a parſonage*, this *diſappropriates* the parſonage, and makes it and the vicarage but one parſonage, and *reunites* them. 11 H. 6. 18. b. 3.] Godolph. Rep. 199. cap. 18. ſ. 11. cites S. C. Br. Annuity, pl. 44. cites S. C. —— Watſ. Comp. Inc. 351. cap. 17. ſays, this is a diſappropriation of the church, though there be *no precedent agreement* between the parſon and the ordinary to that purpoſe, and it ſhall be preſentable after. Cites 44 E. 3. 33. b.

[11. If a *patron of a vicarage, another being patron of the parſonage, preſents thereto by name of a parſonage*, and his clerk *inducted*, yet it continues a vicarage. Dubitatur. 11 H. 6. 19. 32. b.] Br. Annuity, pl. 44. cites S. C.

[12. *The ſame* law, if the *king preſents by ſuch name* to ſuch vicarage. Dubitatur. 11 H. 6. 18. b.] Br. Annuity, pl. 44. cites S. C.

All appropriations are preternatural, and the church during ſuch time is in bondage; and therefore by preſentation is made preſentative. Per Windham J. Keb. 906. pl. 8. Trin. 17 Car. 2. B. R. in caſe of Wilkinſon v. Richardſon.——Watſ. Comp. Inc. 8vo. 352. cites S. C. and ſays, it appears by this, that a *layman* having an appropriation, may diſappropriate it by preſentation, if he be patron of the vicarage of the ſame church, as well as an eccleſiaſtical perſon may, if inſtitution and induction be had upon it; and it is even ſaid, that ſuch patron by his act of preſenting only to the vicarage by the name of a parſonage, does diſappropriate the church, and unite the parſonage and vicarage into one; and cites 11 H. 6. 18. b. 3. 38 H. 6. 20. F. N. B. 35. And therefore Hobart ſays, he is of opinion, that if parſon appropriate *preſents, and his clerk is refuſed for juſt cauſe, and notice given*, lapſe ſhall incur; for the appropriation gives him a choice [the word in Hob. is (charge)] to hold or not, as appears by the form of an appropriation in Grendon's caſe, which by his preſentment he has renounced. Hob. 152. in caſe of Colt and Glover v. Biſhop of Coventry, &c. But Watſon makes a quære, whether a diſappropriation be perfected by preſentment, before inſtitution and induction had thereupon?

[13. If there be a *vicarage and parſonage (and both are void) and one preſents his clerk as parſon*, and he is ſo *inducted*, this ſhall *unite* the parſonage and vicarage again. 11 H. 6. 33.]

[14. If a *parſon appropriate creates a vicarage, and after the advowſon* of the church *is recovered by writ of right*; the vicarage is defeated thereby, becauſe the plaintiff recovers of a higher right than the making of the vicarage. 17 E. 3. 51. b. 76.]

[15. *But* otherwiſe it is, if he *recovers of a later right* than the creation of the vicarage. 17 E. 3.]

[306] 16. *If vicar* be *of the dowment of the ordinary and patron*, all the *franktenement is in the parſon*; and otherwiſe in the vicar, if it be by other title. Br. Dean and Chapter, pl. 34. cites 40 E. 3. 27.

See (H.) pl. 6. Though the ſtatutes 15 R. 2. and 4 H. 4. ſay, that there muſt be a vicarage endowed upon every appropriation, yet they do not extend to appropriations prior to the making the ſaid acts. Arg. Gibb. 251. Paſch. 4 Geo. 2. in caſe of the Biſhop of London and Lewen v. the Mercers Company.

17. 15 *R.* 2. *cap.* 6. enacts, that *in every licence made in Chancery of the appropriation of any church, this ſhall be contained, (viz. that the dioceſan ſhall ordain, according to the value of ſuch churches,) a convenient ſum to be yearly diſtributed out of the profits thereof, to the poor of the pariſh, by the appropriators and their ſucceſſors for ever; and alſo that the vicar ſhall be ſufficiently endowed.*

18. 4 *H.* 4. *cap.* 12. enacts, that *the ſtatute of* 15 *R.* 2. 6. *ſhall be duly executed, and appropriations made ſince that ſtatute contrary thereunto, ſhall* be *reformed before Eaſter, or elſe to be void, except Haddenham in the iſle of Ely.*

All vicarages annexed or appropriated ſince 1 *R.* 2. *ſhall be void.*

In every church ſo appropriate, a ſecular perſon ſhall be ordained vicar, canonically inſtituted and inducted in the ſame, and conveniently endowed (by the diſcretion of the ordinary) to do divine ſervice, inform the people, and keep hoſpitality there, (except Haddenham aforeſaid,) and no religious ſhall be hereafter made vicar in any church ſo appropriate.

19. If vicarage be erected and eſtabliſhed, if *no endowment* be *de facto* of the vicarage, the vicar cannot claim any thing. Per tot. Cur. Palm. 426. Paſch. 2 Car. B. R. Cope v. Bedford.

20. A vicar *cannot have* tithes but by gift, compoſition, or preſcription; for all tithes de jure do appertain to the parſon.—Mar. 11. pl. 29. Paſch. 15 Car. Anon.

21. A

21. A vicar libelled for *tithe of wood*; the defendant ſuggeſted for a prohibition, that time out of mind they had paid no ſmall tithes to the vicar, but that by the cuſtom of the pariſh they were paid to the parſon. Per Twiſden, if the *endowment* of the vicarage is *loſt*, ſmall tithes muſt be paid according to preſcription. Mod. 50. Hill. 21 & 22 Car. 2. B. R. Tildale v. Walter.

S. C. Sid. 447. but there it is ſaid to be for tithe wood and tithe would or woad, (which is a dye-ſtuff,) and that as to the woad, it was ſuggeſted that the tithe thereof belonged to the parſon and not to the vicar; but this was doubted of, becauſe it is reckoned among ſmall tithes, like hops, &c.

22. Libel for tithes by a parſon, the defendant ſuggeſted for a prohibition a *modus to the vicar*, and that the *vicarage* had been *endowed time out of mind*; and it was granted. Vent. 107. Hill. 22 & 23 Car. 2. B. R. Robſon's caſe.

23. 29 *Car.* 2. *cap.* 8. *ſ.* 2. enacts, That *every augmentation, reſerved, or agreed to be made payable ſince the firſt of June, in the 12th year of his majeſty's reign, or which ſhall be made payable to any vicar or curate, or reſerved by way of increaſe of rent to the leſſors, but intended for the benefit of any vicar or curate, by any archbiſhop, biſhop, or any other eccleſiaſtical perſons out of any rectory impropriate, or portion of tithes, ſhall continue for ever, as well during the continuance of the eſtate, upon which the augmentations were reſerved, as afterwards; and the ſaid rectories, or portion of tithes, ſhall be chargeable therewith, whether the ſame be reſerved again or not; and the ſaid vicars and curates are hereby adjudged to be in the actual poſſeſſion thereof for the uſe of themſelves and their ſucceſſors; and ſhall have remedy for the ſame either by diſtreſs upon the rectories impropriate, or portions of tithes, or by action of debt againſt that perſon who ought to have paid the ſame.*

Provided that no future augmentation be confirmed by this act, which ſhall exceed one moiety of the yearly value of the rectory impropriate.

Every archbiſhop, biſhop, dean, and chapter, ſhall cauſe every leaſe [307] *or grant, whereon any ſuch augmentation is made, to be entered in a book of parchment, to be kept by their regiſters; and every dean, or other eccleſiaſtical perſon, ſhall cauſe every leaſe or grant, whereon any ſuch augmentation had been made by himſelf or his predeceſſors, to be entered in the ſaid book, which entry being examined by the archbiſhop, biſhop, or dean, and atteſted in the book to be a true copy of the original leaſe or grant, and that the augmentation in the ſame was intended for ſuch uſe, ſhall be as a record, a copy whereof proved by witneſſes ſhall be evidence in law, whereupon the vicars and curates may recover the benefit of ſuch augmentation.*

Where any archbiſhop, biſhop, or other eccleſiaſtical perſon, upon the renewing or granting any leaſe, have made any agreement for an augmentation for the vicar or curate, and ſuch augmentation hath for any time been paid, although the agreement is not mentioned in the leaſe, ſuch eccleſiaſtical perſon ſhall cauſe the ſubſtance of ſuch agreement to be entered in the book.

Such augmentation ſo entered ſhall likewiſe continue for ever in the ſame manner, as if the ſame had been reſerved by the leaſe.

If any queſtion ariſe concerning any thing in this act, ſuch favourable conſtructions, and ſuch farther remedy, ſhall be had for the benefit of

the vicars and curates, as may be had upon the ſtatutes for charitable uſes.

If upon the ſurrender or determination of any leaſe, wherein any ſuch augmentation hath been granted, any new leaſe of the premiſes ſhall be made without expreſs continuance of the augmentation, ſuch new leaſe ſhall be void.

24. Where the vicar is endowed, and comes in by *inſtitution and induction*, he hath curam animarum actualiter, and is not to be *removed* at the pleaſure of the rector, who in this caſe hath only curam animarum habitualiter; but vice verſa, the rector has curam animarum actualiter, and may remove the vicar at pleaſure. 3 Salk. 378. Smith v. Waller.

(I) Parſon, Patron, and Ordinary. Their *Power jointly in the Time of the Parſon.*

[1. PARSON, patron, and ordinary, may *create a vicarage.* 8 R. 2. Annuity, 53.]

And the parſon may charge with aſſent of the patron and ordinary.

2. The *patron and ordinary* may *charge the church*, in time of vacation for ever *with an annuity*, or ſuch like. Br. Charge, pl. 38. cites 8 E. 3. 26. & Fitz. Releaſe, 57.

Br. Charge, pl. 38. cites Littleton, Diſcontinuance.

9 Rep. 44. a. in the biſhop of Winchester's caſe. Hob. 297. per Hobert Ch. J. in the caſe of Slade v. Drake.

3. If a parſon, patron, and ordinary *grant land to J. S. diſcharged of tithes*, he ſhall hold it diſcharged. Per Doderidge J. Cro. J. 453. Mich. 15 Jac. B. R. in the caſe of Doubitofte v. Curteene.

Fol. 339.

(K) Patron and Ordinary in Time of the Parſon. Their Power in Time of the Parſon *ſeverally.* Patron.

See (L) pl. 10.

[1. IF a man *recovers an annuity againſt a parſon, and* after *releaſes to the patron* during the time of this parſon, this ſhall extinguiſh the annuity. 8 H. 6. 23. b. there it is put generally ſo.—

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41 E. 3. 20. without mention whether it was in time of the parſon, or in vacation; but the ſcire facias is brought againſt the ſucceſſor. Quære this.]

[2. During the time of the parſon, the *patron has not any reverſion in the glebe.* 8 H. 6. 24. b.]

[3. In time of the parſon, the *patron has nothing to do in the church.* 11 H. 6. 4. b.]

Godolph. Rep. 191.

[4. If the *patron grants a rent by fine* out of the *church*, it *being full*, and after the incumbent dies, this charge ſhall not bind the

ſucceſſor; becauſe the parſon and ordinary were not parties thereto. 38 E. 3. 4.] cap. 17. ſ. 12. cites S. C.

[5. If the *patron grants a rent out of the church*, it is void againſt himſelf; becauſe he has nothing in the church. 38 E. 3. 4. b.]

[6. If there be a *dean of the free chapel of the king of the collation of the king*, and he *has an advowſon appropriate* to him, *another who has right to the patronage* of the advowſon *may releaſe all his right to the king*, and this ſhall be good releaſe in the patronage of the king. 33 E. 3. * Aid of the King, 103.] *Fitzh. Abr. pl. 103. cites H. 33 E. 3. but I find no ſuch year in the Year-books.

7. In ſcire facias upon a fine, it was agreed per Knivet and Kirton, that a *fine* levied *by the patron alone of a rent out of the* land of the *glebe* without the parſon, is not good to bind the parſon, and this ſeems to be *where a parſon was at the time of the charge.*— Br. Charge, pl. 11. cites 38 E. 3.

8. Debt againſt the ſucceſſor of the parſon upon a *grant of an annuity by* his *predeceſſor by aſſent of the patron and ordinary*, and for non-payment to forfeit 40s. nomine pœne, and debt was brought of the penalty, and ſo ſee that a grant by aſſent of the patron and ordinary *is as good as if the patron and ordinary had confirmed it.*— Br. Charge, pl. 13. cites 7 H. 6. 19.—And herewith agrees Littleton tit. ---- But note, that it appears the ſame year, fol. 41. that the grant was by one deed, and patron and ordinary made another deed, but it is not expreſſed if it be a confirmation, nor what form it contains; but ſee the ſame caſe anno 8 H. 6. & 28. it appears that it was a confirmation. Br. Charge, pl. 13.

9. Note for law, that the *parſon cannot charge without the patron and ordinary*, (or) *dean and chapter, where the biſhop is patron*, & *e contra* it ſeems *where the biſhop is only ordinary and not patron*; and it is ſaid elſewhere alſo that the *patron ought to have fee-ſimple*, and this *in his proper right*, as appears here by the caſe of the dean and chapter with the biſhop, where the biſhop is patron, and in the caſe of HILL for the parſonage and glebe of Stoke upon Tyerne in the county of Salop. 33 H. 8. where the parſon, patron, dean, and chapter made the aſſurance; quod nota; and therefore it ſeems, that the biſhop was patron there; and the *diverſity* is, that *where the biſhop is patron he hath intereſt in it, but where he is only ordinary he has judicial power, but no intereſt*; note the diverſity. Br. Charge, pl. 40. cites 11 H. 6. 9.

10. It was agreed by 3 of the 4 juſtices, that parſon has fee-ſimple in jure eccleſiæ, and that *waſt lies not for the patron againſt the parſon*. Br. Faux Recov. pl. 51. cites 12 H. 8. 7.

11. If patron *confeſſes action of the land*, a *juris utrum* lies for the ſucceſſor; per Brook. But this ſeems to be, where *no aid was prayed*. Br. Faux Recov. pl. 51. cites 12 H. 8. 7.

12. Per Pollard; the patron may have a *writ of error and attaint* of a recovery had againſt the parſon. Br. Faux Recovery, pl. 51. cites 12 H. 8. 7. But Brooke ſays, that this ſeems not to be law; for it is *given to the ſucceſſor*, and the patron has not the franktenement nor reverſion, but the *franktenement is in abeyance*. Ibid.

See Penſions. (L) Patron and Ordinary in Time of Vacation. Their Eſtate and Power *in Time of Vacation ſeverally.* Patron.

The ordinary ſhall have the profits of the glebe in the time of vacation, becauſe it is ſanctuary, et non negatur; but where the *church is diſſolved*, the patron ſhall have it. Br. Dean, &c. pl. 33. cites 9 H. 5. 9.

[1. DURING the vacation, the *franktenement of the glebe* is not in the patron. 8 H. 6. 24. b.]

And a freehold can be in abeyance *in no other caſe*, but only in the caſe of the parſon of a church. D. 71. pl. 43. in caſe of Withers v. Iſham.—It is the *ſame* in caſe of a *biſhop, abbot, dean, archdeacon, &c.* Co. Litt. f. 647. 342. b. ——See Abeyance.

[2. But it is *in abeyance.* Litt. 144.]

The patron has but *jus præſentandi*, and has no intereſt. Arg. Cro. J. 53. Mich. 2 Jac. C. B. in caſe of the King v. the Biſhop of Winton and Campion.

[3. The patron has the franktenement *in right* during the vacation. 8 H. 6. 24. b.]

Though the profits of the church during the vacation are in the incumbent upon his induction, and not due to the patron or ordinary; (for if the patron enters upon the church in time of vacation, he thereby is not any diſſeiſor, nor gains any right. Sav. 18. [pl. 46. Paſch. 22 Eliz.]) yet the patron and ordinary have ſuch an intereſt in the revenues of the church as that at common law they might have charged the ſame in time of vacation, which would have bound all ſucceeding incumbents, becauſe no other had any intereſt at that time, but they only. Watſ. Comp. Inc. 8vo. 748. cap. 48.

[4. The patron ſhall *not take any benefit of the glebe* during the vacation. 8 H. 6. 24. b.]

Treſpaſs *of a houſe and cloſe broken*; Chant ſaid, that the *cloſe was the church-yard of D. and the houſe was the church* of D. and the *defendant is patron*, and A. *the parſon there leaſed the parſonage to the plaintiff at will, and after* the parſon *reſigned, and* the *defendant as patron preſented*, and *the biſhop inquired of the right of patronage in the church*, and the *defendant as patron entered to ſhew his evidence* to the patronage, and the plaintiff by the leaſe above held himſelf in, &c. which is the ſame treſpaſs, &c. Judgment ſi actio; and by ſome it is no plea for want of colour. But Strange and Martin Juſtices ſaid clearly, that it is a good plea. And the reaſon ſeems to be, becauſe lay gents cannot know the law that the leaſe is void by the reſignation. Br. Treſpaſs, pl. 121. cites 8 H. 6. 9.

[5. If the *parſon leaſes at will* the parſonage *and reſigns*, (by which the will is determined,) the *patron cannot enter upon the leſſee* and ouſt him (for he has the firſt poſſeſſion, and the patron has no right to the profits). 8 H. 6. 9. Admitted.]

[6. The patron ſhall not have any *action for treſpaſs* done in the time of vacation. 11 H. 6. 4. b.]

[7. After the *death of a prebendary*, the *dean and chapter* ſhall have the profits. 33 E. 3. Aid of the King, 103. per Thorpe.]

Watſ. Comp. Inc. 8vo. 748. cap. 40. cites 8. C.

[8. After the *death of a dean of a free chapel of the king*, the *king ſhall have the profits of* his deanry; for it is at the election of the king, whether he will collate a new dean. 33 E. 3. Aid of the King, 103. per Fis.]

[9. *But*

[9. *But if the dean had a parſonage appropriated to him*, the king ſhall not have the tithes and profits thereof. 33 E. 3. aforeſaid, per Thorp.] Fol. 340.

Watſ. Comp. Inc. 8vo. 748. cap. 40. cites S. C.

[10. If a man has an *annuity*, out of a parſonage, and he *releaſes to the patron in time of vacation*, this ſhall extinguiſh the annuity. * 21 H. 7. 41. Co. 5. FORDE, 81. b.] *Br. Deane, &c. pl. 11. cites S. C. Br. Releaſes, pl. 33. cites

† S. C.——S. C. cited 5 Rep. 81. b. Paſch. 37 Eliz. C. B. in Ford's caſe.——S. P. 5 Rep. 71. a. Paſch. 34 Eliz. in HOE's caſe, cites 40 E. 3. 22. 18 E. 3. Avowry, 77. 13 R. 2. Avowry, 89.—14 H. 4. 4. Recordare longe.——Watſ. Comp. Inc. 8vo. 748. cap. 40. cites S. C.——Co. Litt. 266. a. S. P. and that it is good in reſpect of privity.

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[11. If a *judgment in annuity* was againſt a parſon, and after in time of vacation he *releaſes to the patron*, this ſhall extinguiſh the annuity. 8 H. 6. 23. b. (But it does not appear whether the releaſe was in time of vacation or of plenarty.) Vide 7 H. 6. 38. b. 41 E. 3. 20.]

[12. *But* if a *man who has right to the glebe land releaſes to the patron in time of vacation all his right*, it is not good, becauſe the patron has not any eſtate in the land. 8 H. 6. 24. b. may be collected.] Watſ. Comp. Inc. 8vo. 748. cap. 40. cites S. C.

(M) *Ordinary.* [His *Power in Time of Vacation*].

[1. IN time of vacation, the ordinary may *give liberty* to any *to hold the parſonage* for a certain time *(before a new incumbent be)*. 8 H. 6. 9. (This was before the *ſtatute of* ‡ *H. 8. cap. which ordains, that the ordinary ſhall ſequeſter.)*] ‡ 28 H. 8. cap. 11.

[2. The ordinary ſhall have *the eſplees and profits during the avoidance*. 7 H. 6. 39. 11 H. 6. 4. b.]

[3. In time of *vacation*, if a man *has the firſt poſſeſſion* of the parſonage, yet the *ordinary may give power* to another *to inquire of the right of the patron* in the church, upon a preſentment to him; and the commiſſioner, and they who go there to *ſhew their right to the commiſſioner, ſhall not be treſpaſſors*. 8 H. 6. 9.]

4. If the *king* be patron, and *does not preſent* to the church, which is void, within ſix months, *the ordinary ſhall* not preſent, but ſhall *ſequeſter* the profits, and find one to ſerve the cure till the king will preſent one. Per Keble. 14 H. 6. 21. Br. Quare Impedit, pl. 90. cites S. C.——S. C. cited Arg. Roll. R. 453. Hill. 14 Jac. in caſe of Colt v. Glover.——The ordinary may ſequeſter a church *donative*, if the patron does not preſent. Arg. Roll. R. 453. in caſe of Colt v. Glover; cites 3 Jac. Gaer v. ----

5. During the vacation the ordinary *may make a leaſe*. Arg Roll. Rep. 453. Hill. 14 Jac. in Cam. Scacc. in caſe of Colt v Glover.

(N) Proviſion.

As to matters of proviſions, &c. made heretofore by the pope, it may be of little uſe to inſert any thing more here, than only to refer to the ſtatute 25 E. 3. and other ancient ſtatutes made to reſtrain them. ——* Br. Preſentation, pl. 12. cites S. C.

[1. IF the proviſee of the pope has poſſeſſion of the church before the preſentee of the king, he *ſhall be preferred*; but if the preſentee of the king has *the firſt poſſeſſion*, he ſhall be preferred. * 8 H. 4. 21.]

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See Advowſon.

(O) Advowſon. † *What.*

† An advowſon, or as the term is, jus patronatus, eſt poteſtas, preſentandi aliquem inſtituendum ad beneficium eccleſiæ ſimplex & vacans; and of other reſpects, the cauſes and incidents of advowſons is deſcribed more amply in ſuch manner, jus patronatus eſt jus honorificum, oneroſum, & utile. In effect this; a patronage, or an advowſon, is a right to preſent to the biſhops or ordinary a fit perſon, by him to be admitted and inſtituted into a ſpiritual benefice when it becometh void; and he that has ſuch right to preſent is called patron, who is thus deſcribed; patronus eſt defenſor eccleſiæ, qui habet jus præſentandi epiſcopo aliquem, vel aliquos in aliqua eccleſia, & in ea ab eo inſtituatur. And he is ſo called, de patrocinio, of defence; becauſe he ſhould defend the church, or a ſimilitudine patris, quia ſicut pater filium, ſic patronus eccleſiam, de non eſſe, deducit ad eſſe. He is called of old Granvile advocatus; as that he ſhould ſay, an advocate of the cauſes of the church; and therefore the inheritance is called advocatio, or advowſon, or is derived de vocando; becauſe the patron hath power for the preſentment of a fit perſon, by the name of his preſentation. Dod. of Adv. 3, 4. Lect. 1.——‡ Dod. of Adv. 3. cites S. C.

[1. ADVOWSON *is jus mixtum*, becauſe the commencement of every preſentment commences by our law, as by *preſentment of the lay patron*; and by the law of the church takes effect, as by *ability*, non-ability, or criminoſus, which appertains to the ordinary. ‡ 34 H. 6. 40. *Per Aſhton.*]

See Prohibition, &c.

(P) Chapel.

[1. A Chapel *of eaſe is*, where there is a church parochial in the ſame pariſh, and the ſacraments adminiſtered in the parochial church, and not in the chapel. 8 H. 6. 32.]

[2. A *church parochial cannot be a* chapel. 8 H. 6. 37.]

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[3. The chapel of eaſe *belongs to* the church parochial, and parſon thereof. 8 H. 6. 32.]

4. A chapel is *not a temporal inheritance*, as an advowſon is. Arg. Sti. 101. cites D. 83.

5. A chapel is *not conveyed in fines*, and recoveries and entries, *by* the *name of a tenement*, nor in any judicial proceedings; *but* tenementa *in a grant* may contain a chapel. Arg. Sti. 101. Thin v. Thin.

6. The *nominee* to a chapel of eaſe *muſt have* the *biſhop's licence*, but who ſhall nominate whether the patron and rector of the mother-church, or the builders, was not determined. Gibb. 158. The caſe of the Chapel of St. John's in Holborn pariſh.

(Q) Advowſon. *Spiritual Promotion. What* ſhall be ſaid a Spiritual Promotion.

[1. A *Deanry* is a ſpiritual promotion, and not temporal. D. 10 El. 273. 37. By all the Juſtices] S.P. 13 Rep. 70. pl. 34. Paſch. 8 Jac. in the pariſhioners of St. Alphage's caſe.—In caſe of FAIRFIELD AND GAYRE, Williams ſaid, that knights have been deans, and have had deanries, but it is by the ſpecial diſpenſation of the archbiſhop, and that he hath ſeen ſuch licences. D. 273. pl. 35. in Marg.—Yelv. 61. Paſch. 3 Jac. B. R. in the ſaid caſe of Fairchild v. Gayer, it is held by all the juſtices, that deans may be laymen, becauſe the function is temporal. And yet Williams J. ſaid, that laymen, who have deanries, ought and always have had diſpenſations from the archbiſhop.——Brownl. 202. S. C. and P.——Dean and chapter are a body ſpiritual, and annexed to the biſhop throughout all England. Per Hobart Ch. J. but Winch doubted, and ſaid that a dean may be a layman, which Hutton confeſſed, and ſaid, that ſo was the dean of Durham, by ſpecial licence and diſpenſation of the king, but that is a rare and a ſpecial * caſe, and is not common and general; and therefore not to be brought as an example, which was granted by Hobart Ch. J. Winch. 65. Paſch. 21 Jac. C. B. Brigg's caſe.

* [312]

[2. If the nomination and *patronage of a deanry be* appointed *to the king*, his heirs and ſucceſſors, and *he appoints a dean*, yet this is a ſpiritual promotion. D. 10 El. 273. 37.]

3. *Clerk of a pariſh* is not. 13 Rep. 70. Paſch. 8 Jac. C. B. The pariſhioners of St. Alphage's caſe.

4. *Church-wardens* are not. 13 Rep. 70. in the pariſhioners of St. Alphage's caſe.

5. The *lecturers in cathedral* and collegiate *churches* are of the number of eccleſiaſtical promotions. Watſ. Comp. Inc. 250. cap. 14.

(R) Advowſon. *Donative.*

See Donative.

[1. A Donative *of the gift of the king* may be *with cure of ſouls*, as the church of the *Tower of London* is a donative of the gift of the king with cure. Mich. 9 Car. B. R. between FLETCHER and MACKALLER, per Curiam, where information was brought upon the ſtatute of 31 Eliz. of ſimony, for procuring him to be promoted to the ſaid church of the Tower for money, & per Curiam it lies.] See (5) pl. 4. in the notes. Cro. C. 330. S. C. by name of Bowderck v. Mackaller. —Cro. C. 337. S. C. by name of Mackaller v. Todderick.—Cro. C. 353. S. C.——Cro. C. 361. S. C.——Jo. 143. S. C. by name of Todderidge v. Mackalley.

[2. A *church parochial may be a donative*, and *exempt* from ordinary juriſdiction, and the incumbent may † *reſign to the patron*, and not to the ordinary; nor can the ‡ ordinary viſit, but the patron by commiſſioners to be appointed by him. Co. Litt. 144. cites H. 1. Ja. B. R. Rot. 601. between FAIRCHILD AND GAYER, in treſpaſs for the rectory parochial donative of St. Burien in Cornwall. Reſolved.] S. C. cited Show. Pa l. Caſes, 176. in the caſe of the Biſhop of London v. the Attorney General.— † The reſignation is good both in reſpect of the thing reſigned, and of the perſon to whom it is made; for it being a donative, and exempt from ordinary juriſdiction, the reſignation cannot be into his hands, and the incumbent ſhall not be conſtrained to keep the church whether he will or no, if the patron will not accept it,

and becauſe there is no perſon to whom the reſignation can be made, but only into the hands of the patron, it is good. Per Cur. Yelv. 60. Paſch. 3. B. R. Fairchild v. Gayer. —— Brownl. 201. S. C. —— Mo. 765. S. C. —— Cro. J. 63. S. C.

‡ The ordinary has nothing to do with a donative; which may paſs by gift to the parſon without inſtitution or induction, as is ſaid 8 Aſſ. 31. and the donatives of the king are out of the juriſdiction of the ordinary, and not viſitable by him. Dav. Rep. 46. b. Paſch. 5 Jac. B. R. in Ireland, in the Dean and Chapter of Ferne's caſe.

S. C. cited Watſ. Comp. Inc. 8vo. 520. cap. 14. —Watſ. Comp. Inc. 8vo. 305, 306. cap. 15. cites S. C. ——

[3. *But* in ſuch caſe of a donative parochial, a man, who is *merely a layman, is not capable* thereof, but a clerk infra ſacros ordines is; for though he comes in by lay donation, and not by admiſſion and inſtitution, yet his *function is ſpiritual.* Co. Litt. 601. the ſaid caſe of St. Burien ſaid to be reſolved.]

Popham Ch. J. ſaid, that though a church donative in the execution of the charge be ſpiritual, yet the patron may collate a mere layman as well as the king may make a temporal man a dean, quod ſæpe accidit; but Gaudy, Fenner, Yelverton, and Williams contra. Yelv. 61. Paſch. 3 Jac. in the caſe of Fairchild v. Gaier.

[313] (S) Advowſon. *Church with Cure. What* was a Church with Cure. [And *who* ſhall be ſaid to *have* the *Curam Animarum.*]

The church of Weſtbourne in Suſſex has a *parſon and vicar*, and *both are* admitted, inſtituted, and *inducted, and* both *have houſes there.* In ejectment for the rectory it was inſiſted for the vicar, that the *vicar pays ſynodals and procurations, and other charges of the viſitation* only, and *was attendant upon the ordinary*, and *reads divine ſervice*, and officiated there, *which the parſon did not above once or twice in the year*; and *ſeveral ancient inſtitutions and inductions of vicars were produced, but* they *could not ſhew the endowment itſelf*; on the other ſide it was inſiſted for the right of the parſon, that all fine-cures are ſuch either in reſpect of the inability of the parſon as impropriators, or in reſpect of privilege of not being viſitable, that it could not be a fine-cura as to him, becauſe he was inſtituted by the ordinary, and therefore viſitable by him. It was agreed per Cur. that as well parſon as vicar may have curam animarum within the ſame church; for there may be two diſtinct patrons and two diſtinct incumbents of the undivided moieties of the ſame church; and they paid no regard to the caſe in Roll Preſentment, 341. for both being preſentative, the cure prima facie is in both; and whether *habitually* in the parſon, and *actually* in the vicar, is matter of evidence, ſince every one that is inſtituted has cure, though (accipe curam tuam & meam) be not in the inſtrument of inſtitution, in which obſervation Lord Coke (Co. Litt. 334.) is miſtaken. Sid. 426. Mich. 21 Car. 2. B. R. Clarke v. Pryn, and Clark v. Heath.

Note, it was ſaid, that there are ſeveral churches in England which have vicars endowed with cure, and yet the parſon has concurrent cure, and *both take the oath of canonical obedience*, and both are ſubject to the ordinary as to their lives, doctrine, and repairs of houſes, &c. Ibid. 427. —And after conference with Sir Geoffrey Palmer, the Attorney-general, he ſaid, that the law had been taken before to be, that every inſtitution ſuppoſed a cure of ſouls, yet by his experience in his office he found, that the king had ſeveral donatives in Wales, and yet the parſons thereof are preſented and inſtituted by the biſhop as well as the vicars; but he intends, that the *vicars are inſtituted to all the ſpiritualties, and the parſons to all the temporalties, except ſuch whereof the vicar is endowed*; and ſaid, he had ſeen two precedents among the ancient charters in the Tower to that purpoſe. Ibid. —— Vent. 15. S. C. by name of Heath v. Prynn.

A parſonage and vicarage are *two diſtinct eccleſiaſtical benefices*, and the parſon and vicar have curam animarum, the *parſon habitualiter*, and the *vicar actualiter*. Per Noy, Arg. Cro. J. 518. in caſe of Britton v. Wade, cites 31 H. 6. 14. 17 E. 3. 76. 5 E. 2. Quare Impedit, 165.

[1. *A Prebend* is not with cure of ſouls. 29 E. 3. 44. Admitted.]

[2. If there be a *vicar endowed, who is preſentative, and a parſon preſentative*, it ſeems that the parſon has not the cure of ſouls but the vicar. 5 E. 2. Quare Impedit, 165. per Paſton.]

[3. If an *abbot*, or ſuch like ſpiritual man, had been *parſon appropriate before the ſtatute of monaſteries*, he ſhould have the cure of ſouls;

ſouls; for he differs from another parſon only in this, that he ſhall be parſon perpetual, and the other but for life. Com. GRENDON, 496. b.]

[4. A *donative of the king* may be with the cure of ſouls, as the *church of the Tower of London*; this is a donative with cure, and of the gift * of the king; for till the time of king John all biſhopricks in England were donatives, and ſo they are at this day in Ireland. M. 6 Car. B. R. between FLETCHER AND MACKALLER, per Curiam, in an information upon the ſtatute of ſimony, for taking the church of the Tower (being a donative of the king) for money.] (R) pl. 1. S. C. * Fol. 342.

S. P. There are alſo another kind of churches, which are neither preſentative or donative, but *ſtipendiary*, and yet have cure of ſouls; as if there be an *impropriation*, and it *has no vicarage*, but only a certain ſtipend is given yearly to him that ſerves the cure, and that is merely *dative*, and at the pleaſure of the impropriator. 6 Mod. 230. in caſe of Jacob v. Dallow.

(T) *Patron* of an Advowſon, who; and how conſidered. *Where one has* the *Nomination, and another* the *Preſentation.* [314]

1. IN quare impedit, the plaintiff *counted upon fine, by which J. N. granted to W. P. and his feme and their heirs, that as often as the chapel of B. voids, they ſhall preſent a clerk to the grantor, or his heirs, and that they ſhall preſent him over to the biſhop;* and per Curiam this is a grant of the preſentation, but becauſe it came to the king by eſcheat, and he counted as above, but *did not ſhew if he preſented to the grantor, and he refuſed to accept it*, or if he accepted it, and would not preſent over to the biſhop, therefore it was uncertain, and was amended; and ſo ſee that the grantee was patron, and therefore he ſhall not be put to writ of covenant againſt him, who ought to preſent over, but ſhall have quare impedit. Pl. 99. cites 24 E. 3. 69.

2. In quare impedit the plaintiff *counted, that the abbot of B. time out of mind, and his covent, have uſed to elect one* of *their monks to be prior of C. which is a cell to the monaſtery of B. and preſent him to the anceſtor of the plaintiff whoſe heir, &c. and that they have uſed to preſent him over to the ordinary, and alleged preſcription* therein, *and alſo ſeiſin*, by preſentation of one T. B. who was admitted, and that their preſentee ſo admitted is dead, by whoſe death the church voided, and now the abbot has preſented immediately to the biſhop, without preſenting him to the plaintiff, and ſo diſturbed him, to the damage, &c. And it is ſaid there that *preſcription is ſufficient* title of itſelf; for it *ſuffices to ſay, that he is lord of the manor of C. and that all the lords of the ſaid manor time out of mind have preſented.* And per Skip. divers preſentments in quare impedit are double; and the defendant ſaid, that time out of mind the abbots have preſented immediately to the ordinary, and after have uſed by their letters to certify it to the earls of H. whoſe heir the plaintiff is, requiring them to be favourable to them, by which T. B. was ſo preſented by the abbot to the ordinary, and inſtituted

Dod. of Adv. 67. Lect. 12. ſays, he thinks the law to be thus: if one hath the nomination and another the preſentation, and the church becomes void, if the lapſe incur, and he that hath the preſentation only preſents to the biſhop, before the biſhop takes benefit of the lapſe,

without any nomination of the other, the biſhop in this caſe ought, and is bound to admit his clerk, then are they both patrons after a manner, and by injury offered by every of them to the other, one of them may puniſh the other. As if he that hath the nomination will preſent immediately to the ordinary, he that hath the preſentation may bring a quare impedit or a writ of right of advowſon againſt him, as his caſe requires; ſo if he that hath the preſentation refuſes to preſent the clerk nominated to him, or preſents one himſelf without nomination, the other ſhall bring a quare impedit, or a writ of right againſt him, and his writ ſhall be quod permittat ipſum præſentare, &c. but in his declaration he ſhall declare the ſpecial matter.—And though the one has *writ to the biſhop*, yet this ſhall not ouſt the other of the poſſeſſion; and if the parſon makes a leaſe or grants a rent-charge, this charge ought to be *confirmed by both*; but in writ of annuity brought againſt the parſon, *aid* is grantable only of him that has the preſentation; for this is in the right. Mo. 49. 147. Paſch. 5 Eliz. Anon.

inſtituted and received; abſque hoc, that he was received and inſtituted at the preſentment of the earl anceſtor of the plaintiff; priſt and the plaintiff e contra; and ſo it ſeems here, that if the count is true, the plaintiff is patron, and not the abbot; quære. Br. Quare Impedit, pl. 101. cites 24 E. 3. 77.

that he ſo preſenteth as the clerk of the patron himſelf. If reſpect be had of each other,

The writ ought to be quod permittat ipſum præſentare; *but his declaration ſhall be ſpecial*, viz. that the plaintiff ought to nominate one, ‡ and that he ought to

3. Quare impedit the plaintiff made title, becauſe *fine was levied between J. N. and the abbot of B. of the advowſon*, and the ſame *abbot granted* by the ſame fine, *that J. N. and his heirs, at every avoidance, ſhall name to him his clerk, and he ſhould preſent him over to the biſhop*, and *alleged ſeiſin* accordingly, and that the church is void, and he named a clerk to the * abbot, and he would not preſent him to the biſhop, by which he brought quare impedit, and it was quod permittat ipſum nominare clericum, &c. where it ſhould be preſentare clericum; and therefore the writ was abated. Br. Quare Impedit, pl. 56. cites † 4 H. 4. 10, 11.

preſent him over to the biſhop, and the *writ to the biſhop* upon a recovery by the plaintiff *ſhall be, quod epiſcopus admittat clericum ad denominationem*, &c. Dod. of Adv. 65. Lect. 12.——* All the editions of Brook are (eveſque), but it ſeems it ſhould be (abbé).—[† It ſhould be 14 H. 4. 10, 11.]

‡ [315]

S. C. cited Dod. of Adv. 65. Lect. 12. but miſprinted, as 14 E. 4. (26.) whereas there are not ſo many folio's in that

4. If a man grants to me, that *I ſhall name a clerk, and he ſhall preſent him to the ordinary*, I am patron; *but if he grants to me that I ſhall name two, and he ſhall preſent the one*, I am not patron, by reaſon that he has the election; and *grant of nomination and preſentation is all one.* Per Juſticiarios. Brooke ſays, quære in whoſe name the letters of preſentation ſhall be made. Br. Quare Impedit, pl. 133. cites 14 E. 4. 2.

year; but it ſhould be 14 E. 4. 2. b. and the miſtake ſeems to be by turning the (b) into (6).—[*But*] if a man *grants* to me, *that I* and my heirs *ſhall name the clerk* to the church of D. *as often as it void, and that the granter ſhall preſent the ſame clerk to the ordinary*; in this caſe I am patron, and ſhall have quare impedit. Br. Quare Impedit, pl. 144. cites 14 H. 4. 11.

5. If he that hath the nomination preſents to him that hath the preſentation, he that hath the preſentation may *diſturb* in two manners; either *by refuſing the parſon nominated*, or by *preſenting ſome other* himſelf that is not nominated. If he ‖ *refuſe* to preſent him that is nominated to him, and ſuit be commenced *without any actual preſentation made by himſelf*, then the writ to the biſhop of him that hath the nomination ſhall be, *that he ſhall recover his nomination, and that the biſhop ſhall admit ſuch as the other hath nominated* to the preſentor, according to his grant of nomination; *but if* the diſturbance, upon which the ſuit is granted, be, becauſe *the preſentor*, that ſhould preſent the parſon nominated, *hath preſented ſome other*

‖ If the *preſentor refuſes to preſent the nominee* of the nominator, no action lies. Mo. 842. Paſch. 13 Jac. in the caſe of Ford v. Hoſkins.

other himſelf without nomination, then the nominator ſhall immediately, without any nomination at all to be made to the other that hath the preſentation, [have *writ*] *to remove the other incumbent.* Dod. of Adv. 68, 69. Lect. 12.

6. If one hath the nomination, and another the preſentation, if *ſuch right of preſentation accrues to the king*, he that has the nomination *ſhall nominate to the chancellor* ſtill, *who in the name of the king ſhall preſent* to the ordinary. And if the *king preſents without any ſuch nomination*, the nominator ſhall bring his *quare impedit againſt the incumbent only*, becauſe the king cannot be termed as an uſurper. Dod. of Adv. 69. Lect. 12.

7. If a *ſtranger preſents*, he that hath the nomination, and he that hath the preſentation ſhall join in *quare impedit*; the book ſays, that each of them ſhall have quare impedit. D. 48. pl. 17. Marg. cites P. 5 Eliz.

(U) Incumbent. Who.

See (Q. 2) pl. 20.

1. THE incumbent after *a recovery againſt him in quare impedit* continues incumbent *de facto until preſentment* by the recoveror. 2 Roll. R. 62. Mich. 12 Jac. B. R. in the caſe of Whiſtler v. Singleton

2. Where there is an avoidance de facto, and the *king, ſuppoſing he hath a title to preſent by lapſe, doth* accordingly *preſent*, when in truth he *hath no ſuch title*, and a recovery is had againſt him by one who had no title; though he which comes in by ſuch lapſe is not incumbent, nor gains the patronage, yet he is an incumbent as to all eccleſiaſtical things, (viz.) to have offering, tithes, &c. Hutt. 66. Mich. 21 Jac. The ſecond reſolution in the caſe of Rudd v. Biſhop of Lincoln.

3. If the *king preſents and miſtakes his title*, his preſentment is void, and the preſentee is no incumbent. Arg. Het. 51. Mich. 3 Car. C. B. in Thomſon's caſe, cites 6 Rep. 26. Green's caſe.

But where ſuch preſentee in the principal caſe ſued for *dilapidation*, the Court denied a prohibition, becauſe that he was now incumbent, and they would not take notice of the ill preſentment of the king. But in caſe of *ſimony*, the ſtatute makes the church void, and then the *judges may take notice* of that, and grant a prohibition if the parſon ſues for tithes. Hett. 51. Thomſon's caſe.—Litt. Rep. 60. S. C.

4. *Poſſeſſion as* incumbent is not of the *incumbency* itſelf. Per Richardſon Ch. J. Litt. R. 204. Trin. 5 Car. C. B. in Pruſt's caſe. [316]

For more of Parſon and Patron in general, ſee **Appropriations, Diſmes, Donative, Prohibition,** and other proper titles.

Preſentation.

(A. a) *To what Thing* a * Preſentation may be.

* A preſentation *is the nomination of a clerk to the ordinary to be admitted and inſtituted by him* to the benefice void; and the ſame being in writing, is nothing but *a letter miſſive* to the biſhop or ordinary to exhibit to him a clerk to have the voided benefice; the formal force hereof reſteth chiefly in theſe words (præſento vobis clericum meum). Dod. of Adv. 63. Lect. 12. cites 13 H. 8. 14. b. And ſays, that therefore in our books of law an advowſon is called nothing but a nomination or preſentation, a power to enable another to have the benefice, which notwithſtanding the patron cannot enjoy.

[1. BEFORE the time of king John, the king and others, founders and patrons of *priories or abbies*, were wont to preſent priors or abbots. 11 H. 4. 68. b.]

[2. *But* a *free election was granted by king John* to the priors. 11 H. 4. 68. b.]

[3. It is good uſage that the abbot ſhall name a *monk* to the patron of the priory, which is a cell of the abbey, and the patron ſhall preſent him over to the biſhop, and ſo ſhall be inſtituted. 11 H. 4. 68. b.]

[4. So it is a good uſage that the covent of a priory ſhall elect a *prior*, and ſhall nominate him to the patron, and he ſhall preſent him over; and if they do not chooſe within five months, that the patron may preſent whom he pleaſe. 30 E. 3. 21. b.]

[5. A preſentment may be to a *deanry*. 17 E. 3. 40. Adjudged.]

[6. A preſentment may be to an *hoſpital*. 21 E. 3. 6. b.]

A free chapel may be by two means, [7. A preſentment may be to a *chapel*. 14 H. 3. Quare Impedit, 183. Adjudged.]

the one by grant of the king to make it donative, and the other to make it preſentative to the ordinary, and then the ordinary may meddle, and may preſent by lapſe; contra, where it is donative by the founder and his heirs, and there *the ordinary cannot viſit it; and when* free chapel donative is *void*, the *founder may retake it, and not appoint any other incumbent.* Contra of a preſentative. Br. Preſentation, pl. 43. cites 6 H. 7. 14. Per Keeble.

See (B. a) pl. 2.—S. P. Wat. Comp. Inc. 8vo. 207. cap. 13.

[8. If a ſtranger preſents to a *donative*, and his clerk is inſtituted and inducted thereupon, yet it is merely void. Co. Litt. 344.]

(B. a) *What* Act or Thing *will make a Church Preſentative*, which is not Preſentative of itſelf.

See Donative.

[1. IF the *patron of a rectory parochial donative preſents thereto, and his clerk is admitted and inſtituted;* this is now become preſentative, and never ſhall be donative afterwards. Co. Litt. 344.] S. P. Cro. J. 63. Paſch. 3 Jac. B. R. in the caſe of Fairchild v. Gayer —*So of a chapel donative.* Br. Corporations, pl. 76. cites Old Natura Brevium, 35.—*So of a chapel annexed to another church.* Br. Quare Impedit, pl. 39. cites Fitzh. tit. Quare Impedit, 151. 18 E. 3. 15. —Br. Preſentation, pl. 9. cites 47 E. 3. 4.—*So if an abbot parſon imparſonee preſents.* Br. Corporation, pl. 78. cites Old Nat. Brev. 35.—*So if a man preſents to an abbey elective.* Br. Corporation, pl. 76.

* A private act of parliament divides one pariſh into three; and enacts, that the right of patronage and preſentation ſhall belong to the dean and chapter of D. in ſuch manner as the nomination or preſentation of the old church did, and not otherwiſe. The old church was a donative. The new churches ſhall be preſentable. MS. Tab. tit. Advowſon. Feb. 19, 1717. Shirt v. Carr.

* [317]

[2. *But* if a *ſtranger preſents* thereto, and his clerk is admitted and inſtituted, yet this ſhall not make it preſentative, becauſe it is merely void. Co. Litt. 344.] S. P. Watſ. Comp. Inc. 8vo. 182. cap. 12.—S. P. Watſ. Comp. Inc. 8vo. 304. cap. 15.

3. If the king *preſents to a chapel by name of a church*, it ſhall loſe the name of the chapel; quod nota. Br. Preſentation, pl. 9. cites 47 E. 3. 4.

4. Though uſually a *free chapel* is donative, yet by the foundation, or after *by compoſition*, it may be preſentative. Watſ. Comp. Inc. 8vo. cap. 12.

(C. a) Preſentment to the Church. *What Perſons may preſent*, and who ſhall have the Preſentment. The *King or others.*

Fol. 343.

[1. IF a *prebendary* of *a prebend* be *elected biſhop, and after the king grants the temporalties to him, and afterwards he is conſecrated,* the biſhop ſhall have the preſentment to the *prebend*, and not the king, becauſe it is not made void till conſecration, at which time he was patron; for the [biſhop in reſpect of the] biſhoprick was patron. 41 E. 3. 5. b. adjudged. 46 E. 3. 34. accordingly, where the incumbent of an *hoſpital* is created a biſhop.] Dr. Spencer, who was one of the prebendaries of Ely, was *made dean* by the king; ſo that the prebend was avoided by ceſſion. The queſtion was, who ſhould preſent to the prebend, the king, or the biſhop to whom it did belong, if this ceſſion had not intitled the king? The Judges ſeemed to incline for the king, but it was adjourned for further argument. Freem. Rep. 256. pl. 272. Trin. 1678. The King v. Biſhop of Ely.

[2. *But if* the *incumbent be made biſhop by the pope*, and after the temporalties are granted to him, the king ſhall preſent thereto, though the *biſhop be patron.* 46 E. 3. 32.]

[3. If the *king creates an incumbent of a common perſon* a biſhop, the patron ſhall preſent, and not the king. 41 E. 3. 5. b. admitted, and * 44 E. 3. 15. b. admitted. 46 E. 3. 32. admitted. 7 H. 4. 25. b. 26. admitted. 11 H. 4. 38. 21 E. 3. 40. admitted. For the Where an incumbent is *created a biſhop*, the king or other patron may

preſent to his ancient benefices. Quære of the patron; for ſome ſay now, that in ſuch caſe of creation the *king ſhall preſent to all, of whoſoever patronage they are.* And per Norton, *baſtard* ſhall not preſent to a church; *quære* of this uſage; for *it ſeems that the king ſhall not preſent to another's advowſon.* Br. Preſentation, pl. 14. cites 11 H. 4. 37.—*Parſon is made a biſhop*; the king ſhall preſent not only hac vice, but *toties quoties.* 3 Lev. 377. Mich. 5 W. & M. C. B. The King v. the Biſhop of London.—The king has the ſame prerogative in *churches newly erected*, as in old churches, to preſent on *promotion* of a parſon to a biſhoprick. 3 Lev. 382. Mich. 5 W. & M. C. B. The King v. the Biſhop of London.—* It ſhould be 44 E. 3. 25. b. pl. 34.—† Mo. 399. Wright's caſe. S. P.

the king made title to it as guardian in chivalry of the patron. D. 6 El. 228. 48. and 7 El. 223. 12. adjudged as it ſeems. But the law is otherwiſe now generally taken and agreed, ſcilicet, that the † king ſhall have the preſentment. Contra, H. 29 El. B. R. HOLLAND's caſe.]

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For it was void the ſame day that the temporalties came into the king's hands.

[4. If a *church voids, to which the biſhop has title to preſent* as patron, *in reſpect of the temporalties*, if he *dies before preſentment*, ‡ the king ſhall have the preſentment, and not his executors. ‖ 50 E. 3. 26. 9 H. 6. 16. b. admitted. 24 E. 3. 26. b. Curia.]

Br. Preſentation, pl. 4. cites 44 E. 3. 3. Per Thorp & Belknap.—The truth of the caſe was, that the *biſhop preſented his clerk, who was admitted, inſtituted and inducted before dinner, and he died the ſame day after dinner*; but the preſentee was a proviſor, and *had not corporal poſſeſſion in life of the biſhop.* Ibid. [But quære as to the induction, though it is ſo mentioned in the Year-book and in Brook; and Brook ſays ſic vide, that it is no plenarty againſt the king till induction.]——Br. Plenarty, pl. 3. cites S. C. —— And where the king has the temporalties in time of vacation, and dies, the next king ſhall have them, and not the executors, and yet it is but a chattel. Br. Prerogative, pl. 85. cites 24 E. 3. 42.——*Where the king is intitled to the poſſeſſion, and finds the church void, he ſhall have the preſentation*; and ſo it appears often in F. N. B. Br. Preſentation, pl. 29. ——*As* in quare impedit the biſhop of D. was patron of C. the church voided, and *the biſhop* gave the preſentation, ſcilicet, *made collation* to W. C. and after the biſhop *died the ſame day* that he gave it, and *before inſtitution and induction*, by which the king had writ to the biſhop, and the gift void. Br. Preſentation, pl. 29. cites 24 E. 3. 30.—— ‖ Ibid. pl. 10. cites S. C.——Br. Quare Impedit, pl. 42. cites S. C.

[5. *And* if abbot or *biſhop be patron, and the church voids*, and the abbot *dies*, by which the temporalties come into the hands of the king, and after *livery is ſued by the ſucceſſor out of the hands of the king*; the king ſhall have the preſentment. 7 H. 4. 25. b. 18 E. 3. 1. 20. 24 E. 3. 26. b. Curia.]

[6. If *during the vacancy of the archbiſhop of York, and the temporalties being in the hands of the king*, the *deanry voids*, the king ſhall have the preſentment thereto, though by *compoſition* between the archbiſhop and the chapter, the chapter is to elect him; for de jure the patronage thereof belongs to the archbiſhop, and the compoſition cannot bind the king who comes in *paramount*, as ſupreme patron. 17 E. 3. 40. adjudged.]

In quare impedit the *plaintiff ſaid, that J. S. was ſeiſed of the manor of D. and the advowſon appendant and preſented, and after gave the manor cum pertinentiis to the grandfather of the plaintiff in tail, who was ſeiſed, and had iſſue 4 daughters*, and *died*, and that *he is heir to the eldeſt*; and the tenant in tail died, and *the four daughters entered into the manor and into other land, and made purparty of the land and manor, except the advowſon*, and the advowſon remained to them in common; the *eldeſt daughter died*, the *church voided*, and they could not agree in the preſentment, *by which the preſentment belonged to the plaintiff as ſon and heir of the eldeſt daughter*, who preſented, and the defendant diſturbed him; *the defendant ſaid, that the land was held of the king, and he ſeiſed, and the three others ſued livery of their parts* (for they three were of full age), *and the plaintiff, ſon of the eldeſt ſiſter, was within age, and in ward* of the king, *and the church voided and the king preſented*; and at full age the plaintiff ſued livery of his part, and all in common ſued livery of the advowſon, and now the church is void again, by which it belonged to the defendant, as heir to the ſecond daughter, to preſent. Lawton ſaid, the preſentment of the king ſhall be ſaid in the right of all the parceners, and not in right of the eldeſt only; and therefore now, becauſe they cannot agree in preſentment, it belongs to the eldeſt; which

[7. If the *youngeſt daughter coparcener be in ward to the king*, and the *church voids*; the king ſhall have the preſentation alone, and not the other coparceners. 47 E. 3. 14. b. admitted.]

Choke

Choke denied, and ſaid, that it ſhall be ſaid the turn of the eldeſt only, which the king took; but the Court was againſt him; quod nota; by which the *defendant pleaded partition to preſent by turn.* Br. Preſentation, pl. 35. cites 38 H. 6. 9.——Br. Prerogative, pl. 44. cites S. C.——Br. Livery, pl. 25. cites S. C.

8. In quare impedit it is agreed, that where an * *incumbent* is *created a biſhop, his ancient benefices are become void in fact*, and the *patron may preſent; but* † where a parſon *takes ſeveral benefices incompatible without licence* or plurality, *this is a voidance in law*, and he *ought to be deprived of one of thoſe before the patron can preſent*, and the patron may ſue the deprivation to the ordinary. Br. Preſentation, pl. 14. cites 11 H. 4. 37.

* S. P. Br. Preſentation, pl. 48. cites S. C. For he who has an office of ſovereignty, cannot uſe an inferior office.—

† Br. Depoſition, pl. 3. cites S. C.

9. *Conuſee was of a ſtatute* upon which a manor is extended, to which advowſon is appendant. Per Cur. the advowſon may be extended; and if it become void during the conuſee's eſtate, the conuſee may preſent. Ow. 49. Mich. 32 & 33 Eliz. Arundell v. Biſhop of Glouceſter.

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10 It was adjudged that *truſtees of a term* for 500 years, for the raiſing 6000l. ſhould preſent. See Lutw. 902. b. Paſch. 11 W. 3. B. R. in the pleadings of the releaſe. Biſhop of Exon and Heſket v. Freek.

11. *If A. ſells an advowſon to B.* but *before the conveyance* to B. and during the ſeiſin of A. *the church becomes void*, though it remains vacant till after the conveyance to B. yet B. cannot preſent. 2 Lutw. 1631. Trin. 2 Ann. C. B. Crane v. the Biſhop of Norwich.

12. *Excommunicated perſons* were ſaid per Keble to have no ability to preſent to a church. Wentw. Off. Execut. 16.

It is ſaid that perſons outlawed and excommunicated may preſent to their churches, and their preſentations ſhall ſtand good till ſuch time as they be avoided. Watſ. Comp. Inc. 8vo. 249. cap. 13. cites Parſon's Law, cap. 10. But adds a quære whether the biſhop may not refuſe the preſentees of ſuch perſons, and ſo ſuffer the churches to lapſe to himſelf.

13. If an *alien* born *purchaſes an advowſon*, and the church becomes void *after office found* that he is an alien, *the king ſhall preſent.* Watſ. Comp. Inc. 8vo. 179. cap. 11. cites Parſon's Law, fol. 7. cap. 10.

(D. a) *In what Caſes* the *King* ſhall preſent.

[1. IF A. be *found in ward* by office, for land held *in capite*, and that he is ſeiſed of an *advowſon in fee*, or that he is of full age, and after his full age, the king being intitled to a livery, A. *tenders his livery*, and *after the church voids before livery ſued*, but after livery is ſued without any default made after the tender, yet the king ſhall preſent; for though the livery is diſcharged if he dies before livery ſued, as HALE's caſe is, yet the *poſſeſſion of his land and of the advowſon is not* ‡ *out of the king till the livery ſued out.* This is the courſe of the court of wards.]

‡ Fol. 344.

[2. Though

* S. C. and P. cited Arg. Show. 489. Mich. 5 W. & M. in caſe of the King v. Dr. Birch. —And cites D. 428. b. Parkhurſt's caſe.—And. 233. a.

[2. Though it be admitted that if the *incumbent of a common perſon* be created a biſhop, that the king ſhall have the preſentment to the church for this turn by his prerogative, yet it ſeems if the *king grants to the incumbent before he is created biſhop, a diſpenſation retinere* the church with his biſhoprick, and *after he is created biſhop, and dies incumbent*, it ſeems the king ſhall * not preſent to his church by his prerogative, becauſe the church is not void by his making him biſhop, in which caſe the prerogative gives the preſentment to the king, but by death of the incumbent, in which no prerogative holds place. Co. Ent. 474. HELE's caſe, there pleaded that in ſuch caſe the church voided by death, and admitted that it appertains to the patron to preſent upon his death.]

The caſe was, that a *man who held of the king in chief held another manor with an advowſon appendant of another for term of life*, the *reverſion to J. N.* and died, the *king ſeiſed all*, and the *advowſon voided*, and he in *reverſion ſued to the king, and obtained ouſter le main cum exitibus* of the manor (and it is ſaid there, that the *king has right in this caſe to ſeiſe, but not to retain)*; he in *reverſion preſented*, and the *king brought quare impedit, bearing date before the ouſter le main*, and the king recovered the preſentment; *for by the voidance the preſentation was veſted in the king by reaſon of his lawful ſeiſure* of the land of his tenant, ad quod, &c. and the ouſter le main cum exitibus does not give the *preſentation*; for this *is neither iſſues nor profits*, but was a thing veſted in the king, and yet by livery of the land to him who right has, fees and advowſon ſhall paſs, but not preſentations veſted before. Br. Preſentation, pl. 28. cites 24 E. 3. 59. ——Br. Prerogative, pl. 31. cites S. C. [And both Roll and Brooke are right; that in page 29. is pl. 16. and the other in page 59. is pl. 48.]

[3. If the *king ſeiſes an advowſon without cauſe* ignorans tituli ſui, *and after the advowſon voids*, and *he, who right has, comes and has ouſter le main cum exitibus*, yet he ſhall loſe the preſentment hac vice, for nothing paſſes by the word *(exitibus)* but rents and profits of a thing, and not the preſentment; for it is not profit to the patron, but pre-eminence, and the profit is to the parſon, and if the patron takes the profits it is ſimony. 24 E. 3. 29. and Brook Iſſues, 21. 26.]

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Where the *church voided after the temporalties came into the hands of the king*, and the *king died*, and they came to the after king, the *ſucceſſor king ſhall not preſent* by reaſon of the ſtatute, 25 E. 3. pro clero, cap. 1. [which ſee Paſt. 112.] *That the king ſhould not preſent in another's right of any avoidance but in his own time.* Br. Preſentation, pl. 13. cites 11 H. 4. 7.

[4. If a *prebend voids, the temporalties being in the hands of the king*, the king ſhall have the preſentment. 18 E. 3. 31. b. 21 E. 3. 5. adjudged, 29, 30. 24 E. 3. 26. b. Curia. 1 E. 3. 22. b. 5 E. 2. Quare Impedit, 165. Adjudged in caſe of a vicarage. 19 E. 2. Quare Impedit, 178. Adjudged of a *vicarage*, though ſaid that it was ſpiritual.]

It is no plea that it did not void during its being in the hands of the king by reaſon of the death of R. late biſhop; for if the temporalties were in the king's hands by death of any other, or by other means, yet the king ſhall preſent. Br. Quare Impedit, pl. 94. cites 24 E. 3. 26. ——So if an advowſon be void by 6 months, at which time the king is ſeiſed of the temporalties of the biſhoprick, the king ſhall preſent to this advowſon as the biſhop ſhould do. F. N. B. 34. (G) ——Where it is awarded, that the temporalties of a biſhop be ſeiſed into the king's hands, the king ſhall take conuſance of them, and ſhall preſent to an advowſon without office; for the temporalties of a biſhop are always of record in the Exchequer. Br. Office devant, &c. pl. 17. cites Fitzh. tit. Scire Facias, 113. 21 E. 3. 30.

[5. If a *church of the patronage of the biſhop voids after the death of the biſhop, and before ſeiſure of the temporalties*, yet the king ſhall have the preſentment. 12 E. 3. Quare Impedit, 56. per Shard.]

The king ſhall not have preſentment *to the advowſon in groſs by the ward of an infant* who is *in ward for other lands*; per Brian. But all the king's ſerjeants

[6. So if the *tenant of the king dies, and* after, *before ſeiſure of his heir in ward, a church voids*, the king ſhall have this preſentment. 12 E. 3. Quare Impedit, 56.]

jeants contra; for, becauſe the king has the body, therefore he ſhall have the preſentations. Br. Preſentation, pl. 42. cites 3 H. 7. 5.

[7. If the *tenant of the king has title to preſent* to an advowſon which is *void by ſix months*, and after the tenant of the king *dies before the biſhop preſents by lapſe*, *his heir* within age and *in ward* of the king; now the biſhop ſhall not preſent by lapſe, but the king ſhall preſent. Fitz. Nat. 35. a. and there vouches 18 E. 3.]

[8. If there are *three coparceners* of an advowſon, whereof *one is* within age, and *in ward to the king*, and *the other two of full age ſue livery with partition, ſaving the prerogative* of the king, to preſent to the avoidances during the minority of the ward, and after the *church voids during the minority*, the king ſhall preſent. 31 E. 3. Quare Impedit, 1. Adjudged.]

Quare Impedit by the king; the *tenant of the king had iſſue three daughters and died*, and the *tenements came to the king by his prerogative*, and *partition was made in Chancery*, and this *advowſon allotted to the one who took baron, and had iſſue and died, the iſſue within age and in ward of the king*, and the *prebend voided, and the king preſented*, the *defendant ſaid, that after this the three daughters made partition to preſent by turn, and that the firſt had her turn, and* then the *ſecond, and* the *third took the defendant to baron, and had iſſue, and died, and this avoidance now belongs to him as tenant by the curteſy, and ſhewed the compoſition*, and becauſe by the firſt partition in Chancery the king was aſcertained of his tenant of record, and *this new partition without licence of the king is an alienation in law without licence*, therefore judgment pro rege; for it was agreed, that though partition be made between parceners, they are yet in by the common anceſtor and may vouch as heir, and every one ſhall have advantage as heir, yet by the partition in Chancery, the one was ſole tenant [to the king] of the advowſon, and by the laſt partition to preſent by turn all are tenants thereof, and writ of right of advowſon ſhall be brought againſt all, and before againſt every one alone, and * ſo the king was a ſtranger to his tenant [by the compoſition which could not be without licence.] Quod nota; and therefore the king recovered. † Br. Quare Impedit, pl. 73. cites 21 E. 3. 30, 31. ——*And* it was ſaid, that where the *king has advowſon in common with others, as by cauſe of nonage of an infant, who has title to preſent by turn* or otherwiſe, that the king by his *prerogative* ſhall have the preſentment at every voidance ſo long as any parcel of the advowſon remains in his hands. Brooke ſays, *quære inde*; for this is a partition; *but if no partition was*, then the king by the intereſt of the one coparcener ſhall have the whole preſentation. Ibid. ——Br. Alienation, pl. 7. cites S. C. ——Br. Prerogative, pl. 21. cites S. C.

[* Br. is, (et iſſint eſtranger del Roy de ſon tenant) but the Year-book is as tranſlated.]

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10. The biſhop of Ely ſaid to me, that he had ſeen a *preſentation in the time of king E.* 3. made by the ſaid king, whereby he preſented to a benefice pro illa vice which was of another's patronage, by theſe words, *ratione prerogativæ ſuæ*, which benefice voided *by reaſon that the king had made the incumbent thereof a biſhop*, who was conſecrated. So that when benefices become void by making of an incumbent a biſhop, the king ſhall preſent to all his firſt benefices pro illa vice, whoſoever is patron of it; quod nota. Br. Preſentation, pl. 61. cites 5 M. 1.

Ever ſince this caſe was abridged by Brooke, this prerogative has been enjoyed by the kings of England, and there are no precedents that the patron has preſented upon the promotion of his incumbent; per Cur. 4 Mod. 210. in delivering the judgment of the Court in the caſe of the Attorney-general v. Biſhop of London, Dr. Lancaſter, and Dr. Birch.

Fol. 345.

(E. a) In what Caſes the King ſhall preſent *where Chattel veſts.*

[1. IF the *tenant of the king has an advowſon which voids*, and after *dies his heir in ward to the king*, the king ſhall have the preſentment, and not the executor of the father. 18 E. 3. 21. 12 E. 3. Quare Impedit, 159. Though the heir be of full age.]

[2. The *law* would be the ſame though *lapſe had incurred to the ordinary in time of the father*, if the ordinary had *not collated before his death*. 18 E. 3. 21.]

Br. Preſentation, pl. 17. cites 38 E. 3. 3, 4. S. P. but that among common perſons it is otherwiſe.

[3. If the tenant of the king has an advowſon which voids, and *the tenant preſents, and his clerk is admitted and inſtituted*, and *before induction* the patron *dies, and the advowſon comes by wardſhip to the king*, he ſhall preſent; for the church is not full againſt him before induction. 38 E. 3. 9. by Thorpe. 21 E. 4. 34. b. ſaid to be adjudged in the 40 of E. 3.]

[4. If a *church of the patronage of a biſhop voids in time of the biſhop*, and after the *biſhop dies*, the king ſhall have the preſentment by reaſon of the temporalties, and not his executor. 21 E. 3. 6. b. 50 E. 3. 26. 9 H. 6. 16. b. 29 E. 3. 44. 24 E. 3. 30. Adjudged.]

[5. If a church of the patronage of a biſhop, abbot, or prior voids, and the *biſhop*, abbot, or prior *preſents*, *and* after *dies before inſtitution*, the king ſhall have this preſentment by his prerogative. Liber Parliamentorum, 21 E. 1. The prior of BERMONDSEY's caſe, adjudged in parliament. 24 E. 3. 30. Adjudged.]

So after collation to a prebend, if he dies before induction, by which the temporalties come to the king.

[6. *So* if the biſhop, abbot, or prior *dies after inſtitution* of the clerk, *and before induction*, the king ſhall have this preſentment by his prerogative. 11 H. 4. 9. by all the Juſtices. Fitz. Nat. 34. K. 36 K. 33 E. 3. 4. Hobart's Reports, 208.]

Br. Preſentation, pl. 13. cites 11 H. 4. 7. per Cur.

[7. Contra Liber Parl. 21 E. 4. 24 E. 3. 30. Admitted per Curiam, ſaying, donum nullum [eſt] if inſtitution be not made in his life.]

[8. If the *king has an advowſon by cauſe of a wardſhip, and grants it* to another *during the minority* of the ward, and after the *church voids, and continues void till the full age* of the ward, by which the eſtate of the grantee is determined, yet the grantee ſhall have the preſentment, and not the king. Contra, 29 E. 3. 8. b. Admitted by iſſue.]

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An avoidance belonging to a biſhop who died, by which the temporalties came into the hands of the king, belongs now to the king.

[9. If *lapſe incurs to the ordinary, and before the 6 months paſt the ordinary is tranſlated or dies*, it ſeems that the king ſhall have the preſentment, and not the ordinary or his executors, or the guardian of the ſpiritualties. P. 40 El. B. Dubitatur. Hobart's Reports, 280. in caſe of death.]

Br. Quare Impedit, pl. 42. cites 50 E. 3. 26. — Br. Preſentation, pl. 10. cites S. C.

[10. If

[10. If a *biſhop has title to preſent* to a prebend, *and preſents* his clerk, who *is inſtituted and inducted in the morning*, and *after dinner the ſame day the biſhop dies*, by which the temporalties come into the hands of the king, yet the king ſhall not have this preſentment. * 43 E. 3. 3.] See (C) pl. 4. * This ſhould be 44 E. 3. 3.

(F. a) Preſentment to the Church. *Who* ſhall preſent.

[1. OF common right the patronage of the *deanry of the archbiſhoprick* appertains to the archbiſhop, and he ſhall preſent to the avoidance. 17 E. 3. 40. b.]

[2. *But by compoſition* it may be elective by the chapter, and yet the patronage ſhall remain in the archbiſhop. 17 E. 3. 40. b.] Fol. 346.

[3. The patronage of a *prebend* appertains to the biſhop, and he ſhall preſent thereto. 17 E. 3. 40. b.]

[4. If the *parſon ought to preſent to the vicarage*, yet if *the vicarage becomes void during the vacancy of the parſonage*, the patron of the parſonage ſhall preſent. † 19 E. 2. Quare Impedit, 178.] If a vicarage happen void, and before the parſon preſents he is made a biſhop, &c. yet he ſhall preſent to this vicarage becauſe it was a chattel veſted. F. N. B. 34. (N). —— † Watſ. Comp. Inc. 8vo. 248. cap. 13. cites S. C. And Dr. Watſon conceives, that if the parſonage be filled before the vicarage, yet the right of preſenting to the vicarage remains in the patron of the parſonage. Quære.

5. If the king grants to an abbot and his ſucceſſors, that the monks ſhall have the temporalties during the vacation; now if the advowſon happen void during the vacation, the monks ſhall preſent to the ſame. F. N. B. 33. (U) cites Mich. 30 E. 3.

6. By the ſtatute 3 Jac. 1. cap. 5. a *popiſh recuſant convict* is diſabled to preſent, &c. See Recuſant.

(F. a. 2) Who ſhall preſent *in reſpect of Eſtate.*

1. WHERE a *man has a ward*, and *advowſon voids*, and the *heir comes to full age before preſentation*, yet the guardian ſhall have the preſentation. Br. Preſentation, pl. 18. cites ‡ 18 E. 3. 36. S. P. If he preſents within the 6 months. Br. Quare Impedit, pl. 67. cites 38 E. 3. 35. S. C. —— *So of tenant pur auter vie*, or ‖ *termor*, where their intereſt determines after voidance and before preſentation. Ibid. Per Finch. —— Br. Quare Impedit, pl. 67. cites S. C. and P. —— ‖ S. P. Br. Preſentation, pl. 22. cites it as ſaid elſewhere. —— ‡ It ſhould be (38) E. 3. 36.

§ [323] 2. Where a man *grants proximam præſentationem*, and *dies*, his *heir being in ward of the king*, and the *church voids*, the king ſhall have the § preſentation, and not the grantee; per Wilby. Brooke ſays, quære inde, becauſe it ſeems to be contrary to law. Br. Preſentation, pl. 19. cites 21 E. 3. 38. Where a man grants the next preſentation of an advowſon, if the *grantor die*, and the *church voids*, the grantee ſhall have the preſentation, and not the lord in chivalry, of whom the land and advowſon is held, by reaſon of the cuſtody of the heir within age; for the lord ſhall not ouſt the grantee, termor, nor ſuch like. Br. Quare Impedit, pl. 121. cites 5 H. 7. 36. by the beſt opinion.

3. It is good title for the *lord* to preſent *where the heir enters for condition deſcended*, he being *within age*; for he is in as heir, and ſhall be in ward; and the lord ſhall preſent. Admitted without argument. Br. Quare Impedit, pl. 106. cites 39 E. 3. 37.

S. P. Per Finch. Br. Preſentation, pl. 18. cites 18 E. 3. 36.—S. P. Co. Litt. 120.—S. P.

4. In quare impedit, if *baron* is *ſeiſed of an advowſon in jure uxoris, as in dower*, and the *church voids*, the *feme dies before diſturbance*, and after the baron is diſturbed, he ſhall have this preſentation. Per Thirn. quod non negatur. Br. Preſentation, pl. 15. cites 54 H. 4. 12.

That if the feme dies without iſſue, ſo that the baron is not intitled to be tenant by the courteſy, yet he ſhall have the preſentation. Per Newton. Br. Preſentation, pl. 22. cites 21 H. 6. 56. Watſ. Comp. Inc. 8vo. 121. cap. 9. ſays, that though the wife never did preſent to the church, but died before it voided; the right of preſenting during the huſband's life is lodged in him as tenant by the curteſy, though his wife had but a ſeiſin in law, becauſe he could by no induſtry attain to any other ſeiſin, cites 1 Inſt. 29. a.

5. Where *two churches are united*, there each patron in his turn ſhall have quare impedit, *de medietate advocationis*; for the advowſon is ſevered in right and in poſſeſſion there; but *contra between coparceners*, tenants in common, and the like; for there the advowſon is not ſevered, and therefore the writ ſhall be there *de advocatione medietatis*. Br. Quare Impedit, pl. 107. cites 14 H. 6. 15.

6. If a parſon be *outlawed in* writ of *treſpaſs*, *the church being void*, the king ſhall have the preſentation; which is adjudged anno 22. inter Aſſ. Br. Preſentation, pl. 22. cites 21 H. 6. 56. Per Newton.

7. In quare impedit the caſe was, that *a prior ſeiſed of* 3 *acres and advowſon appendant*, and the *maſter of the college ſeiſed of* 2 *chambers*, he *exchanged by indenture*, and the *prior entered* into the chambers; *but the maſter died, and did not enter* into the 3 acres, and his *ſucceſſor brought quare impedit* at the avoidance. And per Danby clearly, a man cannot preſent to the advowſon appendant, if he has not the land to which, &c. But per Moyle, the ſeiſin tempore vacationis is not traverſable. And ſo Littleton and Moyle againſt Danby and Needham, &c. Br. Preſentation, pl. 30. cites 9 E. 4. 38.

Contra 3 Lev. 47. per tot. Cur. for all is done in one inſtant, the deſcent to the heir, and the falling of the avoidance to the executor; and where *two titles concur in an inſtant the moſt ancient ſhall be preferred*, as in caſe of joint-tenants, the one deviſes his part, the title of the deviſee, and of the ſurvivor fall in one inſtant, the title of the ſurvivor being the moſt ancient right ſhall be preferred. Mich. 33 Car. 2. C. B. Holt v. the Biſhop of Winton.—* It ſhould be 21 H. 7. 21.

8. In quare impedit it was agreed, that if a man be *ſeiſed of an advowſon in fee*, and the *church voids*, and he *dies*, the executor ſhall have the preſentation and not the heir. Br. Preſentation, pl. 34. cites * 21 H. 7. 22.

9. A *manor*, to which an *advowſon* was *appendant*, *came to queen Mary by* an *attainder of* the *patron* the earl of Northampton, who had only an eſtate for life in it, and *ſhe made a leaſe* thereof to R. & W. for forty years, if the earl ſhould ſo long live. The *church became void*, and *one* Twiniko, *who claimed not under the leaſe* to R. & W. *preſented* M. who was inſtituted and inducted, all which was pleaded, *but the manor being ſettled in remainder* in fee *to H. 8. queen Eliz. as heir* to him, *preſented upon his avoidance*; but adjudged againſt her, becauſe there is not a bare uſurpation pleaded againſt the

the queen, but alſo an eſtate, viz. a leaſe for years in the ſaid advowſon derived from Q. Mary, and that the avoidance, whereupon the action is brought, falleth within the ſaid term, ſo as the queen, who is plaintiff, is encountered with the leaſe of her anceſtor, againſt which ſhe cannot make title to preſent without ſpecial matter; wherefore judgment was given againſt the queen. Le. 44. pl. 58. Mich. 28 & 29 Eliz. The Queen v. Middleton.

10. A *manor* to which an advowſon is appendant is *extended* on a ſtatute merchant. Per Cur. if it become void during the conuſee's eſtate the *conuſee* may preſent. Owen, 49. Mich. 32 & 33 Eliz. Arundel v. the Biſhop of Glouceſter.

11. If a *man, ſeiſed of an advowſon*, takes a wife, and *dies*, *the heir ſhall have two preſentments*, and *the wife the third*; yea, *though the huſband in his life*-time *had granted* away *the third* turn. Watſ. Comp. Inc. 8vo. 122. cap. 9. cites 2 And. 173. Williams v. the Biſhop of Lincoln and Bailiffs of Bedford & D. 35. b. 28 H. 8.

12. If a *villein purchaſes an advowſon* his *lord ſhall preſent*; becauſe the lord upon ſuch purchaſe of the villein may claim the inheritance of the advowſon, and upon ſuch claim the intereſt thereof ſhall be veſted in him, and then the lord in his own right ſhall preſent to an avoidance. Watſ. Comp. Inc. 8vo. 179. cap. 11. cites Parſon's Law, cap. 10. fol. 75.

(F. a. 3) Who ſhall preſent in reſpect of Eſtate *Mortgagor or Mortgagee.*

1. B. *Mortgaged* to A. *the manor of C.* to which an advowſon is *appendant* A. brings bill to foreclоſe. The church voids. Mortgagor (B) moved for injunction to ſtay proceedings in a quare impedit brought by A. Per Cur. though B. has *no bill*, yet being ready, and offering to pay the principal, intereſt, and coſts, if A. will not accept his money, intereſt ſhall ceaſe, and an *injunction* ſhall be granted as to the *quare impedit*; for A. can make no profit by preſenting, nor account for any value in reſpect thereof to ſink his debt, and A. therefore in that caſe, until a foreclоſure, is but in nature of a truſtee for B. 2 Vern. R. 401. Mich. 1700. Amhurſt v. Dawling.

S. P. admitted by Lord Chancellor King, and by the counſel of both ſides, 2 Wms.'s Rep. 404. Hill. 1726. cited the caſe of Wood and Henchman v. Sir Tho. Stanley—and Serjeant Selby's caſe.—9 Mod. 2. S. P. admitted Arg. Paſch. 1722. in the caſe of Hungerford v. Clay.—*But* where *a mortgage was of an advowſon only without more*, which the mortgagor was poſſeſſed for a term of 99 years, and in the mortgage was a *covenant that on every avoidance the mortgagee ſhould preſent*, it was inſiſted that this differed from a mortgage of an advowſon appendant, though even in that caſe ſuch covenant would be good; and the Court ſeemed to incline thereto, though as to that it gave no opinion, there being another point on which it decreed a diſmiſſion. 2 Wms.'s Rep. 404. Hill. 1726. Gardiner v. Griffith.—Upon the plaintiff's petition Lord Sommers ordered the defendant to revoke his preſentation, and to preſent ſuch parſon as the mortgagor, or his *vendee* (for he had contracted to ſell) ſhould appoint. Ch. Prec. 71. Jory v. Cox.

It was ordered that mortgagee permit *mortgagor to bring quare impedit in mortgagee's name.* 3 Lev. 115. Stanton v. Barker cited in Walker and Hammerſly's caſe.—2 Vern. 450. S. P. though the *mortgagee was in poſſeſſion.* Attorney-general v. Heſketh & al.

Aſſignee of the king's title by reaſon of *ſimony in the mortgagor* brought a quare impedit, and then a bill in Chancery that the mortgage may not be ſet up nor given in evidence againſt him at law, and Lord Wright decreed the ſame. Ch. Prec. 214. Attorney-general for Hindley v. Sudall. Heſkith & al.

2. A mortgagee of an advowſon held for years, without any other thing joined with it in the mortgage, by virtue of an agreement expreſſed in the mortgage deed for that purpoſe, preſented a clerk on an avoidance; the mortgagor brought a *bill in Chancery ſeven months after the inſtitution, to compel the clerk to reſign*; but Lord C. King diſmiſſed the bill, declaring, that as a quare impedit was confined to ſix months after the laſt incumbent's death, ſo ought a
[325] bill to be limited to the ſame time; but had a quare impedit been brought within the 6 months, and the bill been preferred after the ſix months, the Court might, on a proper caſe, give directions in aid of the quare impedit, that the mortgage ſhould not be given in evidence. 2 Wms.'s Rep. 404. Hill. 726. Gardiner v. Griffith.

3. It ſeems, that if *one*, who is *ſeiſed* in fee *of an advowſon*, *mortgages the ſame* for a ſum of money, and the money not being paid, *the grant becomes* abſolute, *and then the church voids*; *if* during the avoidance the money being paid, and the advowſon reconveyed, the *mortgagor gets the clerk inſtituted* to the void church, the *mortgagee is without* all *remedy*, though the void turn was in him, and could not paſs by his reconveyance of the advowſon. Watſ. Comp. Inc. 8vo. 437. cap. 22.

(G. a) Preſentment to the Church. By *Coparceners*, *Tenants in Common* or *Joint-tenants*. *Who* ſhall preſent *of Common Right*.

S. P. 3 Rep. 22. b. Arg. in Walker's caſe; but ſays that this is not in reſpect of her perſon only, but as it is annexed to her eſtate; for as it is agreed 5 H. 5. 10. her baron, who is tenant by the curteſy, ſhall have it.—* Br. Preſentation, pl. 19. cites S. C.—S. P. Br. Preſentation, pl. 53. cites F. N. B. 34.—S. P. Ibid. pl. 59. cites Doct. & Stud. lib. 2. cap. 26.—S. P. Br. Quare Impedit, pl. 12.

[1. OF common right, if they cannot agree *the eldeſt ſhall preſent* at *the 1ſt voidance*, and the 2d coparcener at the 2d, and ſo on *every one in order*. 17 E. 3. 30. 37. b. Adjudged. * 21 E. 3. 37. b. 38. M. 13 E. 1. B. Rot. 3. 12 H. 7. Kell. 1. D. 35 H. 8. 55. 5 Co. Litt. 116. (f) 186. b. (i).]

Quære as to the *aſſignee before any preſentation* by the eldeſt.

[2. *Alſo this privilege* given to the eldeſt *ſhall go to her* † *iſſue and* ‡ *aſſignee*. Co. Litt. 166. b. (f) 186. b. (i).]

Hill. 18 H. 7. Kell. 49.—† See S. P. admitted Br. Preſentation, pl. 35. cites 38 H. 6. 9.—There is a diverſity between the caſe of a partition by deed by act of the party, for there the privilege of election of the eldeſt daughter ſhall not deſcend to her iſſue, and where the law gives the eldeſt any privilege without her act, there, that privilege ſhall deſcend. Co. Litt. 166. b.—‡ Br. Preſentation, pl. 27. cites 24 E. 3. 52. & Monſtrans de Faits, pl. 65. cites S. C.

See pl. 1. in the notes. Br. Quare Impedit, pl. 62. S. P. cites 5 H. 5. 10.

[3. *So tenant by the curteſy of the eldeſt* ſiſter ſhall have the ſame privilege. Co. Litt. 186. b. (f) 166. b. (i).]

4. If *three joint-tenants* are of an advowſon, and the one preſents, the ordinary is not bound to receive him; but if he does, the other has no remedy; for two cannot have quare impedit againſt the third; contra of coparceners. Br. Quare Impedit, pl. 128. cites 6 E. 4. 10.

5. A *fir*

5. A *fine* was levied *of a manor*, unto which an advowſon was appendant, wherein a *third part was rendered back to A.* for life with divers remainders over, and *ſo of the other two parts, with the advowſon of every 3d part as aforeſaid*; if they cannot agree to preſent, a lapſe ſhall incur; they are all tenants in common, and being *firſt named*, or laſt named, is of no privilege or prejudice; for being *by one deed* it ſhall paſs uno flatu. Arg. Godb. 128. cites 45 E. 3. Br. Fines, pl. 24. cites 45 E. 3. 12.

6. A *grant* was made *of the next preſentation to* Sir Godfrey Foliamb, and *to four* others, & eorum cuilibet conjunctim & diviſim, hæredibus, executoribus & aſſignatis ſuis, and afterwards the church became void, and Sir Godfrey preſented one of the other four grantees; and adjudged, that the *preſentation by one alone* was good. Mo. 4. Trin. 31 H. 8. Sir Godfrey Foliamb's caſe. And. pl. 2. S. C. adjudged accordingly.—4 Le. 119. pl. 240. S. C. adjudged accordingly by the name of Sir William Hollis's caſe.—Bendl. 24. pl. 40. S. C. but mentions no judgment.—See (M. a) pl. 2. S. C.—In caſe of Berry v. Perry. 3 Bulſ. a. 66. Coke Ch. J. Arg. ſays it was reſolved, that this grant was not good, becauſe an intereſt cannot be divided, and ſays, that with this agrees 14 Eliz. D. 304. pl. 54.

7. Two *ſiſters coparceners* of an advowſon, *married*; the *younger* ſiſter *died*, and her huſband was *tenant by the curteſy*. The church voided; the clerk of the huſband of the eldeſt ſiſter was received; and afterwards, the church became void again, and the ſaid huſband *of the youngeſt* ſiſter *preſented*, but being diſturbed, brought a quare impedit, as tenant by the curteſy *in turno ſecundo*, and had judgment. Moor, 224. pl. 304. Paſch. 28 Eliz. Beverley v. Archbiſhop of Canterbury. [326]

8. The next preſentation was granted to 2, and *before the next avoidance one gave a releaſe to the other*; then the incumbent died, and *one* of them *preſented alone*, and being diſturbed, brought a quare impedit, and had judgment; it was aſſigned for error, becauſe one of the grantees had brought this quare impedit in his own name alone; but adjudged maintainable, becauſe the releaſe was made before the church was void, and this judgment was affirmed in error. Moor, 467. pl. 664. Trin. 29 Eliz. Rot. 1038. Lewes v. Bennet.

(H. a) Preſentment to the Church. By Coparceners *by Compoſition*. *How* the Compoſition being.

[1. IF the compoſition *be againſt common right* it ſhall *not bind without deed*. 17 E. 3. 38. b. Adjudged.]

[2. *As* after the eldeſt has preſented if the compoſition be *that the eldeſt ſhall preſent again and then the 2d*, and ſo the others in turn, this ſhall not bind without deed being againſt common right; for de jure the 2d is to preſent. 17 E. 3. 38. b. Adjudged.]

3. In *quare impedit*; the plaintiff makes title, that *compoſition was* had *between the defendant and A. B. to preſent by turn*, and the defendant preſented, and *A. B. granted* to us, our heirs and aſſigns, *the next preſentation by the deed, which he ſhewed*, and ſo it belonged to him to preſent, the other prayed that the *[plaintiff] ſhall ſhew the compoſition; and becauſe he does not claim but one preſentation, and ſo the [deed of] *compoſition belongs to the grantor*, and not to S. P. And if the defendant will demur for not ſhewing of the compoſition, and this is adjudged againſt him.

this is *peremptory*, and the plaintiff ſhall recover; for the deed of compoſition belongs to A. B. and not to the plaintiff, who has only a preſentation, as held there by Thorp Juſtice, and the beſt opinion. Br. Peremptory, pl. 25. cites S. C.

to the plaintiff, therefore the opinion was, that he ſhall not be compelled to ſhew it, by which the defendant paſſed over, and pleaded a releaſe of A. B. Br. Monſtrans, pl. 72. cites 39 E. 3. 37.

* In Brook it is [defendant].

And Holt Ch. J. ſaid, that a compoſition *may be* either *by record*, by *deed*, *or* by *parol*. If *either privies in blood* (as coparceners) *or ſtrangers in blood* (as tenants in common, or joint-tenants) *agree by record to preſent by turns*, and *one preſents*, the other is not, by the uſurpation, put to a quare impedit; and this, whether the preſentation be by one privy to the agreement, or by a ſtranger.—2dly, If either privies in blood (as parceners) or ſtrangers (as tenants in common or joint-tenants) agree *by deed* to preſent by turns, the compoſition is good, and the plaintiff need not in quare impedit, mention the compoſition, it being once executed; and this ſhews that the inheritance is ſevered, and that a ſeparate intereſt is veſted in each of them to preſent by turns. 3dly, *By parol*, for ſo a compoſition may be *between parceners*; but between ſtrangers in blood compoſition cannot be without deed. 1 Salk. 43. in the caſe of the Biſhop of Saliſbury v. Philips.——Carth. 505. S. C. and there held that by the agreement to preſent by turns, being executed on both ſides, there was a partition of the inheritance of the advowſon.—So if 3 tenants in common agree to preſent by turn, and every one has once ſo preſented, it is not neceſſary in quare impedit, for any of them to ſhew the compoſition, becauſe it has been executed once; otherwiſe, if not executed, as was held by Shelly, Fitzherbert, and many of the Serjeants. Dy. 29. pl. 194. Hill. 28 H. 8.—Watſ. Comp. Inc. 8vo. 117. cap. 8. cites S. C.

4. Error in quare impedit; plaintiff counts that *A.* & *B.* ſeiſed as joint-tenants of the advowſon in groſs *by indenture agreed to hold as tenants in common*, and that they and their reſpective heirs ſhould *preſent by turns*, and ſhews ſeveral preſentations alternately, and that *A. died*, and *his moiety deſcended to C.* and made title by *grant of the next preſentation by C. to D.* his executors, adminiſtrators, and aſſigns, in whoſe life the church became void, and that *D. made M. executor*, and died, and it belonged to him as executor to preſent, &c. The biſhop claimed title by lapſe; the plaintiff replied, that D. his teſtator preſented one Symms within ſix months, and the biſhop refuſed him; defendant rejoined, that he gave him 3 days to prepare for examination, and he never came; and traverſed that he refuſed Symms at the preſentation of the teſtator; and upon iſſue taken upon this traverſe, verdict and judgment was for the plaintiff; and now it was inſiſted, that plaintiff had made no title, becauſe the *agreement to preſent by turns* did not operate as a partition, and ſever the right, but merely as a † compoſition or agreement, which being broken, the plaintiff has a proper remedy by action; but adjudged, that it *ſevered the right of preſentation*. 1 Salk. 43. Mich. 11 W. 3. B. R. the Biſhop of Saliſbury v. Phillips.

† [327]

This ſtatute does not *extend* where the plaintiff has but *one turn*; for then though a ſtranger had uſurped in their turn they ſhould preſent to the next avoidance in prejudice to the other's right; therefore the ſtatute *intends ſuch patrons only as have a continuing right* of patronage, and to remedy the caſes not within the *ſtat. W.* 2. Gibb. 253. in the caſe of the Biſhop of London and Lewen v. the Mercers' Company.

5. 7 *Ann. cap.* 18. Enacts that *if coparceners or joint-tenants, or tenants in common, be ſeiſed of any eſtate of inheritance in the advowſon of any church or vicarage, or other eccleſiaſtical promotion, and partition is or ſhall be made between them to preſent by turns, that thereupon every one ſhall be taken and adjudged to be ſeiſed of his or her ſeparate part of the advowſon to preſent in his or her turn; as if there be two, and they make ſuch partition, each ſhall be ſaid to be ſeiſed, the one of the one moiety to preſent in the firſt turn, the other of the other moiety to preſent in the ſecond turn; in like manner if there be three, four, or more, every one ſhall be ſaid to be ſeiſed of his or her part, and to preſent in his or her turn.*

(I. a) By *Aſſignee.*

See (K. c).

[1. IF an *advowſon be allotted in Chancery to the youngeſt coparcener,* ſhe ſhall preſent and maintain quare impedit againſt the others until it be defeated. 17 E. 3. 38.]

This is 17 E. 3. 38. a. at the firſt line, &c. of the page, and in pl. 10. And it is ſo ſaid per Seton, that if the advowſon was allotted to the youngeſt, &c. in Chancery, non eſt dubium, that ſhe *ſhall not dereign,* by force of this aſſignment, the firſt preſentment againſt the others by quare impedit.

[2. If *three coparceners of a manor, to which an advowſon is appendant, make compoſition to preſent by turns,* and the *eldeſt uſurps* in the turns of the middlemoſt and youngeſt, and after uſurps again in the turn of the middlemoſt, yet the youngeſt may preſent in her next turn. 30 E. 3. 14. b.]

Sir Richard Talbot v. the Biſhop of Hereford. Ibid. 14. b. 15. but not adjudged. Fitzh. Abr. Quare Impedit, pl. 39. cites 6 E. 3. 52. S. P.

[3. *So* if coparceners make compoſition to preſent by turn, and the one uſurps in the turn of the other, yet ſhe upon whom the uſurpation was, * may preſent upon the compoſition in her next turn. For the *uſurpation between coparceners is an uſurpation but for the ſame turn uſurped, and does not put the other to her writ of right.* F. N. 34. J. 22 E. 4. 9. See the *ſtatute W.* 2. *cap.* 5.]

* Fol. 347.

awarded accordingly.——4 Le. 222, 223. pl. 356. cites S. C. Per Brian.

[4. If a *partition* be made *to one coparcener, and an advowſon aſſigned to her in Chancery, the others being within age,* yet at their full age they may preſent by compoſition, or preſent by turn as if no partition had been made. 17 E. 3. 37. b. 30. b. Adjudged.]

This is in the caſe of the King v. Frevil. Ibid. 30. b. Per Pole, and 37. b. Per Hill.

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5. *Two coparceners and a ſtranger,* who pretended a right to the eſtate and an advowſon, *agreed by indentures* mutually executed, that each of them ſhould preſent by *turns until* ſuch time as a partition could be made. An act of parliament confirms the indenture, and enacts, that every agreement therein contained ſhall ſtand, and that all the reſt of the lands not particularly named, and otherwiſe diſpoſed of by the ſaid indenture, ſhould be held by theſe three in common; the *1ſt in turn grants the next avoidance* (the church being full) to the plaintiff, and judgment for him; for it was agreed, that there ſhould be a preſentation by turns, and therefore for one turn each had a right to the whole advowſon by reaſon of the *act of parliament which confirmed the agreement,* and thereby an *intereſt is ſettled in each of them until partition* made; but this agreement would have veſted no intereſt in either of them without an act of parliament to corroborate it; therefore there had been no *remedy* upon it but by *action of covenant.* 2 Mod. 97. Trin. 28 Car. 2. Croſſman v. Churchill.

(K. a) Preſentment to the Church. By Coparceners *or others*, where it is to be made *by Turn*. *What* Preſentment *ſhall ſerve* for a Turn.

See (C. a) pl. 7. in the notes there. —Several thought the eldeſt ſhould have the preſentment if the youngeſt would not join with her; for this ſhall be ſaid the commencement of her turn, becauſe ſhe had not the turn at the laſt avoidance, that preſentment being made in the name of both; ſed alii e contra. D. 55. pl. 5. Paſch. 34 & 35 H. 8. Archdeacon Carew's caſe.

[1. IF an *advowſon deſcends to two coparceners*, the *one being within age and in ward*, and the *guardian marries with the eldeſt*, and after the *church voids*, and the *guardian preſents in the name of both ſiſters*; this ſhall not ſerve for any turn to the eldeſt; but at the next avoidance if they cannot agree in preſentment, the eldeſt ſhall preſent alone, as if no preſentment had been made after the deſcent to them. D. 35 H. 8. 55. 5. Quære.]

* As for incontinency or other ſuch cauſe. Cro. E. 687. Trin. 41 Eliz. C. B. S. C. by name of Windſor v. Archbiſhop of Canterbury, Loveday, and Fletcher.—S. C. Mo. 558. pl. 760. Paſch. 40 Eliz.——*So* if grantee of the next avoidance preſents one who is *admitted and inſtituted*, but dies before induction, the grantee ſhall not preſent again; but if he *dies before inſtitution*, it is otherwiſe. Arg. Mo. 443. pl. 609. Hill. 38 Eliz. in the caſe of Robins v. Gerrard.—S. P. Arg. Goldſb. 163. ſays, it was ſo adjudged in Colſhill's caſe.—S. P. per Gawdy J. and agreed per Fenner J. and Popham Ch. J. Goldſb. 165. in the caſe of Robins v. Prince.

[2. If two have title to preſent by turn, and *the one preſents, and his clerk admitted and inſtituted, &c.* and *after is deprived for* * *crime* or hereſy, or any other cauſe, yet he ſhall not preſent again; but this ſhall ſerve for a turn, becauſe the church was full, until the ſentence declaratory comes. Co. 5. WINDSOR, 102.]

See (L. a) pl. 6.—S. P. by Bromley J. Roll. R. 467. cites 5 Rep.

[3. So if a man, who has a turn, *preſents one who is merely a lay perſon*, and he *is admitted and inſtituted, &c. and* it is declared by *ſentence, that he is incapable*, and therefore void *ab initio*; yet becauſe the church was full until the ſentence declaratory comes, though this ſhall *relate* to ſome purpoſes, it ſhall be for a turn. Co. 5. WINDSOR, 102.]

Cro. E. 687. Trin. 41 Eliz. C. B. S. C.—Mo. 558. Loveden v. Windſor and Hitch; becauſe the ſentence declaratory for the reſtitution made a nullity in the deprivation of B. and ſo utterly defeats the incumbency of D. as if he never had been preſented.

[4. *So* if A. who has one turn, preſents B. who is admitted and inſtituted, &c. and after he *is deprived by ſentence*; whereupon *C. who has the 2d turn, preſents D. who is admitted and inſtituted, &c. and after he is deprived, and the firſt ſentence* of deprivation of B. *declared to be void, and he reſtored*, and after *D. dies*, and then B. * dies, C. ſhall preſent in his turn; for though D. was parſon for the time to all purpoſes during the firſt deprivation, and B. was not incumbent, yet when the 2d ſentence comes, B. was incumbent again by force of the firſt preſentment, inſtitution, and induction, and needed not a new inſtitution, &c. and ſo B. died incumbent by force of the firſt preſentment in the firſt turn. Co. 5. WINDSOR, 102. Adjudged.]

[5. *But*

[5. *But* in the ſaid caſe, *if D. had died incumbent before the ſecond ſentence, or if the firſt ſentence had not been reverſed;* then this ſhould ſerve for the turn of C. who preſented him. Co. 5. WINDSOR, 102. b.] Cro. E. 686. —Mo. 558. pl. 760.

[6. If a man *preſents B.* who is admitted, inſtituted, and *inducted, but* he has *not ſubſcribed the articles, &c.* according to the ſtatute of 13 *El.* by which the admiſſion, inſtitution, and induction are void, it ſhall not ſerve for a turn; becauſe the admiſſion, inſtitution, and induction, are merely void by the ſtatute. Co. 5. WINDSOR, 102. b.] By his not reading the articles, he was never lawful parſon of the church, by reaſon of the ſtatute of 13 Eliz. D. 377. b. pl. 31. Mich. 23 & 24 Eliz. Anon.——Ibid. Marg. ſays, it was adjudged, that the church is void, ipſo facto, without deprivation, cites Trin. 48 Eliz. B. R. Baker v. Brent.——Hob. 168. cites S. C.——S. C. cited, and S. P. held by Vaughan Ch. J. Vaugh. 133. Hill. 22 & 23 Car. 2. in the caſe of SHUTE v. HIGDEN.——2 Jo. 19. S. C. And there Vaughan Ch. J. took a diverſity between *not reading* the articles and *not ſubſcribing* them; for the ſtatute prohibits admiſſion before ſubſcription, and makes the admiſſion, inſtitution, and induction void.

7. Where the *one loſes his turn by lapſe*, this ſhall ſtand for his turn; and at the next avoidance, the other ſhall have his turn again; quod nota. Br. Preſentation, pl. 26. *As* in quare impedit by J. prebendary of the church of L. of a voidance of a vicarage againſt the biſhop of E. and H. and *counted that he had one prebend* as above, *and H. had ſuch another, and they are ſeiſed of thoſe prebends in the church of L. to which the vicarage is appendant to preſent by turn; and* that *J.* the plaintiff *preſented D. his clerk*, &c. *who was received, by whoſe death*, &c. *the church voided, and the biſhop in default of H. made collation to one G.* &c. *and* made *induction in right of H. by whoſe death the vicarage is now void*; ſo it belonged to him to preſent, and the defendant diſturbed him, &c. and a good count. Br. Preſentation, pl. 26. cites 24 E. 3. 26.

8. A man ſeiſed of a *manor with advowſon appendant* had *iſſue four daughters* and died, and *they made partition, and that each preſent by turn in degrees as their age was*, by which the *eldeſt commenced*, &c. *and her clerk was in*, and after *the eldeſt died, her heir within age, and found by office for the king*, and he ſeiſed the ward, and after the *church voided again*, and the *king preſented in the turn of the ſecond daughter*; and per Cateſby, the king preſented in right of the heir, and therefore his preſentment in the turn of the ſecond daughter does not put her to her writ of right of advowſon. But to this Brian and Choke were ſtrongly contra, and that this is uſurpation; for there is *no privity* of the partition in the king, and *this preſentation is in jure regis proprio as lord*, and never ſhall make title to the heir in quare impedit. Br. Quare Impedit, pl. 139. cites 22 E. 4. 8.

9 Where *one parcener preſents in the turn of her coparcener*, this does not put her to her writ of right of advowſon as uſurpation done by a ſtranger ſhall do, by reaſon of the privity, ſo that ſhe loſes nothing by this turn, and ſhall have her turn again when it comes to her turn again; per Cateſby and Brian. Br. Quare Impedit, pl. 132. cites 22 E. 4. 8. *So of grants* of coparceners. Ibid. —— Where *ſeveral patrons* are, and *one uſurps* upon the other, that other ſhall not preſent to the next avoidance, but muſt wait till his turn comes round. Gibb. 253. Paſch. 4 Geo. 2. B. R. held ſo in the caſe of the Biſhop of London and Lewen v. the Mercer's Company.

10. In

10. In quare impedit; *four manors deſcended to four daughters*, and an *advowſon was appendant to one* manor, and *they made partition*
[330] *of all except the advowſon, and ſo that each daughter had a manor*, and *nothing determined of the advowſon by compoſition or otherwiſe*, and after the church voided, and the *eldeſt daughter preſented*, and at another voidance the *ſecond daughter preſented*, and at a third avoidance the *ſtranger preſented*, and after the incumbent died, and the *fourth preſented*, and well, by the opinion of the court; for the fourth ſhall not loſe her turn by the uſurpation of a ſtranger ſuffered by the third daughter. Br. Quare Impedit, pl. 118. cites 2 H. 7. 4.

11. If the *king* upon his *promotion of the incumbent* to a biſhoprick does not take benefit of the firſt avoidance, but *ſuffers a ſtranger to preſent, and the preſentee dies*, he ſhall not have his prerogative to preſent to the ſecond avoidance. Cro. E. 790. Mich. 42 & 43 Eliz. C. B. Baſſet v. Gee.

Ow. 131. Mich. 42 & 43 Eliz. C. B. S. C.

12. A. and B. ſeiſed in fee of *every other turn*; A. preſented; then B. preſented in his turn, and after induction *his clerk is deprived*, but *no notice is given*. The *biſhop collates*. A. *grants his fee to J. S.* The *collatee dies*. It is now B.'s turn. For A. before his grant to J. S. might have removed the collatee for want of notice; but he dying incumbent, A.'s turn is ſerved. But after A.'s grant to J. S. neither A. nor J. S. could preſent, and the collation was good againſt all but the very patron, who, after the grant, could not have action, but he has deſtroyed it by his grant, and ſo none can have it. Cro. E. 811. Hill. 43 Eliz. C. B. Leak v. the Biſhop of Coventry and Babington.

13. Where the *king has title* by lapſe and preſents, and his preſentee is inſtituted, yet the king may revoke his preſentation and preſent another, *his turn not* being *ſerved* by inſtitution, only *before induction*. Watſ. Comp. Inc. 197. cap. 12. cites 1 Le. 156. Trin. 32 Eliz. Wright v. the Biſhop of Norwich.

Fol. 348.

(L. a) Preſentment to the Church. *What Perſons* may be *preſented.*

Br. Preſentation, pl. 2. cites S. C.—Br. Abbe, pl. 22. cites S. C.——Br. Incumbent, pl. 2. cites S. C.

[1. AN *abbot* may be preſented to a church; (for he was capable of an appropriation by which he was perpetually parſon imparſonee, and had *curam animarum.*) 34 H. 6. 15.]

Br. Preſentation, pl. 2. cites S. C.

[2. A *maſter of a college* is not preſentable to a parſonage.—34 H. 6. 15.]

——Br. Abbe, pl. 22. cites S. C.——Br. Incumbent, pl. 2. cites S. C.——If a corporation conſiſts of maſter and confreres, and the *maſter and confreres preſent the maſter*, it is void; for the preſentor and preſentee are one and the ſame perſon. Br. Preſentation, pl. 23. cites 14 H. 8. 2. per Fitz-James.——And per Moore J. the maſter or head of the corporation cannot be ſevered from the corporation, but other of the commonalty may; for the maſter and confreres, or the dean and chapter, *may preſent one of the confreres*, or one of the chapter; for he is not a perfect body without the head; but he is a perfect body if the maſter, or head, and the greater part of the commonalty aſſent. Br. Preſentation, pl. 23. cites 14 H. 8. 2.——Br. Quare Impedit, pl. 86. cites 14 H. 8. 2. 20.——Watſ.

———Watſ. Comp. Inc. 8vo. 205, 206. cap. 13. cites S. C.———Watſ. Comp. Inc. 8vo. 392. cap. 20. cites S. C. and adds, quære, whether the inſtitution and induction in ſuch caſe be merely void, ſo that lapſe may run from the time that the church became firſt void? and ſays, he conceives it is not ſo, but the dean and chapter may well preſent one of their chapter, or any corporation, one of their members, and cites 3 Buſſ. 43. Trin. 13 Jac. Harris v. Auſtin.———It has been held, that when the maſters and brothers of an hoſpital did preſent the maſter, and the maſter and brothers did bring a quare impedit againſt the maſter by a ſtrange name, that the writ did well lie, and that they ſhould recover, the preſentment being void. Watſ. Comp. Inc. 8vo. 515. cap. 26. cites 12 H. 8. 12.

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[3. The ſame law of a *dean and chapter*, (though by corruption they were capable of an appropriation, and a vicar made to have curam animarum for them. Com. 497.) 34 H. 6. 15.] Br. Abbe, pl. 22. cites S. C.—Br. Incumbent, pl. 2. cites S. C.

[4. It ſeems, that *an alien, who is a miniſter*, may be preſented to a church, though an alien cannot have poſſeſſions of franktenement here, becauſe by intendment they will adhere to their country and againſt us in time of war, and tranſport the treaſure of the realm out of the realm, yet this is not intended of ſpiritual men; and this was the reaſon that anciently it was uſual for aliens to have ſpiritual promotions here, and priors aliens had many poſſeſſions here, and were parſons appropriate.] As to what Roll ſays, that the ſuppoſed innocence of ſpiritual aliens, from the intended inconveniencies, might come to the nation by other aliens, if they were allowed to enjoy eſtate here, was the reaſon they were ſuffered to enjoy eccleſiaſtical benefices here, could not ſure be the reaſon, but rather the pope's uſurpation, and a ſubmiſſion to his pretended authority in church matters, and his providing many eccleſiaſtical preferments here to aliens, his friends and creatures, was the chief reaſon aliens enjoyed benefices in England, though other reaſons probably might be fancied to diſtinguiſh it from the caſe of laymen who had a freehold in their own right; but the practice I believe has always continued to allow aliens to enjoy eccleſiaſtical benefices here. Watſ. Comp. Inc. 8vo. 376. cap. 20.

[5. *By the ſtatute of* 13 *R.* 2. *and* 1 *H.* 5. *Frenchmen are diſabled to have benefices in England*, and Frenchmen endenizened; but quære, whether they continue of force at this day.] They are ſaid to be obſolete.

[6. If a *layman* be preſented, inſtituted, and inducted, he is parſon de facto, and it is not a mere nullity. Hobart's Reports, 209.] See And. 16. pl. 34. Paſch. 12 Eliz. Benefield v. Pickering.——Bendl. 195. S. C.——D. 292. b. pl. 1. Mich. 13 & 14 Eliz. S. C.——Watſ. Comp. Inc. 8vo. 52. cap. 5. cites S. C.——S. P. per Popham Ch. J. Cro. E. 315. Hill. 36 Eliz. B. R. in caſe of Pratt v. Stocke.———At *common law* a mere layman was incapable. By a ſtatute in Q. Elizabeth's time, a *deacon* was made capable; by the ſtatute 14 *Car.* 2. 4. *none but a prieſt* is ſo; and this ſtatute is declarative of the common law, and the *benefice not ipſo facto void*, but that there muſt be a deprivation; and it is not like the caſe of a woman preſented, which is a perfect nullity; but when a mere laicus is in, the church is full; per Scroggs Ch. J. 2 Show. 54. Paſch. 31 Car. 2. B. R. in caſe of Hill v. Boomer.

A layman is capable of a *prebend*, for non habet curam animarum. Cro. E. 79. Mich. 29 & 30 Eliz. B. R. Bland v. Madox.

A doctor of the civil law was admitted, inſtituted, and inducted to a living, being only a layman, and made a leaſe for years of the rectory; and if it was good, was the queſtion. The leaſe was confirmed before 13 Eliz. by the patron and ordinary. Per Gawdy J. ſuch acts which he was not capable to do ſhall *not bind* the ſucceſſor, becauſe upon the matter he was never incumbent, and cited 4 H. 7. . . and 28 H. 8. D. . . . But Popham and Fenner J. contra. For in regard he was *parſon de facto*, and ſuch an one whereof the law takes cognizance by his induction, and the people cannot take notice of any other, all acts done by him during that time ſhall bind as well as if he had been rightful parſon. For it would be miſchievous if all the acts by ſuch averments ſhould be drawn in queſtion. And all agreed, that all *ſpiritual acts*, as marriage, adminiſtration of the ſacraments, &c. by ſuch a one during the time that he is parſon are good, and therefore a *leaſe* made by ſuch an one, and confirmed by the patron and ordinary, ſhall well bind the incumbent ſucceſſor; and reſolved to have adjudged it accordingly by conſent of Gawdy J. But for other defects the judgment was ſtayed. Cro. E. 775, pl. 5. Mich. 42 & 43 Eliz. B. R. Coſtard v. Winder.———Mo. 606. pl. 836. S. C. and ſays, that the ſucceſſor became bound in an obligation after the 14 Eliz. that the leſſee ſhould enjoy the term; after which obligation the ſucceſſor was abſent, more than 80 days in a year; and the queſtion was, if the obligation was void by the ſtatute of 14 Eliz. and adjudged that it was not, becauſe the leaſe was good,

good, and ſo was the obligation made for enjoying the leaſe which the ſucceſſor could not avoid. And note, they agreed, that the parſon being a layman *ought to have been deprived*; for otherwiſe all his acts will be good as lawful patron till deprivation. —— And the deprivation ſhall not have ſuch relation to make him no parſon ab initio, though it be declaratory; for the ſucceſſor ſhall not have meſne profits. D. 292. b. Marg. pl. 72. cites S. C. —— Watſ. Comp. Inc. 8vo. 110. cap. 8. cites S. C.

Though a layman, by being admitted and *inſtituted to a benefice*, has a freehold, yet he may be ſued in the ſpiritual court and *deprived* for that cauſe; but if he has wrong done him, he may, peradventure, try it by aſſiſe. Cro. C. 65. Hill. 2 Car. C. B. in Sutton's caſe.

[7. If a man *utterly illiterate* be preſented, inſtituted, and inducted, this is not a mere nullity, but he is parſon *de facto*.]

S. P. per Scrogg, 2 Show. 54. Paſch. 31 Car. 2. in caſe of Hill v. Boomer.

[8. If a *woman* be preſented, inſtituted, and inducted, it is a mere nullity, becauſe her incapacity is apparent. Hobart, 209.]

[332] (M. a) What Perſons may be preſented *for a collateral Reſpect.*

[1. IF a grant of the *next avoidance be granted to three*, and after the church voids, and *two of the three preſent*, *the third grantee* being a clerk, this is a good preſentment, and the biſhop cannot refuſe him, though all three were jointenants thereof by the grant, and only two of them joined in the preſentment; becauſe the third perſon cannot preſent himſelf. D. 13, 14 El. 304. 54.]

Perhaps that one could not maintain quare impedit; for the *habendum* was *eis & uni eorum conjunctim & diviſim*, and ſo the *ſeverance* in the habendum ſeems *void in law*. D. 304. b. pl. 54. ——Watſ. Comp. Inc. 8vo. 402. cap. 20. cites S. C.

[2. But if *one of the three* grantees had *preſented the third* alone, the biſhop might have refuſed him. D. 13, 14 El. 304. 54.]

Preſentment of the third by one alone was held good, the grant being to the three et eorum cuilibet *conjunctim & diviſim*. Mo. 4. Trin. 31 H. 8. Sir Godfrey Foliamb's caſe. ——Watſ. Comp. Inc. 8vo. 402. cap. 20. cites S. C. ——And. 2. S. C. ——4 Le. 119. S. C. by the name of Sir William Hollis's caſe. ——Bend. 24. S. C. by name of HOLLIS v. ROLAND, where the deed of grant is recited verbatim, and no *habendum* in it. ——Mo. 849. pl. 1154. Coke Ch. J. cited this caſe out of Bendloe, and takes a *difference between a joint intereſt and a joint authority*, and that one alone could not preſent, becauſe it was a joint intereſt, but that had it been a joint authority it had been otherwiſe.

If three are *ſeiſed of a manor with advowſon appendant*, whereof the *one is a prieſt*, and *they three preſent the prieſt by a ſtrange name*, who is admitted, inſtituted, and inducted, this is a good preſentation, and a good ſeiſin for them; and if the prieſt dies, and the other two ſurvive, this is good title for them in another quare impedit; by the juſtices. Br. Preſentation, pl. 45. cites 21 E. 4. 66.

Watſ. Comp. Inc. 403. cites S. C.—* S. P. but if the ordinary does admit him accordingly, this gains no poſſeſſion; for there is no preſentation, and a man cannot plead plenarty of his own preſentment. Watſ. Comp. Inc. 8vo. 204. cap. 13. cites 14 H. 8. 3.

3. He who *preſents himſelf by a ſtrange name* where he is patron, and takes, he ſhall be put out for ſpoliation; for he may pray the ordinary to * admit him, but not preſent himſelf. Br. Quare Impedit, pl. 18. cites 35 H. 6. 59.

And afterwards upon a motion for a conſultation, be-

4. Stokes the father was incumbent, and after his death the patron preſented Stokes the ſon, who was refuſed by the biſhop, becauſe by the canon law *filius non poteſt ſuccedere patri in eadem eccleſia*, whereupon the patron preſented Sykes; then Stokes the ſon obtained

obtained a diſpenſation non obſtante the canon; but the ordinary inſtituted Sykes, and cauſed him to be inducted. Thereupon Stokes the ſon ſued Sykes and the ordinary in the delegates; but by all the juſtices a prohibition was granted; and Jones J. ſaid, that he had known it granted three times, where both perſons claimed by one patron. But he and Doderidge held, that the *canon above-mentioned holds not in this church*; and Doderidge ſaid, that ſo was the opinion of a learned civil lawyer. Lat. 191. Stokes v. Sykes.

cauſe otherwiſe Stokes had no remedy, the Court refuſed to grant it. Lat. 253. S. C. by name of Stoke v. Styles.—Noy. 91. S. C. by the name of Stock v. Sicks.

(N. a) *To whom* it ſhall be *made*.

[1. AFTER *lapſe incurred to the metropolitan*, and before collation by him, if the *patron preſents*, he may preſent *to the ordinary* of the dioceſs without preſenting to the metropolitan.—Contra. H. 41 El. B. R. per Popham.]

Hutt. 24. in caſe of BOOTON v. BISHOP OF ROCHESTER, it was held to be * clear, that though the ſix months paſs, yet if the patron preſents, the biſhop ought to admit, though it be after the title devolved to the metropolitan.——Watſ. Comp. Inc. 8vo. 265. cap. 15. cites S. C.——Watſ. Comp. Inc. 8vo. 199. cap. 12. cites S. C.

* [333]

(O. a) *At what Time* [a Man] may preſent.

Fol. 349.

[1. IF a man preſents his clerk to the biſhop, who *dies before he is received*, he may *preſent another*. 38 E. 3. 36. b.]

[2. If a man preſents his clerk to the biſhop, yet he *may preſent another before the biſhop has received his clerk*. 38 E. 3. 36. b.]

And the biſhop ſhall receive him; for the writ which iſſues to the biſhop does not mention that the biſhop ſhall receive the ſame perſon that was firſt preſented to him. Per Finch. Br. Quare Impedit, pl. 67. cites S. C.——Br. Preſentation, pl. 18. cites 18 E. 3. 36. but it ſhould be (38.)

3. 3 *E.* 1. *cap.* 28. enacts, that *no clerk of the king or other juſtice ſhall receive the preſentment of any church, whereof plea is pending in the king's court, without ſpecial leave of the king, in pain to loſe the church and his ſervice.*

4. Where *a man preſents* to the *biſhop*, and he *will not receive him*, he may preſent as *many as he will till the biſhop will receive him*. Br. Preſentation, pl. 18. cites 18 E. 3. 36.

Br. Quare Impedit, pl. 67. cites S. C.

5. If an *incumbent changes his benefice for another*, or reſigns it, the patron may preſent immediately; for theſe are voidances in law and in fact. Br. Preſentation, pl. 49. cites 2 H. 4. 5.

6. In quare impedit, the defendant *ſaid, that the incumbent was preſented, living the other incumbent*, and ſo he is in by ſpoliation, &c. Br. Quare Impedit, pl. 13. cites 33 H. 6. 26. in a nota.

7. When one having good title to preſent, and an *incumbent by uſurpation is* admitted, inſtituted, and *inducted, and after* that *the patron preſents*, and the biſhop refuſes, and after the patron recovers,

covers, and then he, which had this preſentation, exhibits it to the biſhop, this is now a good preſentation; and the patron cannot revoke or give him a new preſentation; but if the patron, before the death of the incumbent, makes letters of preſentation, that is void; becauſe he had no title to preſent. Hutt. 67. Mich. 21 Jac. Rud v. the Biſhop of Lincoln.

8. If the *patron preſents* his clerk *a week before* the 6 *months* be *ended*, and the *ordinary refuſes* the clerk *for inability*, becauſe he is unlearned, and *then the* 6 *months paſs* before he preſents another after the 6 months after the death of the incumbent; in ſuch caſe, *the biſhop ſhall have* the *collation* of the clerk, becauſe *it was the folly of the patron*, that he did not preſent his clerk before, ſo as the ordinary might examine him; and that thereupon if he be found to be unable, that he might preſent another clerk to the ordinary within convenient time, and for that cauſe is the 6 months given to the patron, that he provide another clerk in the mean time; per Ld. Dyer. 3 Le. 46. Mich. 15 Eliz. in the Common Pleas.

9. Quare impedit to the vicarage of Huſton in Suſſex, by the King againſt and the Biſhop; the caſe was ſuch, the *king* had the *advowſon* of the vicarage belonging to ſuch a manor, *by reaſon of* the *wardſhip* of the which became void during the minority of the heir; the heir ſues livery; the king *preſents* thereto *under the great ſeal; and afterwards* (without mentioning this firſt preſentment) preſents thereto another *under the ſeal of* the *court of wards;* the ſecond preſentee is admitted, inſtituted, and inducted by the biſhop before any notice of the firſt preſentment; the king brings a *quare impedit againſt* the *firſt preſentee;* and adjudged, that it *lay not;* for by Coke and Warburton, it was within the diſpoſing of the court of wards, although it were after livery, becauſe it was a chattel veſted. Cro. J. 247. Trin. 8 Jac. C. B. the King v. . . . . [334]

See (M. b). **(P. a) At what Time it may be. [*Before Deprivation.*]**

[1. IF an *incumbent be deprivable*, yet the patron cannot preſent another to the church before he is deprived; for the church is not void before. Contra. 17 E. 3. 59. b.]

Watſ. Comp. Inc. 8vo. 385. cap. 20. cites S. C. But otherwiſe it is where the church is for ſome fault or defect in the clerk declared by the law to be actually void.

[2. If the *viſitor*, by command of the king, *returns* into Chancery *good matter of deprivation of the clerk of the king*, yet the king cannot preſent another to the church before that he is deprived.—Contra. 17 E. 3. 59. b.]

3. If an incumbent be *created a biſhop*, the firſt benefice is void immediately; but if he *takes two benefices incompatible*, this is a voidance in law or cauſe of voidance, and not void in fact, to make the patron able to preſent till he be convened and deprived by ſentence: per Hill; and ſo ſee that the voidance is not by his act

act only as it is of reſignation, or of the taking of a biſhoprick; quære of thoſe of the ſpiritual court. Br. Preſentation, pl. 50. cites 11 H. 4. 36.

(Q. a) At what Time it may be; *where the Church is full.*

[1. IF J. S. preſents, and his *clerk is admitted and inſtituted*, J. D. cannot preſent his clerk before induction; for the church was *full againſt a common perſon* before; for by the inſtitution he has curam animarum. 38 E. 3. 4. My Reports, 13 Ja. B. between * HITCHING AND GLOVER; and in the ſame caſe H. 15 Ja. B. R. adjudged. D. 4 El. 217. 62. adjudged. 22 H. 6. 27. Co. 6. BOSWELL, 49. b. 33 H. 6. 24. Co. 4. 76. b. Co. 7. 26. Co. 6. 41. Da. 82. b. 21 E. 4. 34. b. Com. HARE, 528.]

* S.C.Roll. Rep. 191. 227. 2Roll. Rep.6.Hill. 15Ja. B.R. — *Admiſſion and inſtitution* without more, is good plenarty and poſſeſſion *between common perſons.* Br. Plenarty, pl. 5. cites 22 H. 6. 27.——Br. Quare Impedit, pl. 1. cites S. C.——S. P. Ibid. pl. 10. cites 33 H. 6. 24.——S. P. Ibid. pl. 83. cites 22 H. 6. 25.——S. P. Br. Prerogative, pl. 20. cites 38 E. 3. 8, 9, & 10.——S. P. Br. Preſentation, pl. 17. cites 38 E. 3. 3, 4.——S. P. Br. Quare Impedit, pl. 65. cites S. C.——S. P. Watſ. Comp. Inc. 8vo. 504. cap. 26. cites Keilw. 88. Hill. 22 H. 7.——S. P. Watſ. Comp. Inc. 8vo. 50. cap. 4. And Ibid 51. it is ſaid, that by admiſſion and inſtitution the church is full as to the cure of ſouls, and againſt himſelf and all other perſons, unleſs the king.

[2. *But* if a common perſon preſents, and his clerk is admitted and inſtituted before induction, *the king*, if he has right, may preſent, and his clerk ſhall be inſtituted; for the church is *not full againſt the king before induction.* 38 E. 3. 4. 9. adjudged. My Reports, 13 J. B. between HITCHING AND GLOVER, and H. 15 Ja. B. R. in the ſame caſe ſo adjudged. D. 4 El. 217. 62. 22 H. 6. 27. 33 H. 6. 24. Co. 7. 26. Co. 6. 49. b. Da. 82. b.]

Againſt the king there is no plenarty *without induction or inſtallation*; quod nota. Br. Plenarty, pl. 5. cites 22 H. 6. 27.——Br. Quare Impedit, pl. 1. cites S. C.——S. P. Ibid. pl. 10. cites 33 H. 6. 24.——S. P. Ibid. pl. 65. cites 38 E. 3. 3. 8, 9.——S. P. Ibid. pl. 83. cites 22 H. 6. 25.——S. P. Br. Preſentation, pl. 17. cites 38 E. 3. 3, 4.——S. P. Br. Prerogative, pl. 20. cites 38 E. 3. 8, 9, & 10.——S. P. Watſ. Comp. Inc. 8vo. 503. cap. 20.——S. P. Watſ. Comp. Inc. 8vo. 50. cap. 4.——S. P. And yet if the patron preſents, and his clerk is admitted and inſtituted, and forbears to be inducted 18 months, the king ſhall not preſent upon him for lapſe, the inſtitution ſtopping the lapſe from going to the inferior ordinary. Watſ. † Comp. Inc. 8vo. 196. cap. 12. cites Hob. 154. Colt v. Glover, and Goldſb. 164. Hill. 43 Eliz. per Popham, in caſe of Robbins v. Prince.

In quare impedit it was agreed, that where a *biſhop preſents to the prebend, and dies before induction*, by which the temporalties come into the hands of the king, that the *king ſhall preſent* to the prebend; for there is no plenarty againſt the king without induction. Br. Plenarty, pl. 3. cites 11 H. 4. 7.——*So* where the biſhop *makes collation, and dies* before induction. And from hence it ſeems that *collation with inſtitution* is good plenarty *againſt a common perſon*, as well as preſentation with admiſſion and inſtitution. Ibid.

† [335]

[3. *But if the king has not any right* to the church, the church is full by admiſſion and inſtitution of the clerk of a common perſon, without induction againſt the king alſo, ſo that he cannot preſent. My Reports, 13 Ja. B. between HITCHING AND GLOVER. And Hill. 15 Ja. B. R. in the ſame caſe agreed.]

S. C. and S. P. by Coke. Roll. Rep. 227, 228. and that ſo it is if he claims from a common perſon.

[4. If a man *uſurps upon the king, and his clerk is inſtituted and inducted*, though the patronage be not out of the king, and the king may remove the incumbent by a *quare impedit*, yet * *till removal*, the church is full againſt the king; and ſo during this time he cannot preſent any other to the church; for by the uſurpation the preſentment *hac vice* is out of the king. M. 13 Ja. B. R. between the KING AND SACKER, agreed. Fitz. Na. 36. K. 1 H. 7. 19. Co. 6. 30. and 49. b.]

* S. P. Or reſignation. Cro. J. 385. Mich. 13 Jac. B. R. S. C. by name of the King v. Biſhop of Norwich, Cole, and Saker.

Before remotion by quare impedit, the plenarty ſhall bind him quoad the poſſeſſion; for reaſon requires that the church be ſerved; and one being in by preſentment, and according to the ceremonies of the church cannot be put out without action. Cro. J. 123. Trin. 4 Jac. B. R. The King v. Champion. —Before a preſentation can be made to a church, it muſt be actually void, and its being voidable only is not ſufficient. Roll. Rep. 213. Per Coke, who cited 17 E. 3. Small's caſe.

If a prebend happen void, and the biſhop collates thereunto, and before induction the biſhop dies, and the temporalties come unto the king, and after he is inducted, and afterward the king giveth the ſame by his letters patents unto another clerk who is inſtituted and inducted, the firſt clerk ſhall have a ſpoliation in the ſpiritual court againſt the preſentee of the king; becauſe the king ought to have removed him by quare impedit, and not to have collated as he did. And there the patronage doth come in by debate. F. N. B. 36. K.

[5. *So, before removal* of the clerk, the *king cannot preſent the ſame clerk* who is in by uſurpation; for this cannot enure as a ſurrender and new preſentment. M. 13 Ja. B. R. between the KING AND SACKER, adjudged.]

S. P. Roll. Rep. 235. Per Coke, quod fuit conceſſum per totam Curiam.

S. C. by name of the King v. Biſhop of Norwich.

Fol. 350.

[6. If a *man recovers in quare impedit againſt the incumbent*, the incumbent is ſo removed by the judgment, that the recoverer *may preſent* to the church *without other removal* of the incumbent, though the incumbent *continues incumbent de facto till preſentment* by the recoverer. M. 12 Ja. B. R. between † WHISTLER AND SINGLETON. Reſolved per Curiam. Trin. 13 Ja. B. R. between AUSTIN and DR. HARRIS, per Curiam, without writ to the biſhop. 32 E. 3. Quare Impedit, 2. admitted in caſe of the king.]

† S. C. Accordingly. Roll. Rep. 62. And Coke ſaid, the firſt incumbent continues

incumbent de facto till the laſt incumbent be inſtituted.—S. P. Watſ. Comp. Inc. 8vo. 382. cap. 20.

[-. *But* after ſuch recovery in a quare impedit *a ſtranger to ſuch recovery cannot preſent* to the church; for notwithſtanding the recovery, yet the incumbent *continues incumbent de facto* as to ſtrangers. M. 13 Ja. B. R. between FAIRBANK AND DURHAM.]

If a ſtranger to the recovery (though his title be beſt) ſhould preſent to the church, his preſentation would be void, as being made to a church that is full. Watſ. Comp. Inc 8vo. 382. cap. 20. cites S. C.

[8. If A. and B. are *tenants in common* of an advowſon, and the church voids, and *a ſtranger uſurps, and his clerk inducted, and* * *A. and B. bring quare impedit*, in which *B. is ſummoned and ſevered, and* after *A. recovers* before other *removal* of the incumbent, *B.* cannot preſent; for he *is a ſtranger to the recovery*. Dubitatur.—M. 13 Ja. B. R. between FAIRBANK AND DURHAM.]

Roll. Rep. 242. S. C. Adjornatur. —Watſ. Comp. Inc. 8vo. 383. cap. 20. cites S. C.

[9. *So* in this caſe *B. cannot after the recovery preſent the ſame perſon* who was incumbent, and againſt whom the judgment is given;

Roll. Rep. 242. S. C.

given; for this acceptance cannot make the church void to B. Dubitatur. M. 13 Ja. B. R. between FAIRBANK AND DURHAM.] Adjornatur. ——Watſ. Comp. Inc. 8vo. 383. cap. 20. cites S. C.

[10. The *biſhop collated without good title* of lapſe or otherwiſe, and after the *patron dies after the ſix months* paſt, aud the *executor brings quare impedit by* force of *the ſtatute of* 4 *E.* 3. and the biſhop and the incumbent *plead plenarty by ſix months*, and adjudged no plea upon demurrer, becauſe this collation is not any plenarty, being *tortious*. P. 32 El. B. Rot. 2065. between SMALLWOOD and others executors of SMALLWOOD, againſt the BISHOP OF COVENTRY AND LITCHFIELD. Adjudged upon demurrer; but another writ brought before abated, becauſe it was to the impediment of the teſtament.] And. 244. pl. 257. S.P. and C. by name of Sale v. Coventry and Marſh.—Cro. E. 207. Mich. 32 & 33 Eliz. S.C. and they all held, that this is not a plenarty within the ſtatute of W. 2. for that muſt be ex præſentatione, and not ex collatione; and the plaintiff had judgment. ——Le. 205. pl. 284. S. C. but I do not obſerve S. P. there.—4 Le. 15. pl. 53. S. C. And it was held, that the executors upon this tortious collation might have quare impedit for the diſturbance, and that by equity of the ſtatute 4 E. 3. 7. and that the clerk ſhould be removed at the ſuit of the executors.

[11. If the *biſhop collates without good title of lapſe*, this does not put the patron out of poſſeſſion, but he may preſent after, though the *clerk of the biſhop be inſtituted and inducted*. Co. 6. GREENE, 29. b. and BOSWELL, 50. Co. Litt. 344.] Co. Litt. 344. b. S.P. For it ſhall be taken to be only proviſionally made for the celebration of divine ſervice till the patron preſents. ——If the biſhop collates his clerk either before he gives notice of an avoidance where notice is requiſite, or at any time within the ſix months limited to the patron to fill his church, the patron may at any time after preſent his clerk; for though a wrongful detainer makes ſuch a plenarty as ſhall bar the lapſe to the metropolitan and king, yet it is no bar to the true patron; and if the biſhop admits the patron's clerk, the other is out ipſo facto; or if the biſhop will not admit him, the patron may as well then, as at any other time before, have his remedy at law againſt the biſhop. Watſ. Comp. Inc. 187. cap. 12. cites Hob. 302. Hill. 17 Jac. Gawdy v. the Biſhop of Canterbury & al. ——In ſuch caſe the patron muſt actually preſent, and the ordinary muſt refuſe to admit his clerk before the patron can bring his action; for though the ordinary has collated, yet the true patron may preſent to the ſame ordinary, and he may inſtitute, &c. his clerk, and then the two clerks ſhall try who hath the better title. Watſ. Comp. Inc. 8vo 425 cap. 22. cites Pl. C. 500. Grendon's caſe. ——Watſ. Comp. Inc. 8vo. 425. cap. 22. cites S. C.

[12. If *lapſe* be *devolved to the metropolitan*, and after *the ordinary*, who has paſſed his time, *collates his clerk within the* 6 *months of the metropolitan*, and his clerk thereupon *is inſtituted and inducted*, it ſeems that this was a *plenarty* againſt the patron; for the collation is lawful againſt all except the metropolitan, and it is a plenarty againſt him alſo. Summer aſſiſes at Bath in the county of Somerſet before the Lord Finch, upon a trial between Sir FRANCIS POPHAM, and the BISHOP OF BATH AND WELLS and his ſon; this was a queſtion, and ſo held by Lord Finch.]

[13. *But a collation* by lapſe by a biſhop, and an inſtitution and induction thereupon, *will put another biſhop, who has the right title to collate, out of poſſeſſion*, and to a quare impedit; ſo that he cannot preſent before the incumbent is removed. Co. 6. GREENE, 29. b. and BOSWELL, 50. Co. Litt. 344.]

[14. If the *king preſents jure prærogativæ ſuæ ratione lapſus*, as it is expreſſed in the letters patents, *where the king has not any title* S. C. Cited by Hobart

to preſent by lapſe or otherwiſe, and thereupon the ordinary admits, inſtitutes, *and inducts the clerk*, yet this doth not put the true * patron to his quare impedit, but he may preſent; for the *preſentment was void, the king being deceived*; and then this is an inſtitution and induction without any preſentment. Co. 6. GREENE, 29. b. adjudged.]

Ch. J. Hob. 302. in the caſe of Gawdy v. Archbiſhop of Canterbury & al. and ſays it is to be well underſtood that it makes no binding plenarty againſt the true patron; but that he may not only bring his quare impedit when he will, but alſo preſent upon him 7 years after. —— Watſ. Comp. Inc. 8vo. 188. cap. 12. cites S. C. and P. but adds, that ſuch plenarty bars a lapſe to the metropolitan. —— S. P. Jenk. 244. pl. 8.

If the queen non habens jus preſentandi, and yet preſents to the advowſon as in ſuo pleno jure, it is a void preſentment; for the queen was deceived in her preſentment, which made it merely void as to the queen, who can do no wrong. And the uſurpation is only in the incumbent, who procured himſelf to be inſtituted; and he is the wrong doer, and againſt him only the quare impedit is always brought.— Per Croke J. but the other juſtices doubted of this point. Cro. C. 562. Mich. 16 Car. B. R. in caſe of Yates v. Sir John Dryden & al.

Fol. 351.

[15. If the *king preſents, and therein miſtakes his title, as* if he preſents *ratione lapſus where he has title pleno jure*, though the clerk be inſtituted and *inducted thereupon*, yet this does not put the king to his quare impedit; for his *preſentment is void*, and then an inſtitution and induction without a preſentment is *only as a collation*, and ſo the king not out of poſſeſſion, but may preſent before *removal* of the clerk. Co. 6. GREENE, 29. b. reſolved.]

S. C. and P. cited Het. 51. Mich. 3 Car. C. B. in Thompſon's caſe. — And alſo Litt. Rep. 60. in S. C. and which is reported in the ſame words. —— S. P. Arg. Roll. R. 236. Mich. 13. in caſe of the King v. the Biſhop of Norwich.

Co. Litt. 344. b. S. P.

[16. If the *king preſents, and before inſtitution or induction*, the king *repeals it, and* thereof *gives notice to the ordinary*, who after, notwithſtanding, inſtitutes and *inducts* him, yet the king may preſent another; for the church is not full, inaſmuch as there is not any preſentment. D. 12 El. 292. 70. will prove this, inaſmuch as a *confirmation to ſuch incumbent* made by the king *is void*. Co. 6. GREENE, 29. b. reſolved.]

[17. *So* would it be in this caſe, *though* the ordinary inſtituted, and *inducted the clerk after repeal, and before notice thereof to him given*; for the notice makes nothing to the eſſence of the repeal, but only to charge the ordinary as a diſturber, if he proceeds after notice. D. 12 El. 292. 70. will prove this inaſmuch as a *confirmation to ſuch incumbent is void*. 25 E. 3. 47. accordingly. Vide Co. 6. GREENE, 29. b.]

D. 339. b. pl. 47. Hill. 47 Eliz. S. P. adjudged, the vicar of Yatton's caſe. —— The Queen having title to the advowſon of M. preſented one W. The preſentee being diſturbed procured quare impedit, &c. After which one S. obtained a ſecond preſentation to the ſaid church; notwithſtanding which W. procured the biſhop to admit and inſtitute him, and a mandamus to have him inducted, and after judgment was given for the queen; W. was inducted, and writ awarded after this to the biſhop, and the opinion of the

[18. If the *king preſents A.* and, *upon refuſal of him, brings quare impedit*, and *pending this B. procures a preſentment from the king of himſelf in deceit of the king*, and thereupon the ordinary inſtitutes, and *inducts B.* yet this does not put the king out of poſſeſſion; but he may preſent before *removal* of B. by quare impedit, inaſmuch as the preſentment was void, and ſo an inſtitution and induction, without any preſentment. Co. 6. GREENE, 29. b.]

the juſtices was in this caſe, that the firſt preſentation was repealed, and become void. And. 38. Mich. 15 & 16 Eliz. Anon.

[19. If a *man preſents in time of war*, and the preſentee is *inſtituted and inducted in time of peace*, yet this ſhall not put the patron to his quare impedit, but that he may preſent; for this is but an inſtitution and induction without any preſentment. Co. 6. Greene, 30. Vide 6 E. 3.]

Watſ. Comp. Inc. 8vo. 392. cap. 20. cites S. C. & 2 Rep. 93. Bingham's caſe. ——S. P. And though the preſentment be in time of war, and the clerk is admitted thereupon in time of peace, yet the law gives regard to the original act, that is to ſay, to the preſentment, and all that follows thereupon ſhall be avoided, as being conſtrued to be in time of war, and ſhall not put the rightful patron out of poſſeſſion. Watſ. Comp. Inc. 8vo. 210. cap. 13. cites 6 E. 3. 41. 6 Rep. 30. Green's caſe, 2 Rep. 93. Bingham's caſe, & 1 Inſt. 249. b.

* [338]

[20. If a *ſtranger, without title, preſents by tort* to my church (being void) *by ſimony, and 6 months paſs*, yet I may after preſent; for the ſtatute has made the preſentment, inſtitution, and *induction*, void, and ſo he is not incumbent, nor the church full. Co. Litt. 120.]

Watſ. Comp. Inc. 8vo. 383. cap. 20. cites S. C.

[21. If a *lapſe devolves to the king*, and after *the inferior ordinary collates* for the lapſe, *and his clerk is inſtituted and inducted*, it ſeems that this does not make any plenarty againſt the king to put him to his quare impedit, but that he may preſent and ouſt the clerk of the ordinary; for when lapſe is incurred to the king, this cannot be taken away by the ordinary, and then when the † ordinary collates without good title, this does not make any plenarty againſt him who has the right as the king has to preſent; for lapſe incurred to the king is not like to a lapſe incurred to a metropolitan.]

† See pl. 1.

[22. If a man be preſented, inſtituted, and *inducted* to a church *by ſimony, though it be void as to the king and the pariſhioners, yet* it is *not* void *to an uſurper*; for a man without right ſhall not preſent thereto. Hobart's Reports, 227. WINCHCOMB's caſe.]

Hob. 168. Paſch. 14 Jac. Winchcomb v. the Biſhop of Winton & Pulleſton.—Watſ. Comp. Inc. 8vo. 383. cap. 9. cites S. C.

23. Where an *advowſon* is aliened in mortmain, the immediate lord may preſent within the year, though the *church be full by 6 months before his quare impedit brought, ſo that he brings it within the year*; quod nota. Br. Mortmaine, pl. 13. cites 21 E. 3. 27.

Br. Quare Impedit, pl. 70 cites S. C.

24. A man *may be parſon without induction*. Per Newton. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

By the *inſtitution* a man is parſon *without taking any profits*. Per Aſcue. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25. ——S. P. Br. Dean and Chapter, pl. 9. cites 22 H. 27.

25. If the *incumbent reſigns*, and the *uſurper preſents* within 6 months, and is in for 6 months, *no notice* being given of the reſignation, yet that ſhall bind him, and he ſhall be put to his right of advowſon; otherwiſe if the ordinary had *collated*; becauſe the *induction is notorious* to the country, and the patron ought to take notice of it at his peril, to prevent the uſurpation by a ſtranger. Noy, 65. Paſch. 39 Eliz. Servien v. Biſhop of Lincoln.

S. P. Comp. Inc. 8vo. 186, 187. cap. 12. cites S. C. & Hob. 318. Sir William Elvis v. the Archbiſhop of York and others.

26. Admiſſion, inſtitution, and induction *without preſentment*, is merely void, ſaid per Williams J. to have been ſo adjudged in

in the caſe of Green v. Baker, Cro. J. 252. Mich. 8 Jac. B. R. Caſe of Hunſton v. Cocket.

27. Admiſſion, inſtitution, and induction of one who is *mere laicus*, is not void, but voidable; and till deprived the plenarty remains. Per Holt Ch. J. Cumb. 202. Paſch. 5 W. & M. B. R. Dr. Harſcot's caſe.——Poph. 37. in an Anon. caſe.

28. In all caſes when the church is not otherwiſe filled, than by *inſtitution and upon a void preſentment, or* by *wrongful collation* (except the collation be made upon him that hath right to collate) *though the clerk*, by whom the church is filled, *has remained* as *incumbent* for *ſome years, yet if* after the *patron preſents* his clerk to the biſhop his *preſentment is not void*, but the biſhop may and ought to inſtitute him thereupon, and the inſtitution ſhall be good to the ouſting of the other incumbent, and if the biſhop refuſe, the patron may by ſuit recover his preſentment. Watſ. Comp. Inc. 8vo. 384. cap. 20. cites 6 Rep. 22. Green's caſe———and 6 Rep. 50. Boſwell's caſe———& Co. Litt. 344.

[339] 29. If a *church* be *once duly filled* of a clerk, *though the clerk be* after *deprivable, yet it till* ſuch time as *he is* actually *deprived*, the patron may *not preſent*. Watſ. Comp. Inc. 8vo. 384. cap. 20.

(Q. a. 2) *Plenarty. By whom* to be *pleaded, and in what Caſes* it is a good Plea.

None ſhall plead plenarty in quare impedit but the *patron, or he who is preſented by lapſe.* Per Belknap, but per Parry *at common law the incumbent* might have pleaded that he *was in of the preſentment of the plaintiff himſelf*, but *not* of the preſentment *of a* * *ſtranger*, quod Belknap conceſſit. Br. Plenarty, pl. 12. cites Fitzh. Incumbent, pl. 2. 2 R. 2.—* S. P. that *plenarty by* 6 *months of the preſentment of a ſtranger* is not plea for the *incumbent to plead*, per tot. Cur. For *it is not to the writ*; for he does not give a better writ againſt any perſon certain; *nor* it is not *to the action*; for he does not make to himſelf any title to the patronage. Br. Plenarty, pl. 9. cites 16 E. 4. 11.——S. P. *Nor for any other but for him againſt whom the writ of right of advowſon lies*, which is againſt none but the patron, per tot. Cur. Br. Quare Impedit, pl. 134. cites S. C.—S. P. Br. Plenarty, pl. 6. cites 38 H. 6. 20.——If the clerk of a ſtranger be incumbent of a church by the ſpace of 6 months, by admiſſion and inſtitution only, upon his preſentation, this makes a plenarty without induction. Hill. 22 H. 7. Kelw. 88.——And the patron may plead plenarty againſt all common perſons. Watſ. Comp. Inc. 8vo. 504. cap. 26.

1. AS well *the incumbent* as the patron may plead plenarty by 6 months the day of the writ purchaſed. Br. Plenarty, pl. 14. cites Fitzh. Quare Impedit, 32. 47, 48, 49. & 189.

But if a man had preſented to it, and the church is full by this by 6 *months in the time of the anceſtor*, then the iſſue ſhall attend until the church voids. Br. Preſentation, pl. 8. cites 46 Aſſ. 4. Per Finch J.

2. If my *anceſtor, tenant in tail, preſents*, and after a *prior gets the ſame advowſon and appropriates it*, and holds in proper uſe *by licence a year and a day*, and my *anceſtor dies*, I may have aſſiſe of *darreign preſentment or quare impedit* at any time; for now the advowſon is always full, and this is a preſentation. Br. Preſentation, pl. 8. cites 46 Aſſ. 4. Per Finch J.

The defendant had been *parſon for* 3 *years*, and

3. In quare impedit, the *incumbent pleaded, that the patron* T. H. *was ſeiſed of the manor* of Dale, *to which the church is appendant, and the church voided by the death of one F. and* the ſaid T. H. *preſented him*, by

by force of which he was admitted 6 months before the writ purchaſed, judgment ſi actio, &c. Per tot. Cur. it is a good plea for the patron himſelf without ſhewing other preſentment in him before; but per Danby, yet this does not lie in the mouth of the incumbent. To which it was ſaid, that the plea was good by the incumbent in this caſe. Quære cauſam, becauſe it ſeems that this plea is for the patron, and not for the incumbent. Br. Plenarty, pl. 4. cites 22 H. 6. 25.

pleaded plenarty generally by 6 months of the preſentation of one A. a ſtranger to the writ; and the Court held the plea naught, becauſe the defendant *ſhewed no title in A.* Brownl. 162. Cranwell v. Liſter. —— Noy, 30. S. C. by name of Liſter v. Crameel. But had he pleaded preſentment of the plaintiff himſelf, or collation by lapſe to the ordinary, there, he need not make any title. —— Watſ. Comp. Inc. 8vo. 516. cites S. C.

4. *Parſon imparſonee* cannot plead plenarty *againſt a ſtranger patron*; for the pleading is given by the ſtatute of *Weſtminſter, cap.* 5. that the church is full by 6 months, before the writ purchaſed, of ſuch a one by preſentation of ſuch a one; which *parſon imparſonee* cannot plead, for he is *not in of any preſentation*. Br. Plenarty, pl. 7. cites 38 H. 6. 20. 39 H. 6. 21. Per Priſot.

S. P. Br. Plenarty, pl. 6. cites 38 H. 6. 20. That plenarty by parſon imparſonee is no plea. — S. P. Br. Preſentation, pl. 36. cites 39 H. 6. 20. —— Br. Quare Impedit, pl. 14. cites S. C. —— S. P. Fin. Law, 8vo. 197. —— S. P. Watſ. Comp. Inc. 8vo. 515. cap. 26. cites 22 H. 6. 14. 38 H. 6. 20. and 16 E. 4. 11. and Pl. C. 501. GRENDON'S CASE. —— *But* per Priſot, *in quare impedit againſt* parſon imparſonee, plenarty of himſelf by a year and a day before the writ purchaſed, is a good plea, if it was lawfully appropriated. Br. Plenarty, pl. 6. cites 38 H. 6. 20.

5. Note, *when there is no patron, as where the prior is a prieſt, and is admitted to his own benefice; or* where *my advowſon is alienated in mortmain, and appropriated* to a religious houſe, and the like; in thoſe caſes I may have quare impedit, and there plenarty by 6 months is no plea. Br. Plenarty, pl. 10. cites 14 H. 8. [340]

6. *Plenarty* by 6 months *upon an inſtitution*, where the inſtitution is made *upon a preſentment, is pleadable* by all perſons againſt a common perſon; yet a plenarty by *mere collation is not* pleadable, but the patron may bring his writ and remove the collatee at any time. Watſ. Comp. Inc. 8vo. 505. cap. 26. cites Stat. Weſt. 2. cap. 5. 2 Cro. 297. Mich. 32 & 33 Eliz. C. B. Smallwood, Cole and Sale v. the Biſhop of Coventry and Marſh. Jenk. Cent. 7. Caſe 7. 6 Rep. 49. Mich. 3 Jac. Boſwell's caſe.

Dr. Watſon ſays, from this he ſuppoſes, that plenarty upon a void preſentment is not pleadable; for then the clerk is incumbent as it were by collation only; but when it is ſaid, that plenarty by collation is not pleadable, it is to be limited as to ſuch who have right to preſent, but not to ſuch who have no right to collate; for plenarty by collation puts him, that has the right to collate, to his writ of right, and is pleadable againſt him that hath the right of collating. Watſ. Comp. Inc. 8vo. 505. cap. 26. cites 17 E. 3. 64. b. Dean of Lincoln's caſe. — And 6 Rep. 49, 50 Mich. 3 Jac. in Boſwell's caſe, and 2 Inſt. 357.

(R. a) At what Time it may be. [*Where there is Alienation, Diſſeiſin*, &c.]

See (F. a. 2)

[1. IF a *man be diſſeiſed of a manor to which* an advowſon is appendant, and *after the church voids*, the *diſſeiſee* may preſent thereto *before re-entry* into the manor, becauſe his entry is congeable into any part * of the manor. 19 H. 6. 33. 16 E. 3. Quare Impedit, 146. Contra, 39 E. 3. 21. b.]

S. P. Watſ. Comp. Inc. 8vo. 180. cap. 11. —

* Fol. 352.

Where his entry into the manor is not taken away, he may preſent to the advowſon; per Priſot. Br. Quare

Quare Impedit, pl. 11. cites 33 H. 6. 32.—S. P. by Pollard J. Kelw. 169. Mich. 6 H. 8.——But Brooke (ut ſupra) makes a quære thereof, becauſe, he ſays, it ſeems he cannot make title without the manor.—If a man *ſeiſed of land and of advowſon appendant* be *diſſeiſed of the land*, and the advowſon voids, he ſhall not preſent to the advowſon, for he *cannot make title*; for if he intitles himſelf as to the advowſon in groſs, then the diſſeiſor ſhall make a leſing, ſaying, that A. B was ſeiſed of the land to which, &c. and infeoffed him, &c. abſque hoc, that it is in groſs, &c. And if he claims, as appendant, the other ſhall ſay, that A. B. was ſeiſed of the land to which, &c. and infeoffed him, abſque hoc, that the diſſeiſee was ſeiſed at the time of the avoidance; per Danby; but per Littleton, a man who is diſſeiſed of the manor or land, may ſeiſe villein regardant, and may enter into any parcel, and therefore may preſent, but cannot have common appendant without an entry. But per Danby Ch. J. advowſon is not parcel of a manor but appendant, and therefore a diverſity; for diſſeiſee may *enter into any parcel*, but *not into the appendancies without the manor or land to which*, &c. And though the advowſon may be ſevered and made in groſs, it ought to be *when the owner is ſeiſed of the land to which*, &c. but *not by preſentment when he is out of poſſeſſion*; quod nota, good reaſon; and Needham J. cum illo. Br. Preſentation, pl. 30. cites 9 E. 4. 38.—*And* where *tenant for life aliens the manor in fee*, he in reverſion cannot preſent to the advowſon before he has entered into the manor; per Needham J. But per Moyle the ſeiſin tempore vacationis is not traverſable; and ſo Littleton and Moyle againſt Danby and Needham, &c. Ibid.—If an *advowſon voids in the time of a diſſeiſor*, and the *diſſeiſee re-enters before preſentation* made, the diſſeiſee may preſent and ſhall have quare impedit. Br. Preſentation, pl. 41. cites 2 H. 7. Per Townſend; quod non negatur.

Waſ. Comp. Inc. 8vo. 18c. cap. 11. cites S. C. and 16 E. 3. Quare Impedit, 146. Contra, 39 E. 3. 21.

[2. *So* if *leſſee for life of a manor, to which* an advowſon is appendant, *aliens the manor*; and after the *church voids*, the *leſſor may preſent before entry* into the manor for the forfeiture, becauſe his entry is congeable into any part. 19 H. 6. 33. b.]

[3. *So* if *diſſeiſor* of a manor to which, &c. *aliens it, and after the church voids*, the *diſſeiſee may preſent* thereto before entry into the manor. 19 H. 6. 33. b.]

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Waſ. Comp. Inc. 8vo. 18c. cap. 11. cites S. C.

[4. If *leſſee for life of a manor, to which* an advowſon is appendant, *aliens one acre with the advowſon*, by which the advowſon is appendant to the acre, and after the *church voids*, the leſſor may preſent before entry into the acre, becauſe his entry is congeable into any part for the forfeiture. Contra, 18 E. 3. 44. by iſſue. My Reports, contra.]

[5. If *baron* be *ſeiſed of a manor, to which* an advowſon is appendant, *jointly with his wife for life, and aliens one acre with the advowſon*, by which the advowſon is appendant to the acre, *and dies*, and after the church voids, the *feme cannot preſent before the acre recontinued*. 17 E. 3. 5. 19. Adjudged. Contra, 22 E. 3. 7. Reverſ. 23 Aſſ. 8.]

[6. *But if the alienee aliens the acre* to another, *ſaving the advowſon*, and *after baron dies*, the feme may preſent to the next avoidance; becauſe ſhe ſhall not recover this with the acre. 17 E. 3. 5. 19. b.]

[7. *So* if the *baron had aliened the advowſon as in groſs, and after aliens the manor to another, and dies*, the feme may preſent to the advowſon, when it voids, before the manor recontinued, becauſe it is in groſs. Contra, 17 E. 3. 19. b.]

[8. If a *feme* be *endowed of the third part of a manor, and of the advowſon appendant, and after another baron and feme purchaſes the whole manor; and* after the *baron aliens one acre* of the manor *with the advowſon appendant*, and *after ſecond preſentment paſſed* the *baron dies*, and *tenant in dower dies*, the *feme may preſent to the third preſentment though*

though ſhe has not recontinued the acre; becauſe the advowſon by the alienation could not paſs as appendant to the acre, inaſmuch as the baron had only a reverſion therein at the time. 23 Aſſ. 8. Adjudged. 22 E. 3. 7. Adjudged. Same caſe.]

[9. If *tenant in tail of a manor, to which* an advowſon is appendant, *diſcontinues one acre with the advowſon, and dies*, and after the church voids, *the iſſue* may preſent *before the acre recontinued; becauſe the diſcontinuee never preſented after the diſcontinuance*, this being the *firſt voidance* after. 34 E. 1. Quare Impedit, 179.] S. P. Watſ. Comp. Inc. 8vo. 133. cap. 10. cites S. C. & Co. Litt. 333. b.

[10. If *tenant for life of an advowſon in groſs levies a fine come ceo, &c.* thereof, and after the *church voids* by death of the incumbent, or otherwiſe, *before any claim made by him in reverſion, but after he in reverſion preſents;* in this caſe he ſhall not have this preſentment, though the levying the fine was *a forfeiture;* yet till he in reverſion has made his election to take advantage of the forfeiture, the eſtate of the tenant for life is not deſtroyed nor ended; and he might have taken advantage of the forfeiture by his claim in the life of the incumbent; and inaſumch as he did not make his claim before the death of the incumbent, the preſent preſentment *was a chattle veſted in the leſſee*, which cannot be deveſted after by the preſentment of him in reverſion. Trin. 13 Car. B. R. between SPRING and SIR JULIUS CÆSAR. Per Curiam. Adjudged in writ of error upon a judgment in Bank in a quare impedit. Intratur. Mich. 11 Car.] See Eſtate, (Q. b) pl. 2. ——Watſ. Comp. Inc. 8vo. 134. cap. 10. cites S. C.—— Watſ. Comp. Inc. 8vo. 181. cap. 11. cites S. C.—Jo. 389. S. C.

(S. a) What ſhall be a *good* Preſentment. *How* it may be.

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Fol. 353.

[1 A *Common perſon* may preſent to a church *by parol.* Co. Litt. 120.] S. P. it being only a commendation of a fit clerk to the ordinary. Watſ. Comp. Inc. 8vo. 390. cap. 20.

[2. If a common perſon preſents to a church *by writing, yet this is not any deed, but only in nature of a letter* to the biſhop. Co. Litt. 120.]

[3. The *king* may preſent to a church *by his letters.* 2 E. 1. Rot. Patentium Membrana, 5.] See pl. 4. in the notes.

[4. The *king* may preſent *by parol* without preſentment in writing. 19 E. 3. Quare Impedit, 60. Agreed. Co. Litt. 120.] For the preſentation is of the clerk, and the direction is to the biſhop, and though it be by writing it is no deed, but only as a letter to the biſhop, and this is the reaſon that the king himſelf may preſent by parol. Co. Litt. 120. a.——It is only a commendation, or declaration of the king's will, which may be by parol. Cro. J. 248. Trin. 8 Jac. B. R. pl. 7. the King v. .... for the vicarage of Hunſton in Suſſex.——S. P. Mo. 874. pl. 1221. in caſe of the King v. Biſhop of Lincoln and King.

[5. If the *king be deceived in his title* of preſentment, this is a void preſentment. Co. 6. GREENE. 29. b. Adjudged. Dubitatur D. 16 El. 327. 6.] See (Q) pl. 14, 15. and Prerogative, (O. b) pl. 3, 4, &c.

[6. If the *king* grants a preſentment *by his letters patents* by theſe words, *(damus [&] concedimus)* without any words of preſentment, yet it ſeems that it ſhall amount to a preſentment, and a good warrant

rant to the biſhop to inſtitute him, &c. Dubitatur. 19 E. 3. Quare Impedit, 60.]

And though a corporation made their preſentation *by a wrong name* of incorporation, yet it was held good. Cro. J. 248. pl. 7. Coke ſaid, it was ſo ruled in the Dean of Norwich's caſe.

7. Preſentation *by corporation* ought to be *by writing*. Br. Preſentation, pl. 23. cites 14 H. 8. 2. per Broke.

8. If a man preſents *ad rectoriam*, it is as good as if he had preſented ad eccleſiam. Cro. J. 248. pl. 7. Coke ſaid, it had been ſo adjudged.

9. If the king do *ratify* the poſſeſſion of the *incumbent*, ita quod in nullo gravetur, this is now as a new preſentment; per Coke Ch. J. 3 Bulſ. 90. Mich. 13 Jac. in caſe of the King v. Sakar.

(T. a) Revocation. *Who may revoke* his Preſentation.

* Br. Quare Impedit, pl. 48. cites S. C.—*But* in the ſecond preſentment the firſt *muſt be recited*, and the pleaſure of the king to revoke it; otherwiſe it is a deceit of the king and void. Arg. 3 Le. 242. cites D. 339. The Vicar of Yatton's caſe.——If the king, before admiſſion of the firſt preſentee preſents another, without fraud or covin in the ſecond preſentee, ſuch recital is not neceſſary; but if the firſt † preſentee be inſtituted, then ſuch ſecond preſentation is no repeal of the former, without *recital of the former preſentation, and the admiſſion and inſtitution* thereupon; and alſo there ought to be *an expreſs clauſe of revocation of the firſt preſentment, and of the admiſſion and inſtitution* thereupon mentioned in the ſecond letters patents of preſentment. D. 339. Marg. pl. 47. Ivys, *this difference* was adjudged. Paſch. 9 Ja. in the Exchequer, between Caveit and Kitchen.——The king may vary in his preſentation *without reciting the former*, and it ſhall not be void by the ſtatute of ‡ 6 H. 8. 15. per Coke, Warburton, and Foſter. Cro. J. 248. pl. 7. Trin. 8 Jac. C. B. in caſe of the King v. . . . .

‡ See this ſtatute at Prerogative (Q. b. 2) pl. 8.

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[1. THE *king* may revoke his preſentation. 14 E. 3. Quare Impedit, 5. 28 E. 1. Rot. Patentium, Memb. 24. 2 E. 2. Rot. Patentium, part 1. M. 3. D. 18 El. 348. 12. Fitz. Na. 34. (C) 271. (D) D. 12 El. 292. 70. he may *before inſtitution*. 25 E. 3. 47. Admitted and adjudged. * 7 H. 4. 32. D. 16 El. 327. 4. *After letters obtained for admiſſion, inſtitution, and induction, and before execution thereof.* 14 E. 3. Quare Impedit, 5.]

After induction upon a preſentation by the king, he by letters patents revoked the preſentation; and per Thorp, the preſentation is deſtroyed by the repeal, and if the biſhop does not ouſt the clerk, the temporalties ſhall be ſeiſed into the king's hands for the contempt, and becauſe no other title was made but the king's preſentation, which is defeated, a writ was awarded to the biſhop. Br. Preſentation, pl. 6. cites 44 E. 3. 35.

[2. If the *preſentee of the king be inſtituted*, the king cannot revoke it after before induction. Dubitatur. 18 El. 348. 12. 25 E. 3. 47. Admitted as it ſeems; for it is certified, that it was received after the letters of repeal.]

[3. If the *preſentee of the king dies after inſtitution and before induction*, this is a revocation in law, ſo that the king ſhall preſent again, becauſe the king has not the effect of the preſentment. D. 20 El. 360. 7. Admitted. And Co. 9. HOLT, 132. ſaid, that it was ſo reſolved there. Dubitatur D. 18 El. 348. 12.]

The king had title to preſent by *lapſe*, and his clerk is inſtituted but not inducted, and *died before induction*. The queſtion was, if the king ſhall preſent for the ſaid lapſe, becauſe the church was not full againſt the king? The Juſtices were all clear of opinion that the king might repeal ſuch preſentment before induction; and as to the principal matter, the Court ſeemed inclined that the king might preſent again. Le. 156. pl. 218. Trin. 32 Eliz. C. B. Wright v. the Biſhop of Norwich.—S. P. D. 348. a. pl.

pl. 12. Hill. 18 Eliz. in WESTON'S CASE, and there it was held by Dyer and Mounſon accordingly; but Manwood and Harper e contra; but all agreed, that the king's preſentation ſhall always be ſaid to be admiſſus, inſtitutus, & inductus, which was confirmed by precedents and the books of * 22 & 33 H. 6. and 24 & 38 E. 3. ——— But D. 360. b. pl. 7. Mich. 19 & 20 Eliz. in the caſe of GYLES v. COLSHILL, where a church became void by taking a ſecond benefice, and lapſe to the queen by the 21 H. 8. by default of patron, biſhop, and metropolitan, the queen preſented B. who was admitted, inſtituted, and inducted. Then B. died. The queen preſented G. The patron brought quare impedit againſt G. and counted of the avoidance and lapſe, and that the queen preſented G. who was admitted and inſtituted, but did not ſay (inducted) and that the church being now void by B.'s death, it belongs to him to preſent. The queſtion was, if this pleading was good? And by the greater number of juſtices it was held good enough, and precedents ſhewn in the king's caſe where admiſſus & inſtitutus only had been allowed. And in this caſe it cannot be intended otherwiſe than that the queen's preſentation was effectually executed in all reſpects, and ſo not revocable, and writ for the plaintiff was awarded to the biſhop. ——— Bendl. 312. pl. 297. S. C. accordingly, and cites ſeveral precedents where (inductus) was omitted and held good. ——— * Br. Quare Impedit, pl. 1. cites 22 H. 6. 27.

[4. If the *chancellor preſents* to a benefice, *ſuppoſing it to be under the value, where in truth it is above* value, and thereupon the preſentee is admitted and *inſtituted*, and before induction *the king*, being apprized thereof, *repeals the ſaid preſentment, and preſents one in his own name*, this is a good repeal; becauſe, as it ſeems, the king has a right precedent, and the king is deceived alſo in the firſt grant. 38 E. 3. 3. b. 9. Adjudged.]

Watſ. Comp. Inc. 8vo. 394. cap. 20. cites S. C. And Dr. Watſon ſays, he conceives it to be underſtood, that the living is not recited in the preſentation to be under the value, elſe according to the LORD CHANCELLOR'S caſe in Hob. 214. the preſentation will be void, and if ſo, it can be no queſtion in the king's caſe at what time it may be revoked. ——— It remained good until it was avoided. Winch. 19. Parſon and Morlee's caſe.

[5. By the common law of *Scotland*, a *lay patron* may vary after he has preſented his clerk, and preſent another. Skene Regiam Majeſtatem, † 10. b. vers. 3. 31 E. 1. Quare Impedit, 185. So, *by our law*, Linwood, fol. 110. b. 38 E. 3. 36. b. 14 E. 3. 2. b. and that the *ordinary may admit which of the clerks he pleaſe.*]

Where a common

† Fol. 354.

perſon preſents his clerk, and he *is admitted and inſtituted*, he cannot change his preſentation before induction and * preſent another; contra of the king; note the difference. Br. Quare Impedit, pl. 65. cites 38 E. 3. 2. 8, 9. ——— A lay patron may vary from his preſentation before ‖ induction, but a ſpiritual patron cannot, becauſe he may well underſtand the ſufficiency of his preſentee at firſt; per Doderidge. Noy, 91. in caſe of Stock v. Sicks. — Cites 38 E. 3. 36. D. 222. Keilw. 154. — N. B. 14 E. 4. 2. ——— Doderidge ſaid, that the Civilians ſay, that a lay patron cannot revoke his preſentation; but he may *cumulando variare*; and ſo the ordinary ſhall have election to inſtitute which of them he will; but that a ſpiritual perſon cannot vary at all. But he ſaid, that by our law without queſtion a patron may revoke his preſentation. Lat. 191, 192. Mich. 3 Car. S. C. by name of Stoke v. Sykes. ——— Lat. 253. S. C. ——— ‖ It ſeems miſprinted for (inſtitution).

[6. *But* by the law alſo of the ſaid realm, an *eccleſiaſtical patron cannot vary* from his preſentment, quia præſentatio a clerico patrono facta vim habet electionis & eligens indignum privatur ipſo jure. Skene Regiam Majeſtatem, 10. b. ver. 3. 31 E. 1. Quare Impedit, 185. *So by our law* a common lay patron cannot revoke his preſentation. D. 81 El. 384. 12.]

‡ [344]

7. Brooke makes a quære in the caſe of nomination being in one, and the preſentation being in another, if the nominator may *name one, and after another*, as well as the patron may vary in preſentment; and ſays, that divers of the juſtices held that he may. Br. Quare Impedit, pl. 133. cites 14 E. 4. 2.

(U. a) *What* ſhall be ſaid *a Revocation.*

See S. C. Argued, Lane, 71 to 74. Trin. 7 Jac. in the Exchequer.—And Ibid. 100 to 104. Hill. 8 Jac. S.C. argued and adjudged.

[1. IF the *king preſents* to a benefice, *and dies before his clerk is admitted and inſtituted*, the preſentment is revoked in law by his death. Mich. 8 Ja. Scaccario, and Hil. 8 J. Scaccario, between CALVERT AND KITCHIN adjudged. Per Curiam.]

[2. If the *king preſents* to a benefice, *and after preſents another without revocation of the firſt, or mention thereof*, yet it is a revocation in law of the firſt. Mich. 8 Ja. Scaccario, H. 8 Ja. Scaccario, between CALVERT AND KITCHIN, per Curiam. D. 12 El. 292. 70. 16 El. 327. 4.]

[3. *But* otherwiſe it is if ſuch ſecond preſentment be obtained *by fraud* and deceit of the king, *pending a quare impedit by the king* upon the firſt grant. Notice being given to him of his firſt grant. D. 17 El. 339. 47. Co. 6. GREENE, 29. b.]

See (T. a) pl. 3. S. C. and the notes there.

[4. If the *preſentee of the king dies after inſtitution, and before induction*; this is a revocation in law, becauſe the king has not the effect of the preſentation, and ſo ſhall preſent again. Dubitatur. D. 18 El. 348. 12. Co. 9. HOLT, 132. ſaid to be reſolved in the ſaid caſe of 18 El. D. 20 El. 360. 7. Admitted.]

See (T. a) pl. 1, 2. If the *king preſents his clerk who is admitted and inſtituted*, yet *he may revoke* this preſentment, and preſent another; for there is no plenarty againſt the king without induction; for where title falls to the king, and admiſſion and inſtitution is paſſed before, and no induction, then the king may preſent. Br. Plenarty, pl. 13. cites 38 E. 3. 4.——*Contra of a common perſon.* Ibid.

[5. If the *king* preſents, and after *before inſtitution revokes it, but before notice* thereof *to the ordinary*, the ordinary *inſtitutes and inducts him*, it ſeems that this preſentment was well revoked in law, and the conuſance thereof to the ordinary is not material as to the ſubſtance of the revocation, but only to diſcharge him from being a diſturber. D. 12 El. 292. adjudged as it ſeems. But Dyer makes a quære thereof. Dubitatur, D. 16 El. 328. 6. Vide 25 E. 3. 47. it ſeems will prove it.]

S. C. Cited Watſ. Comp. Inc. 8vo. 398. cap. 20. For if his executor preſents another clerk, this ſecond preſentment is alſo good, and the biſhop is at his liberty which clerk to receive. Cites Le. 205. Trin. 21 Eliz. Smallwood v. the Biſhop of Litchfield, &c.——S. P. Arg. Lane, 74. cites Mark Ogle's caſe.

[6 If a *man preſents, and before inſtitution dies*, yet it ſeems that this is not any revocation in law of the preſentment, becauſe this is paſſed from him by the preſentment. 24 E. 3. 30. it ſeems will prove it.]

[345] 7. The *vicarage of Yatton*, &c. *came to the queen by lapſe* of two years. Afterwards the *biſhop* of the dioceſe *collated L. to it*; and afterwards the *queen preſented one P.* to the vicarage, *who brought a quare impedit* againſt the biſhop and his collatee, *pending which ſuit L.* the collatee *by fraud* and deceit *obtained a preſentation from the queen, without mentioning her pleaſure to revoke the firſt preſentation.* The *queen by letter* ſigned, &c. by her, *certified* the court *that ſhe had forgot the firſt preſentation, and* ſaid *her pleaſure was that it ſhould ſtand firm.* And in the term following the queen had

had judgment, becauſe *L. having demurred, the fraud* and deceit done to the queen and the court pending the writ *was confeſſed* by it, though the notification thereof was not made under the great ſeal, &c. D. 339. b. pl. 47. Hill. 17 Eliz. Price v. Biſhop of Bath and Lancaſter.

8. A. was preſented by *ſimony*, and died; the patron preſented B. the king preſented J. S. and after a *general pardon* came out *with a clauſe of reſtitution of forfeitures*. And although the king may revoke his preſentation by expreſs words, yet whether or no the general words of reſtitution contained in the pardon ſhall amount to the revoking of the preſentation, and of reſtoring to his right of preſenting, was a great queſtion. Et adjornatur. Freem. Rep. 198. Trin. 1675. C. B. The King v. Turvill and the Biſhop of Lincoln.

(X. a) Preſentment. * *Examination. What Time the Ordinary ſhall have* to examine the Clerk.

* Examination *is* that trial or probation, which the biſhop or ordinary makes before his admiſſion of any perſon

[1. *By the ancient canons* the biſhop had *two months* time to inquire and inform himſelf of the ſufficiency and qualities of every clerk to him preſented, as appears by the canon in 1 Ja. cap. 95.]

to holy orders or to a benefice, touching the qualification of ſuch perſons for the ſame reſpectively; ſo that there are two certain times or ſeaſons eſpecially, wherein this examination is required; the one before an admiſſion to holy orders, the other before an admiſſion to a benefice. The former of theſe is expreſsly enjoined by the 35th canon eccleſiaſtical, whereby it is required, that the biſhop, before he admit any perſon to holy orders, ſhall diligently examine him in the preſence of thoſe miniſters that ſhall aſſiſt him at the impoſition of hands; or in caſe of any lawful impediment of the biſhop, then the ſaid examination ſhall be carefully performed by the ſaid miniſters, provided they be of the biſhop's cathedral church, if conveniently it may, otherwiſe by at leaſt 3 ſufficient preachers of the ſame dioceſs. Godolph. Rep. 270. cap. 24. ſ. 1.

[2. *But* by the canon made 1 *Ja. cap.* 95. it is ordained that the 2 months ſhall be abridged to 28 *days* only.] Fol. 355.

3. Examination of the clerk is *to be done at a convenient time within the 6 months*, for the ordinary cannot refuſe to examine the clerk during all the 6 months, and to ſuffer a lapſe to incur to himſelf; for by ſo doing the patron ſhould loſe his preſentation, and the ordinary take advantage of his own wrong; but if the ordinary, when the clerk comes to be examined ſedet circa curam paſtoralem, he is *not* then *obliged to leave the buſineſs in hand*, and preſently examine the clerk; but he may appoint a convenient time and place for the examining of him. Godolph. Rep. 271. cap. 24. ſ. 3.

See Recuſant—Outlawry.

(Y. a) Preſentment. *Refuſal.* What ſhall be *good Cauſe* of Refuſal *In Reſpect of* the *Preſentor.*

So of *outlawry* in the patron. Jenk. 259. in pl. 55.

[1. IT is good cauſe of the refuſal of a clerk, that his preſentor being the *patron is excommunicated.* 15 H. 7. 7. b. ſaid to be held in our books. Co. 5. SPECOT, 58.]

See (M. a) pl. 1.

[2. If 3 *jointenants are* of an advowſon, or of a next avoidance, *and one or two of them only preſent*; the biſhop is not any diſturber if he refuſe him, for he is not bound to admit the clerk, if all the jointenants do not join in the preſentment. D. 14 El. 304. 54.]

See (M. a) pl. 1.

[3. *But* if there are 3 *grantees of a next avoidance*, and after the church voids, and *two of them preſent*, *the third* being a clerk, the ordinary is bound to admit him, becauſe he cannot join in preſentment of himſelf, and he may relinquiſh his title, and accept a preſentment from the other two. D. 14 El. 304. 54.]

[4. If 4 *coparceners are of an advowſon, and the* 2 *eldeſt*, or *eldeſt and the* 3*d preſent*, and the *others preſent another*, and not all together, or the eldeſt alone, the ordinary may refuſe all their clerks. Co. Litt. 186. b. 1.]

(Z. a) What ſhall be good Cauſe of Refuſal. In reſpect of the *Preſentee.* And for what Cauſes they may be refuſed. [*Crimes*, &c.]

3 Le. 198. pl. 251. S. C. but no judgment. And. 189. S. C.—D. 252. b. pl. 2. Mich. 8 & 9 Eliz. Bell v. Biſhop of Norwich, and after the word (criminoſus) adds, viz. Et ſic inhabilis & non idonea perſona eſſe inſtituenda in vicariam prædictam, &c. ——— Hob. 296. cites S. C.——But ſuch crimes as are *mala in ſe*, as * *homicide*, *drunkenneſs*, *incontinency*, *perjury*, &c. are good cauſes of refuſal. Ibid.——*Nonage*, † *baſtardy*, or ‡ *outlawry*. Ibid.——* S. P. if the clerk be attainted and not pardoned, *but* otherwiſe *if he be pardoned*; for then *he is reſtored* to the benefit of the law. Jenk. 259. pl. 55. cites Hob. 289. Searl's caſe.—† S. P. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12. & 32. 34 H. 6. 11. 38. & 35 H. 6. 18.—‡ S. P. Br. Quare Impedit, pl. 119. cites 5 H. 7. 19. Per Keble.—§ S. P. and *ſo* of *excommunication*, Jenk. 259. pl. 55.

[1. *D.* 8, 9 El. 254. 2. IN quare impedit, the biſhop returned that at the time of the preſentation of the preſentee, and all the time of his commorancy within his dioceſs he *commonly haunted taverns and other places*, *and unlawful and prohibited games*, *ob quod & diverſa conſimilia crimina*, the ſaid preſentee was *criminoſus.* And by all the juſtices, the particular defects above do not make the preſentee criminoſus, becauſe none of them deſerve refuſal; for they are only *mala prohibita.* Co. 5. SPECOT, 58. cites this caſe to be adjudged; and that the words *ob diverſa crimina* are too general and uncertain.]

[2. 5 Co. SPECOT, 58. Reſolved that all ſuch as are *ſufficient cauſes to deprive* an incumbent are ſufficient to refuſe preſentee.]

[3. It

[3. It is not any cauſe of refuſal of preſentee, that he *has another benefice;* for this is * at the peril of the preſentee, and peradventure of the 2d benefice is better than the firſt, and the firſt ſhall be only void; and therefore it would be miſchievous to the preſentee if he ſhall be refuſed on this account. 14 H. 7. 28. b. Curia.]

* For if he keeps them for two months, both ſhall be void; and therefore it is not at the peril of the biſhop.—Br. Quare Impedit, pl. 92. cites S. C.

[4. It is good cauſe of refuſal, becauſe the preſentee *was perjured, though no conviction* was thereof. D. 13 El. 293. 3. † 38 E. 3. 2. b.] [347] Fol. 356.

[5. *So*, it ſhall be, though he was *perjured in a ſuit between the ordinary and another.* Dubitatur, ‡ 38 E. 3. 2. b.]

† S. C. Cited 5 Rep. 58. a. in Specot's caſe, and ſays, the plea of the biſhop was, that the preſentee confeſſed himſelf to be perjured, &c. and ſo he was criminoſus; whence it is ſaid it appears that to allege criminoſus generally, is not good; for no certain iſſue can be taken thereupon, and it was doubted there if the biſhop ought not to ſay in fact, that he is perjured, and not that he has confeſſed himſelf to be perjured.—‡ Br. Quare Impedit, pl. 94. cites S. C.

[6. It is good cauſe of refuſal of a preſentee, becauſe he *is a villein.* 14 H. 7. 28. b. Curia. Co. 5. SPECOT, 58.]

Br. Quare Impedit, pl. 92. cites S. C. By Brian and the greater part of the juſtices and ſerjeants.——S. P. Br. Quare Impedit, pl. 119. cites 5 H. 7. 19. Per Keble.

[7. It is good cauſe of refuſal of a preſentee, that he *has killed a man.* 38 E. 3. 2. b.]

Br. Quare Impedit, pl. 64. cites S. C.

[8. The ordinary may refuſe a clerk *upon his conuſance of an offence done by the preſentee, which is good cauſe of refuſal, though* he be *not convicted* thereof by the law; and this ſhall be *tried by iſſue* whether it be true or no. 38 E. 3. 2. b.]

[9. It is good cauſe of refuſal of a clerk, becauſe he is *ſimoniacus in the ſame preſentment*, that is to ſay, has made a corrupt contract to be preſented.]

[10. It is good cauſe of refuſal of a clerk, becauſe he *is ſimoniacus in other benefice* than this, to which he is now preſented. Trin. 16 Ja. B. between BOUGHTON and the BISHOP OF ROCHESTER in a quare impedit, per Curiam.]

11. *Nonability* and *criminoſus* are ſufficient cauſes for the ordinary to refuſe the clerk. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12. 32. 34 H. 6. 11. 38. & 37 H. 6. 18.

S. P. Per Keble. Br. Quare Impedit, pl. 119. cites 5 H. 7. 19.

12. If a *miſcreant* or ‖ *ſchiſmatic* be preſented and inducted, this is good cauſe of deprivation. 5 Rep. 58. in Specot's caſe, cites 5 R. 2. tit. Tryal, 54. and ſays, it was agreed to be good law; ſo if he be *irreligious*, he may be refuſed, as it is ſaid in 5 H. 7. 6. But when he is charged with the one, or refuſed for the other, *it muſt be alleged particularly*, ſo that the party may anſwer thereto. Ibid.

‖ S. P. And ſo hereſy is good cauſe of refuſal. Jenk. 259. pl. 55.—— And though it does not belong to the king's courts to determine ſchiſms or hereſies, yet the original cauſe of the ſuit being matter whereof the court of the king has conuſance, the cauſe of ſchiſm or hereſy upon which the preſentee is refuſed ought to be alleged

alleged in certain, that the king's court may conſult with divines to know if it be ſchiſm or not; and in caſe the party be dead, then to direct a jury to try it. 5 Rep. 58. a. b. Reſolved in Specot's caſe.

See (Z. a. 3)

(Z. a. 2) Refuſal. What ſhall be good Cauſe. Illiterature, &c. *not being Crimes.*

1. IN quare impedit, the bp. pleads, that he *demanded of* J. S. *the preſentee* of the plaintiff, *to ſee his letters of orders*, and *he would not ſhew them*; and for this cauſe, for that he was not aſcertained, whether he were deacon or not, and *alſo he demanded* of him *letters miſſive*, or teſtimonials teſtifying his ability; and becauſe he had not his letters of orders, nor letters miſſive, nor made proof of them otherwiſe to the biſhop, he deſired leave of the biſhop to bring them, and he gave him a week, and went away and came not again, and that the ſix months paſſed, and he collated by lapſe; and upon demurrer upon it, it was adjudged for the plaintiff; for theſe were not cauſes to ſtay the admittance, * and the clerk is not bound to ſhew his letters of orders or miſſive to the biſhop, but the biſhop muſt try him upon examination for the one and the other; and the plea is not alleged in facto, but pro eo quod non monſtravit, ſo that all cometh under the (eo quod) and ſo no part of it is traverſable; and for one and the other cauſe it was adjudged for the plaintiff. Cro. Eliz. 241, 242. Trin. 33 Eliz. B. R. Margaret Palmes v. the Biſhop of Peterborough.

Le. 230. S. C. And Anderſon ſaid, that the biſhop may examine him upon oath if he has orders or not; but as to the letters teſtimonial of his good behaviour and ſufficiency, the biſhop ought to examine the ſame himſelf, and if he gives day and defers the admiſſion, becauſe he is not reſolved therein, he is a diſturber if the clerk comes to him in a convenient time; and the biſhop cannot refuſe a clerk for the want of letters teſtimonial.

* [348]

2 Lutw. 1094. S. C. but only ſtates the pleadings, and does not report the caſe.——

2. In quare impedit, plaintiff counts that he was ſeiſed in fee, of the advowſon, and that the church becoming void, he preſented one G. who died, and that it belonged to him to preſent, and the defendants diſturbed him; the *biſhop* claimed nothing but as ordinary; and *ſaid, that within ſix months* after the avoidance, the *plaintiff preſented Francis Hodder, who*, at that time, *was* a perſon † *minus ſufficiens in literatura ſeu capax* to have the ſaid church; that *he examined him*, and finding him minus ſufficientem, he *refuſed him, whereupon he gave notice* to the plaintiff, *and he not preſenting within the ſix months, the biſhop collated the defendant*; plaintiff *replies, that Hodder*, at the time of his preſentation, &c. *was in holy orders*, and had been admitted thereto upon ‡ examination by the ordinary, *and was inſtituted a vicar* into another church for divers years, *and was in verbo divino doctus*, &c. The plea was held good by 3 juſtices (there being then no chief juſtice) but was adjourned to be further argued; afterwards Treby being made Ch. J. it was held, per tot. Cur. to be an ill plea. 3 Lev. 313. Trin. 3 W. & M. C. B. Hele v. the Biſhop of Exeter and Hayman.—But this judgment was § reverſed in the Houſe of Lords.

† He muſt ſhew in what particular he is minus ſufficiens, 2 Salk. 519. S. C.——

‡ The Court inclined, that he was ſtill ſubject to an examination of his ability on a new promotion, but gave no reſolution. Carth. 311, 312. S. C. by name of the Biſhop of Exeter v. Hele.——§ Show. Parl. Caſes, 88. S. C.

(Z. a. 3) Refuſal. *Trial.* Where, and how the Cauſe of Refuſal ſhall be tried. *And Pleadings.*

See (Z. a. 2.)

1. 9 E. 2. cap. 13. *IT is deſired, that ſpiritual perſons whom our lord the king doth preſent unto benefices of the church (if the biſhop will not admit them either for * lack of learning, or for other cauſe reaſonable) may not be under the examination of lay perſons in the caſes aforeſaid, as it is now attempted, contrary to the decrees canonical; but that they may ſue unto a ſpiritual judge for remedy, as right ſhall require.* (2) The anſwer: *Of the ability of a parſon preſented unto a benefice of the church, the examination belongeth to a ſpiritual judge, † and ſo it hath been uſed heretofore, and ſhall be hereafter.*

It is required by law, that the perſon preſented be idonea perſona, for ſo be the words of the king's writ, præſentare idoneam perſonam; and this conſiſteth in divers exceptions againſt perſons preſented; 1ſt, Concerning the perſon, as baſtardy, villeinage, outlawry, excommunication, a layman, under age, and the like; 2dly, Concerning his converſation, as if he be criminoſus, &c. 3dly, Concerning his inability to diſcharge his paſtoral duty, as if he be unlearned, and not able to feed his flock with ſpiritual food, &c. and the examination of the ability and ſufficiency of the perſon preſented belongs to the *biſhop*, who is the eccleſiaſtical judge; and in this examination he *is a judge, and not a miniſter*, and may and ought to refuſe the perſon preſented, if he be not idonea perſona. And if the cauſe of refuſal be for *default of learning*, or that he is an ‡ *heretick, ſchiſmatick*, or the like, belonging to the knowledge of eccleſiaſtical law, there he *muſt give* § *notice thereof to the patron*; but if the cauſe be temporal, as a felon, or *homicide, or other temporal crime, or* if the *diſability* grow *by any act of parliament* or other temporal law, there no notice ought be given, unleſs notice be preſcribed to be given thereby. But in a quare impedit brought againſt the biſhop for refuſal of the clerk, he muſt ‖ *ſhew the cauſe of his refuſal ſpecially and directly* (for whether the cauſe thereof be ſpiritual or temporal, the examination of the biſhop concludes not the plaintiff) to the intent the Court, being judges of the principal cauſe, may conſult with ⸸ learned men in that profeſſion, and reſolve whether the cauſe be juſt or no; or the party may deny the ſame, and then the court ſhall write to the metropolitan to certify the ſame; or if the cauſe be temporal and ſufficient in law, (which the Court muſt decide) the *ſame may be traverſed*, and an iſſue thereupon joined, and tried by the country; and yet in ſome caſes, notwithſtanding this ſtatute, idoneitas perſonæ ſhall be tried by the country, or elſe there ſhould be a failure of juſtice, (which the law will never ſuffer,) as if the inability or inſufficiency be alleged in a man that is ¶ dead, this caſe is out of this ſtatute; for the biſhop cannot examine him; and the words of this act are de idoneitate perſonæ preſentatæ ad beneficium eccleſiaſticum pertinet examinatio, &c. And conſequently, though the matter be ſpiritual, yet ſhall it be tried by a jury; and the Court, being aſſiſted by learned men in that profeſſion, may inſtruct the jury as well of the eccleſiaſtical law in that caſe as they uſually do of the common law. 2 Inſt. 632.——‡ See (Z. a)——§ See (R. a), &c.——‖ See Specot's caſe.——¶ S. P. 12 Rep. 67. Mich. 8 Jac.

* In quare impedit againſt the biſhop he pleaded, that he refuſed the clerk, becauſe *upon examination he found him to be ſchiſmaticus inveteratus*, and for that reaſon he refuſed to admit him, as being a perſon by the laws of the church, unable and unfit to take a benefice with cure of ſouls. This plea was adjudged in C. B. to be inſufficient, becauſe it was generally ſchiſmaticus inveteratus; and upon error brought in B. R. the judgment was affirmed; for the ſtatute of *Articuli* ** *ſuper Chartas*, cap. 13. *ſays, propter defectum ſcientiæ, and other reaſonable cauſes*, whereas cauſa vaga & incerta is not a reaſonable one; and though the biſhop (as it was urged) is judge in the examination, yet ſince his proceedings are not of record, the cauſe of refuſal is traverſable; and if it be traverſed, and the party refuſed be alive, it ſhall be tried by the metropolitan, but if he be dead, it ſhall be tried by the country. And if ſuch general allegations be admitted, patrons will be much prejudiced now-adays in their preſentations. 5 Rep. 57. Hill. 32 Eliz. B. R. Specot's caſe.——Alias, Specot v. Biſhop of Exeter.——And. 189. pl. 225. S. C. adjudged.——Goldſb. 35. S. C. but no judgment.——3 Le. 198. pl. 251. S. C. but no judgment.——And it was obſerved, that it appears in our books, that the cauſe of refuſal ought to be certain, as in 5 H. 7. 19. and 11 H. 7. 7. & 37. that the preſentee is a *baſtard, villain, within age, or illiterate, &c.* 5 Rep. 58. a.——** Theſe words ſeem to be wrong, and that it ſhould be articul. (cleri.)

† So as *this act is a declaration of the common law* and cuſtom of the realm. 2 Inſt. 632.

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2. Quare impedit *againſt the biſhop and others*; the *biſhop ſaid, that he examined the clerk of the plaintiff at B. in the county of C.* S. C. cited 12 Rep. 67. Mich. 8 Jac.

and refuſed him for nonability, and gave notice to the plantiff thereof, and he did not preſent another within ſix months, by which he preſented by lapſe; and the *plaintiff ſaid,* that his clerk was *able;* and becauſe the clerk *is now dead,* this cannot be tried by the metropolitan by examination, and therefore it was *tried per pais,* and this *by the county of C. where the examination was,* and not by the county of D. where the writ is brought; quod nota. Br. Quare Impedit, pl. 102. cites 39 E. 3. 1, 2.

3. In *quare impedit* if *the biſhop juſtifies the refuſal* of the clerk *becauſe the church was litigious until he inquired de jure patronatus,* he *ſhall not traverſe all refuſals after the inquiry,* by reaſon that he has juſtified before; and *if the plaintiff alleges other refuſal after the inquiry* de jure patronatus, *this is a departure and jeofail;* for he relinquiſhes his firſt day alleged of the refuſal which ought not be; for if he will have advantage thereof, he ought to have alleged this day at firſt; for he ſhall allege only one day. Br Repleader, pl. 41. cites 33 H. 6. 13.

4. The *ordinary commanded the clerk to come* to him *afterwards* to be examined, *becauſe* the ordinary *had then other buſineſs.* And there the better opinion was, that it was a *good plea* for the ordinary, *that he did not refuſe* the clerk, *but that the clerk did not return* to him again; and that the 6 months paſſed, ſo as he made the collation, and that the patron made his preſentation too late, ſo as he had not convenient time to examine him. 3 Le. 46. Mich. 15 Eliz. in C. B. cited by Lord Dyer, as * 14 H. 7.

* This is at 14 H. 7. 21. b. pl. 4.— S.P. 15H.7. 7. a. b. 8. a.

See (Z.a.2) pl. 1. Marg.

(A. b.) *Diſturbance* by the Ordinary. *What Act* will make the Ordinary a Diſturber.

[1. IF the ordinary admits and *inſtitutes the preſentee of the chancellor,* and ſends to the archdeacon to make induction, and after the *king, before induction* made, *ſends an inhibition, reciting,* [350] *that the church is of the value of* 40l. per annum, and ſo it does not belong to the chancellor to preſent, *commands the ordinary to receive J. S. his clerk, whom he preſents,* if the *ordinary does not ſend to the archdeacon not to make induction, but ſuffers* the induction to be made a month after, he ſhall not be adjudged a diſturber; for there is not any default in him. 38 E. 3. 4. 9. Adjudged.]

[2. *But* in this caſe *if the inhibition had come* to the ordinary *before the warrant made to the archdeacon* to make induction, if he *had made the warrant after,* by which he had been inducted, he ſhould be a diſturber. 38 E. 3. 3.]

3. In quare impedit, the biſhop pleaded, that he *claimed nothing in the patronage but as ordinary;* a writ to the biſhop is thereupon awarded againſt him, and after *he collates;* this makes him a diſturber. 8 H. 4. 22. b. 23. pl. 8. Biſhop of Wincheſter v. Rye and ux.

4. Where a man preſents, and his *title is found upon a jure patronatus,* and *he ſues to have his clerk admitted,* and after *another preſents;*

preſents; there, *if the biſhop could have admitted and inſtituted the clerk of him who had the verdict, and does not, but defers it until the lapſe falls, and then preſents his own clerk*, in this caſe he is a diſturber againſt both the preſentors; and *iſſue* ſhall be taken, *whether he, who preſented and had his title found, ſued to have his clerk admitted, or not; and whether the ſecond preſented to him ſo haſtily that he could not admit the clerk of the firſt by due proceſs, before the preſentation of the ſecond, or not. And ſo the church is not litigious, but where* * *two preſent ſeverally at one time, and both titles are found by divers commiſſions*; or *where one preſents, and his title is found by commiſſion, and before that the biſhop can admit his clerk, another preſents*, quod nota. Per Newton; if *two preſent* to one church *at one time*, now the church is litigious; and there, if after the *title is found* by commiſſion, the hands of the biſhop are cloſed from taking benefit by the litigiouſneſs, unleſs the other ſues a ne admittas; for he *is bound in right to admit his preſentee for whom his title is found*; and in this caſe *divers commiſſions* ought to be awarded, and the biſhop *ought to give to the commiſſioners divers days, and* ought *to warn the one of the day given in the other commiſſion*, ſo that they may have notice to come and give their evidence, and yet ſuch *titles found there ſhall not conclude the other party in quare impedit; for it is only inqueſt of office*. Br. Quare Impedit, pl. 80. cites 21 H. 6. 44.

* S. P. Per Paſton. Ibid.

5. Where *different perſons preſent their ſeveral clerks, and the ordinary accepts the preſentee of the one without inquiry de jure patronatus*, he is a diſturber; per Port. Quod Newton & Markham conceſſerunt. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

Refuſing to award a jure patronatus when he is required, makes him a diſturber. Br. Nugation, pl. 3. cites 33 H. 6. 13. —— Br. Quare Impedit, pl. 12. cites 33 H. 6. 12.

6. If a *diſturber preſents, and the biſhop inquires de jure patronatus*, and *another is found patron*, there, *if he* will *preſent within the ſix months, the biſhop is bound to admit his clerk; but if he does not preſent he ought to* * *admit the clerk of the diſturber*. Agreed. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 6. 11. 38. and 35 H. 6. 18.

* Orig. is (preſent), and ſo are all the editions.

7. If there are two parſons, and *the biſhop admits the clerk of the true patron*, yet *this is no excuſe in quare impedit*; for *it is no plea, that he was verus patronus*. Per Priſot, quod non negatur. Contra, if he had inquired de jure patronatus. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 6. 11. 38. and 35 H. 6. 18.

8. Whether if the *plea of the ordinary be inſufficient*, he ſhall thereby be a diſturber? Goldſb. 35. Arg. ſays, it ſeems that he ſhall, and cites 14 H. 7. 21. b. and 5 H. 7. 20.

9. If after *a jus patronatus*, he *admits the clerk of the patron againſt whom it is found*, it is at his peril, both as to the title itſelf, and ſuch patron's defending it. And it is againſt juſtice and the intent of the law, to put the party to the delay and charge of a trial, and then act contrary to the finding. And the books, which

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ſay, that the ordinary is to judge of the better title, mean, that he *is not to prejudge of his own head*, but ſecundum allegata & probata *upon verdict* given of the right, and found according to the form of law to give inſtitution, which is his judgment, and induction which is his execution. And if the patron bring quare impedit againſt the uſurper and incumbent, not naming the biſhop, and makes good his title, he may have an *action on the caſe* againſt the ordinary *for that wilful wrong delay and trouble* that he hath put him to, and ſhall recover *coſts and damages*, not in reſpect to the value of the church (for there is no damages for that by the common law but by the ſtatute of Weſtminſter 2d.) but for the other reſpects. But if he *name the ordinary in the quare impedit*, he can have no other action on the caſe; neither can he have ſuch action on the caſe before he has *tried his title* in a proper action, and againſt the proper parties. Per Hobert Ch. J. Hob. 317. Paſch. 17 Jac. in the caſe of Elvis v. Archbiſhop of York, Taylor, and Biſhop.

10. Biſhop *refuſes a clerk for inſufficiency*. Upon notice the *patron preſents another*. The biſhop within the 6 months admits the firſt. Per Cur. the biſhop is a diſturber; for he cannot accept afterwards a perſon refuſed by him for inſufficiency. Cro. E. 27. Paſch. 26 Eliz. C. B. Biſhop of Hereford's caſe.

Twenty-two days held too large delay. Le. 32. pl. 39.

11. Ordinary may examine and refuſe, but both muſt be in convenient time, elſe by his *delay* he is a diſturber. 2 Salk. 539. Mich. 3 W. & M. B. R. Hale v. Biſhop of Exeter. Trin. 27 Eliz. in C. B. Albany v. Biſhop of St. Aſaph.

12. It was objected, that the biſhop *not giving notice of refuſal for illiterature until* 32 *days after*, was a diſturbance ipſo facto; but the Court gave no opinion in this point. Carth. 312. Trin. 6 W. & M. B. R. in caſe of Biſhop of Exeter v. Hele.

(A. b. 2) Diſturbance. How puniſhed. Pleadings, &c.

* Orig. is (non omittas) and ſo are all the editions, but the Year-book is (ne admittat.)

1. *THE biſhop incumbered the church after a* * *ne admittas directed to him within the 6 months*, and the patron brought quare impedit, and recovered, and had writ to the biſhop to diſincumber the church, who ſaid that he had admitted the plaintiff; et non allocatur. The reaſon ſeems to be, inaſmuch as he traverſed the incumbrance, and upon the incumbrance found it was *prayed that the temporalties be ſeiſed*, as upon attachment upon prohibition; & non allocatur. Br. Quare Impedit, pl. 145. cites 21 E. 3. 3.

2. Quare Impedit *againſt the biſhop of N. and others*; and *at the diſtreſs the biſhop appeared*, and the *others made default*. Chaunt. ſaid the biſhop claims nothing but as ordinary: judgment if without ſpecial diſturbance ſhewn, the plaintiff aſſign tort in him. Caund. ſaid,

ſaid, we *releaſe* our *damages*, and pray judgment and writ to the biſhop. But per Babb. this cannot be; for the damages are *not taxed*, but it *ſhall be recorded that you will not have damages*; and ſo it was, and he had writ to the biſhop. Br. Quare Impedit, pl. 150. cites 10 H. 6. 4.

3. The *biſhop may be a diſturber within the 6 months*, and it is no plea in quare impedit or treſpaſs, to *juſtify by matter happening pending the writ*; for it is brought of diſturbance before the writ brought, which was a tort, and cannot be defended by matter ſubſequent. Br. Quare Impedit, pl. 80. cites 22 H. 6. 28 & 29. Per Newton and Paſton.

As in quare impedit againſt the biſhop of R. and W. D. *the biſhop ſaid*, that *he* **claimed nothing but as ordinary*; judgment if without ſpecial diſturbance action may he have, the *plaintiff ſaid that he preſented his clerk, and the officer examined and found him able, and the biſhop would not receive him, but preſented within ſix months one J.* &c. The *defendant ſaid, that he examined him, and did not find him ſufficiently lettered*; and they were compelled to join iſſue, *able or not able*; quod nota; and *pending the iſſue the biſhop accepted*, inſtituted, and inducted *him*; and therefore the plaintiff prayed his judgment of damages; and judgment was, that he recover his preſentment and damages, notwithſtanding the biſhop *alleged that it might be* that *the clerk was not able at the* time of the *examination, and* had *learnt better after*, and yet, becauſe by the admittance after, he has admitted him always able; therefore judgment as above. Br. Quare Impedit, pl. 22. cites 40 E. 3. 25.

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4. And by ſome, where the biſhop pleads *ne diſturba pas*, yet this ſhall not conclude the biſhop, but he ſhall ſay that he preſented, and his title was found by jure patronatus, and he preſented his clerk. Br. Quare Impedit, pl. 80. cites 22 H. 6. 28, 29.

And ſo where *two preſent ſeverally*, and *he preſents by lapſe*, and after *the one brings quare impedit againſt the other*, and he pleads *ne diſturba pas*, yet the biſhop may ſhew the matter. Br. Quare Impedit, pl. 80. cites 22 H. 6. 28, 29.

5. Quare impedit by two *againſt an abbot and W. C. proceſs continued to the diſtreſs, and the defendants made default*, and a writ iſſued *to the biſhop for the plaintiffs, which was returned not ſerved, and alias and pluries awarded*, and then the *biſhop returned, that the 13th of October* 1463, *J. S. the parſon*, &c. *reſigned to him, to which he agreed*, and accepted the reſignation; *and the 4th of December next the biſhop certified the abbot then patron of the reſignation, and the church remained void till the 28th of January, by which the biſhop by lapſe made collation to W. C. clerk*, who was inſtituted and inducted; *and after this writ were delivered to him the 12th July laſt after the collation by lapſe*. And by ſome the certification is not good; for the *reſignation and collation were made pending the quare impedit*. Per Cur. this *does not appear to the court*, nor *if W. C. who is preſented be the ſame perſon* who is defendant; therefore it ought to be ſhewn by the plaintiff. And by ſome, he who is defendant ſhall be bound by the judgment of the plaintiff, if he be the ſame perſon who is preſented; for he is party to the writ, and he who purchaſes pending the writ ſhall be bound; contrary of the biſhop here, he ſhall not be bound, for he is not party to the writ; and therefore if the plaintiff will not plead certainly that the one and the other is one and the ſame perſon, it ſhall be intended that he is a ſtranger of the ſame name; and therefore he averred accordingly, and that the abbot was not verus patronus,

and there it is agreed, that upon death of the incumbent the biſhop ſhall not give notice to the patron; contrary upon reſignation. So upon deprivation; and by the judgment in the quare impedit the abbot loſt his patronage, and was not any longer patron; and therefore the notice made to him after the judgment, is not good by ſome. Br. Quare Impedit, pl. 123. cites 5 E. 4. 115.

6. The *biſhop ſaid that he claimed nothing but admiſſion and inſtitution as ordinary;* judgment if without alleging ſpecial diſturbance, &c. Action lies; and the *plaintiff alleged preſentation to the ſaid biſhop ſuch a day, and he refuſed, and ſo diſturbed,* &c. and then the *biſhop ſhewed that the church before this preſentation was* * *litigious by preſentment before made by one N.* And it was ſaid there, that upon the firſt plea the plaintiff might have writ to the biſhop; contrary upon the ſecond plea, and ſee the pleading of thoſe pleas there. And per Cur. the firſt plea is a good plea. Br. Quare Impedit, pl. 119. cites 5 H. 7. 19.

* It is a good *plea* to ſay, *that he is ordinary, and the church was litigious.* Brooke ſays, quære if this be intended good, *without ſhewing that he had awarded a jure patronatus* thereof. Br. Quare Impedit, pl. 119. cites 7 E. 3.

7. In quare impedit *againſt the biſhop of C.* the *plaintiff counted how he was ſeiſed of the advowſon, and preſented N.* who was admitted and inſtituted, &c. *and after N. died, and the church voided by 6 months, and the biſhop made collation to one M. by lapſe, who was in, and after died,* by which the church voided, and the *plaintiff preſented,* &c. The *defendant ſaid, that J. B. preſented this ſame M. to the defendant as ordinary, at whoſe preſentment he received him* [353] *as ordinary, by which he was inſtituted and* inducted, *abſque hoc, that he made collation modo & forma prout the plaintiff ſuppoſes.* And per Keble, Fineux, Townſend, and Brian Ch. J. this is a *good plea for the ordinary to ſhew that another is patron and not the plaintiff,* though he does not make to himſelf title to the advowſon; for the ordinary has intereſt to meddle with the church, as in aſſiſe of rent the tenant ſhall compel the lord to make to himſelf title to the rent; *for there is privity* between them and *between the ordinary and the patron;* as in waſt the tenant may ſay that the leſſor has granted the reverſion to J. F. to whom he has attorned. So of a ſeigniory granted, &c. And ſo, that a ſtranger has recovered the ſeigniory againſt the lord; for *the ordinary may traverſe this thing alleged againſt him, which proves him to be a diſturber, without alleging title in the other perſon.* And per Rede, Jay, Vaviſor, and Davers, this is no plea; for he does not plead as ordinary, as to ſay that he claims nothing but admiſſion, inſtitution, and induction as ordinary; judgment if without ſpecial diſturbance, &c. or to ſay that he ne diſturba pas; for then the plaintiff ſhall have writ to the biſhop immediately, or to ſay that the church is litigious, or that his clerk is criminoſus, but cannot intitle a ſtranger without intitling himſelf. But Brian and Townſend contra; for otherwiſe there ſhall be a miſchief, that the biſhop ſhall be bound to admit the clerk of whomſoever will preſent to him, which is not reaſon: et adjornatur; for the ordinary has lawful meddling with the church, as the tenant has with the ſeigniory or reverſion. Br. Quare Impedit, pl. 120. cites 5 H. 7. 33.

(B. b) * Admiſſion. † Inſtitution and ‡ Induction. *Of what Things* it ſhall be made.

* *Admiſſion is* when the *biſhop* upon examination admits him to be able, and *ſays, admitto te habilem.* Co. Litt. 344. a.———S. P. Fin. Law, 8vo. 89.———S. P. Godolph. Rep. 272. cap. 24. ſ. 6.

† *Inſtitution is* when the biſhop ſays, *inſtituo te rectorem talis eccleſiæ cum cura animarum & accipe curam tuam & meam.* But ſometimes in a more large ſenſe *admiſſus doth include inſtitutus* alſo; cujus præſentatus ſit admiſſus, i. e. inſtitutus. Co. Lit. 344. a.—S. P. Fin. Law, 8vo. 89.—S. P. Godolph. Rep. 274. cap. 24. ſ. 8.

‡ *Induction is* nothing elſe but the putting of the perſon into actual poſſeſſion of the church and glebe, which are temporalties of the church, or the making of a clerk compleat incumbent of the church; this is induction, and it is by letters from the biſhop of the dioceſs directed to all and ſingular the clerks, rectors, vicars, &c. within the ſaid dioceſs, to put the clerk or his lawful attorney for him, and in his name, into the actual poſſeſſion of the church to which he had been preſented and inſtituted, together with all the profits, dues, members, and appurtenances whatſoever thereunto belonging or appertaining; of the due execution whereof a certificate endorſed on the inſtrument of induction, and ſubſcribed by a competent number of witneſſes, ought to be returned to the ſaid biſhop as ordinary, who may appoint the archdeacon to give induction. Godolph. Rep. 278. cap. 24. ſ. 16.

Induction is done in the following manner; one of the clergymen commiſſioned takes the perſon to be inducted by the hand, lays it on the key of the church, and pronounces thoſe words, By virtue of this commiſſion I induct you into the real and actual poſſeſſion of the rectory of, &c. with all its appurtenances; then he opens the church door, and puts the parſon into poſſeſſion thereof, who commonly tolls a bell, &c. and thereby ſhews and gives notice to the people, that he had taken corporal poſſeſſion of the ſaid church. If the key of the church door cannot be had, the clerk to be inducted may lay his hand on the ring of the door, the latch of the church gate, on the church-wall, &c. and either of theſe are ſufficient. So it may be by delivery of a clod of the glebe, &c. Jac. Law Dict. verbo Induction.—Cites Country Parſ. Comp. 21, 22.

[1. A *Donative* may paſs by gift of lay patron without inſtitution or induction. Da. 1. 46. b.]

[2. In the *king's chapel at Weſtminſter*, when a *prebend* is void, the king ſhall make *collation by a patent* to whom he pleaſe, and ſend him with it, and by force thereof he ſhall take poſſeſſion. 11 H. 4. 9. (without any inſtitution or induction is implied.] Br. Preſentation, pl. 13. cites 11 H. 4. 7.

[3. If the *king grants a free chapel* to another, he ought to be ‖ *put in poſſeſſion by the ſheriff.* 14 H. 4. 11. b.] ‖ Fol. 357.

Godolph. Rep. 279. cap. 24. ſ. 16. S. C. and P. Watſ. Comp. Inc. 8vo. 276. cap. 15. cites S. C.

[4. If a clerk be preſented, he has not *poſſeſſion before induction.*— 11 H. 4. 9. Com. HARE v. BICK, 528.] [354]

[5. If the *biſhop of Sarum be patron of the church of S.* which is *preſentative, and lies within the dioceſs of Sarum, and it is the corps of a prebend in the church of Sarum*, and the biſhop of Sarum *is alſo patron of* the church of *D. which is preſentative alſo, and lies within the dioceſs of Winton*, and after the church of *D. is united to the ſaid prebend*, with the aſſent of the biſhop, and dean and chapter of both dioceſſes. By this union both churches are ſo annexed and united, that if the biſhop of Sarum *collates* a clerk *to the prebend, and he is* thereupon *inſtalled in the cathedral church of Sarum, he has* thereby *poſſeſſion of both* churches without any preſentation, admiſſion, inſtitution, or induction to, or by the biſhop of Minton; for inaſmuch as he has poſſeſſion of the prebend, he thereby has poſſeſſion of the corps of the prebend, and by the *union* the church

of D. is parcel of the body of the prebend. P. 10 Car. B. R. between LEIGH AND HELLIER upon evidence at bar in an ejectione firmæ, upon the trial of a title of a leaſe made by ſuch prebendary before the ſtatute of 13 El. of the church of D. which was not confirmed by the biſhop of Winton, but only by the biſhop, dean, and chapter of Sarum; and this held per Curiam to be good for the cauſe aforeſaid.]

6. By the laws of England, the acts of preſentation, inſtitution, and induction, *are* all *authorities given by law, and muſt be executed according to the form preſcribed by law*, and cannot be modified; for actus legitimi non recipiunt modum. For the law gives the church, and not the patron and ordinary, who are but ceremonious miniſters, and are appointed their manner and form, which they may neither exceed nor abridge. Hob. 153. in caſe of Golt and Glover v. Biſhop of Coventry.

(C. b) *By whom* it ſhall be *made*. Admiſſion. Inſtitution. Induction.

It is not only *peral* for the biſhop to inſtitute, but the inſtitution is void; becauſe it is an act of juriſdiction, from which he is ſuſpended. *But* it may be a queſtion in caſe of a *collation*, whether if a *lapſe* happen the biſhop may collate? but the better opinion is, he cannot; becauſe it is not by way of *intereſt*, but by way of *proviſion for the cure*, and to ſupply the negligence of the patron. This appears, becauſe the patron may preſent at any time after a lapſe, and before collation. 3 Salk. 202. cites Paſch. 13 Car. B. R. Lunne v. Dodſon. —— Cro. C. 475. S. C. and becauſe this and another point there concerned eccleſiaſtical juriſdiction, the Court required to hear Civilians, and it was argued accordingly; but the other point being clear for the defendant, judgment was given for him upon that point, and then this not being material; nothing more is there ſaid about it.

[1. IF *archbiſhop viſits his inferior biſhop, and inhibits him during the viſitation*, if the *biſhop has title to collate* to a benefice *within his dioceſs* by cauſe of *lapſe*, yet he cannot inſtitute his clerk, but *ought to preſent to the archbiſhop, and he ought to inſtitute* him, becauſe during the inhibition his power of juriſdiction is ſuſpended. Trin. 13 Car. B. R. between DODSON AND LYNN. This was a point upon a ſpecial verdict in the county of Lincoln, and the Civilians who argued this ſeemed to agree it, but the caſe was argued upon another point, and this not reſolved. Intratur Tr. 11 Car. Rot. 446.]

Watſ. Comp. Inc. 8vo. 274. cap. 15. cites S. C. But the biſhop may direct his mandate to ſuch other clergymen as he pleaſes to make induction, and cites Parſons Councellor, 8. —— The archdeacon having received a mandate for induction makes a precept omnibus literatis infra archidiaconatum to induct, a *clerk not belonging to the archdeaconry* made the induction, and held to be well enough. Arg. Vent. 320. Mich. 29 Car. 2. B. R. in caſe of Robinſon v. Wolly. Cites Noy's Reports. But ſays, (quære that caſe.)

[2. The ordinary ſhall ſend to the *archdeacon* to make induction. 38 E. 3. 3. b.]

[3. The *archdeacon* ſhall make the induction. 38 E. 3. 3. b.]

[355] Godolph. Rep. 278. cap. 24. ſ. 16. cites S. C. —— Watſ. Comp. Inc. 8vo. 275. cap. 15. cites S. C. And that if induction be made by the archbiſhop when it appertains to the dean and chapter by preſcription, that induction is ſaid

[4. *By preſcription* the *dean and chapter* of Lichfield make induction. 11 H. 4. 9.]

[5. *So* of the dean and chapter of Paul's. 11 H. 4. 9.]

ſaid to be void, 11 H. 4. 9. but the contrary is held Fitzh. tit. Quare Impedit, 162, that in ſuch caſe it is only voidable, and ſo reſolved. Hill. 36 & 37 Car. 2. C. B. 3 Lev. 211. in caſe of Wrighton v. Brown.

[6. An induction *made by the biſhop is* * *void, where it belongs to the dean and chapter by preſcription.* 11 H. 4. 9. b. Contra. 14 H. 6. Quare Impedit, 162. Adjudged of a † *prebend.*] S. C. cited 3 Lev. 212. in caſe of Wrighton v. Brown——

* *But* Br. Executions, pl. 32. cites 11 H. 4. 7. 9. ſays it is *good* at the common law.—Br. Preſentation, pl. 13. cites S. C. accordingly; becauſe he is officer and ordinary immediate to the Court, and the Court will not take conuſance of peculiar juriſdictions.——Godolph. Rep. 278, 279. cap. 24. ſ. 16. cites S. C.

† Induction of a *prebendary* muſt be by the dean and chapter, and not *by* the archdeacon. Pl. C. 329. in caſe of Hare v. Bickley.

[7. An induction *by the patron* is void. 11 H. 4. 10.] Godolph. Rep. 278, 279. cap. 24. ſ. 16. cites S. C.—— Watſ. Comp. Inc. 8vo. 275. cites S. C. and Parſons Counſellor, 8. But Dr. Watſon ſays, he ſuppoſes this is to be underſtood where it is done of his own authority; for he ſays, he doubts not but that a biſhop may give induction as well as inſtitution to a benefice of his own gift where the right of induction to a benefice within his own dioceſs is in him; or however that an archdeacon may induct to a benefice within his archdeaconry, although he be patron thereof; nevertheleſs, the rule is, modus et conventio vicunt legem, and therefore de jure communi neither biſhop nor archdeacon may induct a clerk to their benefices of which they are patrons, yet by preſcription or compoſition their induction in ſuch caſe muſt be good. And accordingly, though the biſhop of Chicheſter does admit the dean of the exempt juriſdiction of battel within that dioceſs, and does commit to him the cure and juriſdiction of that church, yet the patron thereof is to inſtitute and induct the dean, and the patrons accordingly have given the deans inſtitution and induction for ſome hundreds of years; and without queſtion ſuch inſtitution and induction is good; but this deanry was originally given to the incumbent as a donative only by the patron, and the biſhop admits or approves of the patron's preſentee, and commits to him the cure and juriſdiction by compoſition only. Watſ. Comp. Inc. 8vo. 275, 276. cap. 15.——R. S. L. 4 Vol. 17. S. P.

[8. The *king's grantee of a free chapel* ſhall be put in poſſeſſion *by the ſheriff* of the county, and not by the ordinary of the place. 14 H. 4. 11. b.] Godolph. Rep. 279. cap. 24. ſ. 16. cites S. C. and P. cites S. C.

——Watſ. Comp. Inc. 8vo. 276. cap. 15.

9. A. and B. *two patrons, pretend a title* to preſent. *A preſented;* the *biſhop refuſed;* whereupon *A. ſued* in the audience, *and had an inhibition* to the biſhop. *And afterwards,* upon that ſuit he *obtained inſtitution and induction by the archbiſhop;* after which the inferior *biſhop* inſtituted and *inducted the clerk of B.* Whereupon proceſs iſſued out of the audience againſt the inferior ordinary. Thereupon a prohibition was prayed, becauſe the eccleſiaſtical court ought not to intermeddle after inſtitution and induction; for this would be to determine the incumbency. And therefore *quoad the incumbency the prohibition was granted; but not quoad the contempt of the inferior ordinary* in granting inſtitution after he had been inhibited. Moor 879. pl. 1235. Trin. 15 Jac. Middleton v. Lawte.

10. Though the *king* may preſent to a church, yet he ſhall not collate, admit, nor inſtitute; for he cannot exerciſe the ſpiritual function. And if he brings qua. imp. againſt the biſhop and recovers, he ought not himſelf to make an admittance, but muſt ſend his writ to the biſhop to do it. Arg. 2 Bulſt. 4. in caſe of Stevenſon v. Wood.

11. The

S. C. argued Vent. 309. Paſch. 29 Car. 2. and Ibid. 319. Mich. following it was argued again, and adjudged, that the induction was void. —— 2 Jo. 78. S. C. adjudged; but Ibid. 79. ſays it was afterwards reverſed in the Exchequer Chamber. —— See 3 Keb. S. C.

11. The *biſhopric* of Glouceſter being *void*, and the *archbiſhop* of Canterbury *guardian of the ſpiritualties, a church became void.* The *patron preſented* to the *archbiſhop*, who admitted and inſtituted the clerk, and *granted mandate to the archdeacon for induction*, which was by an inſtrument directed to certain parſons, as uſual, to do it. They omitted * the doing it for 2 or 3 months, and in the mean time *a biſhop of Glouceſter is made and conſecrated, and afterwards the parſons made the induction.* Adjudged per tot. Cur. that the induction is void; for though it belongs to the office of archdeacon, yet his doing it is only by mandate and authority of the biſhop, and they held it to be no more than if a man makes a letter of attorney to make livery and dies, and the attorney makes livery after his death. 2 Lev. 199. Trin. 29 Car. 2. B. R. Robinſon v. Woolley.

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Fol. 358.

(D. b) *What* Thing ſhall *amount to* Inſtitution and Induction.

[1. THE *proviſion of the pope* is as an inſtitution. 11 H. 4. 76. b.]

[2. *And when* the clerk is *put in execution* by force of the proviſion, it ſhall be as an induction by force of the bulls. 11 H. 4. 76. b.]

3. A parſon, vicar, or chauntery prieſt may be admitted and inſtituted he not knowing it. As if the patron ſends to the biſhop to admit his clerk, and he agrees to it; and if *the biſhop ſays, in the abſence of the clerk, to J. N. I admit thee to the church of D. in the name of the clerk*, this admiſſion is an inſtitution though the clerk be abſent; but there he may refuſe, becauſe he was abſent at the time, &c. Br. Quare Impedit, pl. 155. cites 32 H. 6. 28. by a doctor of the law.

4. Where a *recovery is in qua. imp. and* the *biſhop* upon preſentment will admit and inſtitute *his clerk*, and he *is inducted*, and this without any writ to the biſhop. This is good, as well as a man may enter without an habere facias ſeiſinam after recovery. Hutt. 66. the third reſolution in the caſe of Rud v. Biſhop of Lincoln.

(D. b. 2) Admiſſion, Inſtitution, or Induction. *Good. And the Effect* thereof.

1. PERSONA eccleſiæ nunquam dicitur *imperſonata* ante inductionem; nec habet jus in re, ſed ad rem, ante inductionem. D. 221. b. pl. 19. cites Hill. 38 E. 3. Per Thorp.

2. Note

2. Note that a common perſon may *have quare impedit* againſt another, though his clerk was not inducted; for the entry is there quod admiſſus & inſtitutus fuit. Br. Quare Impedit, pl. 1. cites 22 H. 6. 27.

But it was ſaid, that *writ of right of advowſon* does not lie *without induction*; for he ſhall allege the eſplees, as in great tithes and ſmall tithes, &c. Br. Quære Impedit, pl. 1. cites 22 H. 6. 27.—S. P. Ibid. pl. 10. cites S. C. & 33 H. 6. 24.—S. P. Br. Ibid. pl. 83. cites 22 H. 6. 25.

3. The incumbent has *no remedy for* the *profits*, *nor can* he *try* his *right*, *till induction*. Per Popham. Cro. E. 653. Hill. 41 Eliz. C. B. in the caſe of Quarles v. Fairchild.

The clerk ſhall not have the profits before induction, but the *ordinary ſhall ſequeſter* them. Per Nichols J. Roll. R. 461. Paſch. 14 Jac. in Cam. Scacc. in the caſe of Colt v. Glover.——Inſtitution intitles the parſon to the *ſpiritual profits* as oblations, &c. before induction, and he is liable to be ſued for neglecting the cure, but he can *not* ſue for *great tithes*, for they are temporal. 11 Mod. 46. pl. 12. Paſch. 1705. B. R. Anon.

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4. Admiſſion, inſtitution, and induction *without a preſentation is void*. 6 Rep. 29. b. Trin. 44 Eliz. B. R. Green's caſe.

S. P. Adjudged accordingly. Cro. J. 252. Mich. 8 Jac. B. R. Hunston v. Cocket, and cites S. C.——S. C. Cro. C. 99, 100. Mich. 3 Car. in caſe of Stephens v. Potter, and ſays it was reſolved accordingly, Anno 8 Jac. in C. B.—S. C. cited Arg. Gibb. 32. Paſch. 1 Geo. 2. B. R. in the caſe of the King v. the Archbiſhop of Armagh.——And cites Cro. J. 252. Hunſton v. Cocket. S. C. cited Gibb. 34. But ſays that it is to be underſtood, that they do not put the rightful patron out of poſſeſſion, but that he may at any time preſent or bring quare impedit, and ſo it is taken in Lord Hobart, 301, 302. which proves that Hunston and Cocket's caſe, which is founded on Green's caſe, miſtook that reſolution; therefore though the king might notwithſtanding ſuch collation either preſent or remove the incumbent by quare impedit any time during the life of ſuch incumbent, yet it does by no means follow, that the collatee was not a compleat incumbent during his life if not removed, and cites Cro. E. 207. 240. Dy. 293, 294.

5. If a *gift be made to a parſon before* induction, it is good. Arg. Goldſb. 163. in the caſe of Robins v. Prince.

6. If he *alien by conſent of patron and ordinary* before induction, it is good. Arg. Goldſb. 163. in the caſe of Robins v. Prince.

7. Before induction he is not patron to all intents; for a *grant of annuity* before induction is not good. Per Gawdy J. Goldſb. 163. in the caſe of Robins v. Prince. Cites Pl. C. 526.

8. He, who is inſtituted, *may enter into the glebe* land *before induction*, and has right to have it againſt any ſtranger. Per Coke. Roll. R. 192. Paſch. 13 Jac. B. R. in the caſe of Hitching v. Glover.

But before induction he *has no eſtate* in the glebe, nor can he receive any tithes as incumbent. Watſ. Comp. Inc. 8vo. 241. cap. 13. cites 28 E. 3. 9. 26 H. 8. cap. 15. cites S. C. & 38 E. & 3. 4. & 22 H. 6. 27.

9. By inſtitution the incumbent has *officium*, but *beneficium* comes by induction. Per Doderidge J. Poph. 133. Mich. 15 Jac. B. R. in Rone's caſe.

Inſtitution gives the cure of ſouls, but the temporalties paſs by induction. Arg. Pl. C. 528. in the caſe of Hare v. Bickley.——Watſ. Comp. Inc. 8vo. cap. 15. cites S. C. & 38 E. 3. 4. & 22 H. 6. 27.

S.P. Goldſb. 163. in the caſe of Robins v. Prince.

10. By inſtitution *habet curam animarum*, the words of the inſtitution being inſtituo te habere curam animarum, curam tuam, & meam; ſo that curatus implies a parſon inſtituted. Per Doderidge J. which Whitlock J. & Crew Ch. J. agreed. 3 Bulſ. 310. Mich. 1 Car. B. R. in the caſe of Wrothmeal v. Gill.

But Vent. 16. Paſch. 21 Car. 2. B. R. in caſe of HEATH v. PRYN ſays, it ſeemed by the Court that letters of inſtitution muſt be under the epiſcopal ſeal.

11. It was held, that *letters of inſtitution ſealed with another ſeal* than that of the biſhop of the dioceſe, *and made out of the dioceſe*, were good enough; for the ſeal is *not material*, it being an act made of the inſtitution, and the writing and ſealing is but a teſtimonial thereof, which may be under any ſeal or in any place; but they would adviſe. Cro. C. 242. Hill. 9 Car. B. R. in the caſe of Cort v. the Biſhop of St. David's.

12. A preſentation may be *without inſtitution and induction*, the biſhop being party. Reſolved. Cumb. 302. Mich. 6 W. & M. B. R. in the caſe of the Queen v. the Biſhop of London and Dr. Birch.

(D. b. 3) Admiſſion, Inſtitution, or Induction. *Triable how*; and *Puniſhment of refuſing* them.

1. ADMISSION and inſtitution ſhall be tried *by the ordinary*, but *induction* ſhall be made by the archdeacon, and ſhall be tried *per pais*. Br. Quare Impedit, pl. 155. cites 32 H. 6. 28.

[358] 2. Induction is triable *by the country*, and not by the biſhop. Pl. C. 529. b. in the caſe of Hare v. Bickley——cites 21 E. 4. 7. & 33.

A. ſued a *quare impedit* againſt B. and pending it, B. was inſtituted and inducted, and A. ſued B. in the ſpiritual court to *remove him*, and a prohibition was prayed, becauſe he cannot ſue for the ſame cauſe duplici foro; and 2dly, becauſe it is a ſuit after induction, and upon this laſt point the Court granted a prohibition. Lat. 205. Trin. 3 Car. Oliver v. Huſſey.

3. Matters of induction, and the validity thereof, are triable *at common law*, and not in the ſpiritual court. Bulſ. 179. Trin. 9 Jac. Holt's caſe.

It was adjudged, that action upon the caſe lies againſt an archdeacon who refuſes to induct, but not againſt the ordinary who refuſes to inſtitute; becauſe there a quare impedit lies, or duplex querela before the metropolitan. Mo. 836. pl. 1126. Mich. 12 Jac. Pole v. Godfrey.

4. If the biſhop refuſes to give inſtitution, the clerk may have a *quare impedit* or *duplex querela* to the archbiſhop for it, but action ſur caſe will not lie againſt him. Roll. R. 64. in caſe of Powle v. Godfrey.

If the archdeacon refuſes to induct a clerk, &c. he ſhall have an action upon the caſe. Cited 12 Rep. 128. as Fitzh. 47 H. 6. 8. and affirmed for good law by all the Court, and that with this agrees 26 H. 8. 3. a. True it is, that it is held in 38 H. 6. 14. that in ſuch caſe he ſhall have remedy againſt the archdeacon to puniſh him, but ſaving the opinion there, they cannot award him damages in ſuch caſe, but he ſhall recover them at common law. 12 Rep. 128.

(E. b) *Reſignation. By what Words* it may be.

[1. THE word *reſignare* is not the proper term of the law for reſignation, but *renunciare, cedere*, and *dimittere* are the uſual terms of reſignation. D. 13 El. 294. b.]

This in the margin is ſaid to be the caſe of Walrond v. Pollard. ——And Ibid. 294. a. Marg. pl. 6. cites Hill. 20 Jac. B. R. FAIRCHILD v. GAYER, where the civilians held, that reſignare is not a good word of reſignation, but the judges contra.

[2. If a *prebendary gives, grants, renders, and confirms to the ordinary his prebend, and the poſſeſſions* appertaining thereto, to have and *to hold to him and his ſucceſſors in fee, and* ſubjects and *ſubmits to him omnia jura* by reaſon thereof *qualitercunque acquiſita*, thoſe words are ſufficient and amounting to a reſignation, though the proper words are not therein. D. 13 El. 294. b.]

3. A reſignation was made, and afterwards in the ſame inſtrument a *condition was inſerted*, declaring it void, if A. or B. were not admitted by aſſent of the biſhop within 6 months. The biſhop within the ſix months refuſed to accept the preſentation. It was inſiſted, that it is againſt the nature of a reſignation to be conditional, and that it muſt be abſolute, ſponte, pure, and ſimpliciter, and that this is an act judicial to which a condition cannot be annexed; and judgment was afterwards given accordingly. Ow. 12. 34 Eliz. C. B. Gayton's caſe.

Watſ. Comp. Inc. 8vo. 47. cites S. C.

4. One that had a *donative* made a reſignation thereof by the words *(de eccleſia)*. Per tot. Cur. this reſignation extends to all the poſſeſſions; for as the donation to the church extended to inveſt him with all the poſſeſſions, ſo the reſignation extends to the ſame. Cro. J. 63, 64. Paſch. 2 Jac. B. R. Fairchild v. Gayre.

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(F. b) *To whom* it may be.

See Preſentation, Parſon, &c. (R) pl. 2.

[1. A Reſignation ought to be *to the immediate ordinary*, and not to the mediate ordinary. D. 13 El. 294. b.]

For it is a rule in the canon law that *apud eum fieri debet renunciatio, apud quem pertinere dignoſcitur confirmatio*. Godolph. Rep. 284. cap. 25. ſ. 3.——S. P. Dod. of Adv. 81. Lect. 15.——A reſignation (eſpecially of a benefice with cure) cannot be made to void the ſame by the ſole act of the incumbent, but the ordinary muſt for that end alſo accept it, and declare the church void; and till then the patron's new preſentation will be null; and the reaſon of the law in this caſe is partly becauſe the ordinary is to give notice of a reſignation to the patron, and that he may preſent again, and if he do not within 6 months after notice, that the ordinary may provide for the church; but more eſpecially, I ſuppoſe, becauſe the biſhop having cure of all ſouls within his dioceſs, is to ſee that the paſtors to whom he has committed, and who have undertaken the cure, and in whom thereby the people have an intereſt, do not without a reaſonable cauſe leave their charge; that it be not for money, &c. or to live a lay-converſation, which he is not to ſuffer. Watſ. Comp. Inc. 8vo. 68. cap. 5.

[2. A *prebendary* cannot reſign *to the king*, becauſe though he be the ſupreme ordinary, yet he is not the immediate ordinary, and

Watſ. Comp. 8vo. 49. cap. 4. cites

S. C. and Dyer 294. POLLARD v. WALROND.

and he is not bound to give * notice to the patron as the ordinary ought, nor can make collation of himſelf, but ought to preſent to the ordinary. D. 13 El. 294. b.]

* S. P. Dod. of Adv. 81. Lect. 15.——Reſignation *to the king by a dean* of Wells, was adjudged good and effectual, in as much as he was held of the church of England, and as good as if it had been made to the biſhop, and the deantry was void thereby. Adjudged, Niſi. D. 293. b. Mich. 12 & 13 Eliz. Pollard v. Walrond.

Watſ. Comp. Inc. 8vo. 49. cap. 4. cites S. C.

3. Reſignation cannot be but to a *ſuperior*; per Coke; quod Haughton conceſſit. And per Coke, a biſhop cannot reſign to the dean and chapter. Roll. R. 137. Hill. 12 Jac. B. R. Anon.

Watſ. Comp. Inc. 8vo. 49. cap. 4. cites S. C.

4. Where *two perſons have the donation of a donative* as founders a *reſignation to one* of them is good. Reſolved Cro. J. 63. Paſch 3 Jac. B. R. Fairchild v. Gayer.

And being made to one of the patrons and a ſtranger, yet it is good to both patrons, and void to the ſtranger, and eſpecially it being made (et quibuſcunque aliis perſonis, who have intereſt, &c.) Yelv. 60. S. C.——Brownl. 201. S. C.

(F. b. 2) *How* Reſignation may be. And *when; and the Effect* thereof.

1. IF *two parſons* reſign *cauſa permutationis*, the church is not thereby void; for this is not abſolute, but conditional. 3 Bulſ. 218. Arg. cites 4 E. 3.

2. In ſcire facias upon an *annuity* recovered *againſt a parſon*, the *defendant ſaid, that ſuch a day*, &c. *at B. in another county, he reſigned into the hands of the biſhop of L. ordinary there, who accepted it, and ſo it remains in the hands of the biſhop;* judgment of the writ, and no plea; for it is only argument, and ſo it ſeems that he *ſhall ſay* that *not parſon, or traverſe that he was not parſon the day of the writ purchaſed nor after.* Br. Traverſe per, &c. pl. 223. cites 7 E. 4. 15, 16.

[360] See Eſtate, (Q. a. 10.)

3. Reſignation or deprivation *ſhall not abate the writ*, and yet ſuch acts by a parſon, prebend, &c. *ſhall avoid leaſes made by him* who reſigns or is deprived. Br. Depoſition, pl. 8. cites 15 Aſſ. 8.

11 Mod. 276. Hill. 8 Ann. B. R. Riley v. Adams.—

4. If an incumbent reſigns, yet till the *ordinary agrees* thereto he remains incumbent ſtill. Arg. Lane 4. Mich. 3 Jac. in caſe of Bret v. Johnſon.———Cites it as lately ſo adjudged in C. B.

And if a preſentation be made by the patron before the agreement, and the biſhop admits, inſtitutes, and inducts upon ſuch preſentation, it is void; for the church was full. Cro. J. 197. Mich. 5 Jac. B. R. Paine v. . . . .——It only puts the freehold in *abeyance* till the ordinary accepts. Arg. 3 Mod. 197. in the caſe of THOMPSON v. LEACH, cites Cro. J. 198. D. 294. Br. tit. Bar. 81. Yelv. 61. Sid. 387.——Reſignation *to a prelate* makes not the church void till it be accepted by the biſhop, *and acknowledged* by him; ſo that a preſentation in the meantime is void, and ſpecial verdict finding an inſtrument under ſeal of the biſhop, on which was indorſed, that the reſignation was acknowledged and *accepted by the biſhop*, is not an abſolute finding that it was a reſignation in facto. Noy. 147. Smith v. Fox.

5. After a clerk has *taken inſtitution*, he *may avoid* the church again *by reſignation before induction.* Watſ. Comp. Inc. 8vo. 50. cap. 4.

(G. b) Voidance. *Diſpenſation. In what Caſes* the Diſpenſation *of the Pope ſhall prevent a Voidance.*

[1. IF the pope has *granted to an incumbent, being a biſhop elect* before conſecration, *that he ſhall retain* the benefice with the biſhopric, yet this ſhall not prevent the avoidance; for it is void by the common law, and the pope could not change the law. Dubitatur. 11 H. 4. 38. 59. 76.]

The *king* brought quare impedit againſt R. biſhop of Sarum, and H. C. biſhop of St. D. of the prebend of C. in the church of Sarum, and *counted that M. biſhop of Sarum, preſented* this ſame *H. C. now biſhop of St. D. to the* ſaid *prebend, and after the biſhop was tranſlated to Bath and Wells*, by which the temporalties came to the hands of the king, and after the ſaid H. C. prebendary was made and created biſhop of St. D. by which the prebend voided, &c. (For it was agreed, that where an incumbent is created a biſhop, that his ancient benefices are void in fact immediately; for ſovereign cannot uſe the office of a ſubject; quod nota.) And the *biſhop of Sarum made bar as patron* as above, *by which he made collation, abſque hoc that the prebend voided, the temporalties being in the hands of the king*, and *the incumbent S. biſhop of St. D. ſaid*, that *the biſhop of Sarum preſented him, by which he continued poſſeſſion, abſque hoc, that the church voided the temporalties, being in the hands of the king*, & non allocatur without making title, by which he *ſaid, that before he was created a biſhop, the pope granted to him to retain his ancient benefices, by which he retained it*, &c. And there it is agreed by Thirn. Hill, and Culpeper, that the grant of the pope cannot change the law of England, and after the *king left his count in another term, and counted upon the ſtatute of proviſions*; and per Hank. and Thirn. this grant to retain is no collation, reſervation, nor proviſion, and therefore out of the caſe of the ſtatute; but Hill and Culpeper contra; and per Hill, the *king is patron paramount* the biſhop, though the biſhop be immediate patron; and it was agreed, that by the creation into a biſhop *the church is void in fact immediately*, and the patron may preſent. Br. Quare Impedit, pl. 51. cites 11 H. 4. 37. 59.—Br. Prerogative, pl. 14. cites S. C. and ſays, quære de toto.—Vaughan Ch. J. ſays, their meaning is to be learned, who ſay, that an incumbent's benefice is void by the common law, and not by the canon law upon his being made a biſhop. The words of Thirning, who was Ch. J. in this caſe of 11 H. 4. are, "That he ſuppoſed, that when a man beneficed is made a "biſhop, it is by the law of holy church that his benefice becomes void; and that the ſame law "which give the voidance, may cauſe that it ſhall not be void, and that that concerns the power of "the pope." And Vaughan ſays, the common law does not prohibit pluralities, nor make a voidance of his benefice when the incumbent is biſhop, but it is by the ancient eccleſiaſtical law of England. Vaug. 22. in caſe of Edes v. Walter, Biſhop of Oxford.

2. In a quare impedit, *the defendant pleaded in bar the ſtatute* 21 *H.* 8. that if the incumbent hath a benefice with cure of the yearly value of 8 l. and is inducted into another, &c. the firſt ſhall be void, and alleged that the former incumbent had, &c. The plaintiff replied the ſtatute 25 H. 8. that a chaplain to an earl might have a diſpenſation to hold two livings, and that the former incumbent was ſuch. And the queſtion was, whether the *pope before that ſtatute could grant ſuch diſpenſations at common law*; and it was argued that he might, for at firſt *every biſhop had power* to grant diſpenſations for pluralities, till they by their indiſcretion loſt their power, and it was abrogated by a general council held anno 1273, to which council this nation ſent two biſhops; and this conſtitution has been received ſince till H. 8.'s time; but the court did not ſpeak to it; but the plaintiff was ſo diſcouraged that he would not proceed. And ſic pendebat. Mo. 119. pl. 264. Mich. 24 & 25 Eliz. Dolman v. Biſhop of Sarum. [361]

*(G. b. 2) [Voidance. Diſpenſation.] Plurality.

*There is no letter to this in Roll.

Lord Ch. J. Vaughan † Fol. 359. takes notice, that it paſſes in the new books for current, that in caſe of pluralities the voidance is by the canon law, and therefore may be diſpenſed with by the ſame law; but that in caſe of a biſhop made the voidance is by the common law; but he ſays, that if the canon law be made, part of the law of this land, then it is as much a law of the land, and as well and by the ſame authority as any other part of the law of the land; and if it be not made the law of the land, then hath it no more effect than a law of Utopia; therefore the canon law here is the law of the land. Vaug. 21. in caſe of Edes v. Walter Biſhop of Oxford.

[1. IF an incumbent has a diſpenſation for a plurality from the pope, and he *takes a ſecond benefice*, he may keep both, and neither ſhall be void, †becauſe it *is not a voidance by common law, but by a canon and law of the church*; and therefore the church may diſpenſe with it. 11 H. 4. 60. b.]

[2. If a *parſon* has a diſpenſation *to retain* the benefice, *if he enters into religion*, the church ſhall not void if the entry into religion be afterwards. Dubitatur. 11 H. 4. 60. b. 77. b.]

Br. Premunire, pl. 14. cites 11 H. 4. 37. where it was ſaid by ſome that it had been uſed to make diſpenſations, and to grant to one who entered into religion to retain his firſt benefices.

[3. A *monk* or ſuch religious cannot *have benefice* by licence, *unleſs he has a bull of exemption*. 11 H. 4. 78. Quære.]

4. If an *incumbent* has diſpenſation *to retain the benefice*, though *he be deprived*; this ſhall not ſave the avoidance, if he be deprived after; (for it ſeems it is repugnant.) Contra 11 H. 4. 60. b.]

So if ſuch a perſon obtains a diſpenſation from the king or archbiſhop before he be deprived, he ſhall retain the benefice. Watſ. Comp. Inc. 8vo. 257. cap. 14. cites 11 H. 4. 38. 76, 77. &c.

[5. If a *baſtard* be a parſon, if the *pope makes him able before privation*, he ſhall retain the benefice. 11 H. 4. 78. Granted. (It ſeems he ſhall not be deprived in this caſe.]

(H. b) In what Caſes the Diſpenſation *of the King* ſhall prevent a Voidance.

‡ Mo. 542. pl. 719. S. C. and P. reſolved.—— Cro. E. 542. Hill. 39 Eliz. S. C. adjornatur.——Cro. E. 601. S. C. and P. reſolved.——4 Rep. 75. a. S. C. by name of Holland's caſe.

[1. IF the king gives licence to an incumbent *to be incumbent and biſhop*, if he be made biſhop after, the benefice ſhall not void. 11 H. 4. 60. H. 39 El. B. R. between ‡ ARMIGER AND HOLLAND. Per Curiam reſolved.]

11 H. 4. 38. Hankford referred to this caſe, and ſaid that the ſame perſon had the poſſeſſions and the dignities of them at the ſame time.——In the time of H. 6. *Henry Beaufort* the king's great uncle, being made cardinal, had the pope's § diſpenſation to retain the biſhopric of Wincheſter; and though it was held then, that this diſpenſation came too late, yet afterwards in the time of H. 8. *Cardinal Woolſey* having, before he was created cardinal, obtained the pope's bull to retain the *archbiſhopric of York* as perpetual adminiſtrator, *and the abbey of St. Alban's in perpetual commendam*, he held both during his life by virtue of this diſpenſation. Dav. Rep. 80. a. cites 27 H. 8. 15. b.

[2. *Henry de Blois* the brother of King Stephen, was *biſhop* of Wincheſter *and abbot of* Glaſſenbury. Liber Succeſſionis, 19.]

(I. b) In what Caſes the Diſpenſation of the Pope ſubſequent ſhall toll the Benefit of a Voidance. [*Voidance by the Canon* or by Statute, when and in what Caſes. And Pleadings.]

[1. IF an *incumbent be created biſhop*, the diſpenſation of the pope after to *retain* the benefice alſo ſhall not ouſt the *patron* of the preſentment. 11 H. 4. 38. b. 59. b. 78. b. *clearly agreed.*]

Jo. 404. S. C. See pl. 3. in the notes there.

[2. If an *incumbent of a church with cure under* 8*l. per annum, takes a ſecond benefice with cure,* in which he is alſo inſtituted and *inducted*, by which the firſt is void againſt the patron, ſo that he may preſent, but *before preſentation the archbiſhop by force of* the ſtatute of 25 *H.* 8. *gives* to him a *licence* **perinde valere to hold* the 1ſt with the 2d benefice, *though he was* inſtituted and *inducted before into both*; this is not a good licence, though confirmed according to the ſtatute to take away the preſentment of the patron, though it is a voidance by force of the canon, and not by force of the ſtatute of 21 *H.* 8. For *by the canon* the firſt benefice was ſo void, that the patron might have preſented before any deprivation; and therefore after ſuch time as the patron had power to preſent, this power cannot be taken away by a licence. Trin. 14 Car. B. R. between BALDOCK AND THE KING, in writ of error upon a judgment in Bank in quare impedit, where it was ſo adjudged upon a demurrer; and now per Curiam of B. R. accordingly reſolved, but day given over to Michaelmas term. But afterwards in the ſame Trinity term adjudged accordingly per Curiam. Intratur. 13 Car. Rot. 1259.]

* If before the ſtatute of 21 H. 8. a man had taken two benefices, it *had not been good without* a perinde valere *in the ſpiritual law*, and the meaning of the law was to help one that was a chaplain to noblemen, and not ſuch as are *hunting chaplains* that hunt *after benefices*. Per Popham. Cro. Eliz. 164.

Hill. 43 Eliz. in the caſe of Robins v. Prince.

[3. If an incumbent of a church with cure *above* 8*l. value*, afterwards is preſented and *inſtituted into a 2d benefice with cure, but before induction* into it he *is made a chaplain within* 21 *H.* 8. *and after obtains a diſpenſation according to the* 21 *H.* 8. to hold both; this diſpenſation is not good, becauſe though the 2d church was not void within 21 H. 8. before † induction, yet it was void by the inſtitution by the *canon*; ſo that the patron might have preſented, the which cannot be taken away by a retainer and qualification after. Co. 4. DIGBY, 79. Reſolved.]

See S. C. argued Mo. 434 to 448. by name of Robins v. Gerrard and Prince. And Ibid. 428

† Fol. 380.

The juſtices doubted if the qualification and diſpenſation which came after the inſtitution, and before the induction to the ſecond benefice, be ſufficient by the proviſo of the ſtatute of 21 H. 8. to retain both benefices; and Popham and Gawdy thought that it was not ſufficient, becauſe the induction ſhall have relation to the inſtitution, and the benefice is taken by the inſtitution; and the intent of the ſtatute was not, that the qualification ſhould ſerve them who might obtain two benefices, but that firſt they ſhould be chaplains retained, and qualified or graduates, and then to acquire the benefices; and if it ſhall be allowed that the firſt benefice ſhall not be void till induction, one might by covin obtain 20 benefices, and not be inducted to any, and would never take diſpenſation till he had firſt the benefice; but Fenner and Clench e contra, that the qualification and diſpenſation is time enough before induction: and after at a convocation of all the juſtices of England, Hill. 41 Eliz. they agreed with Popham and Gawdy, by which Clench

Clench and Fenner mutatis opinionibus aſſented to the judgment for the plaintiff.——Colliſs. 162. pl. 97. S. C.——Jenk. 273. pl. 42. S. C.

4. King H. 4. preſented *one* that was *incapable* of his preſentation, and the preſentee *was* thereby admitted, inſtituted, and *in-*
[363] *ducted*, and afterward the pope enabled the preſentee by his bull, yet the king had a ſcire facias, and thereby recovered his preſentation again, becauſe the incumbent was not capable when he was preſented. Dod. of Adv. 74. Lect. 14.

21 *H.* 8. 13. *is a general law*, and therefore need not to be pleaded, or any part thereof.

5. 21 *H.* 8. 13. *ſ.* 9. enacts, That *if any perſon having a benefice with cure of ſouls, being of the yearly value of* 8l. *or above, accept another with cure of ſouls, and be inſtituted and inducted in poſſeſſion of the ſame, immediately upon ſuch poſſeſſion thereof the firſt benefice ſhall be adjudged * void.*

Cro. E. 601. Armiger v. Holland.——Mo. 542. S. C. and P.——8l. value of a church *ſhall be accounted as* it is valued in the valuation of the benefices, and not according to the true value, as it is upon improvement, though opinions have differed before; for the ſtatute intends as it was valued in the ancient book of Firſt Fruits and Tenths, which was taxed 29 E. 1. And after, when another valuation was made 26 H. 8. then according to that valuation. Cro. C. 456. cites it as adjudged 8 Car. in C. B. in caſe of Drake v. Hill.

Averring in general, that it is of 8l. value, is ſufficient, without ſaying it is of ſuch value in the Queen's books, and it ſhall be taken to be according to the true value thereof. Cro. E. 853. Bond v. Tricket.—It ſhall be accounted according to the very value of the church. Noy, 38. Bene v. Tricket.—Same caſes cited Watſ. Comp. Inc. 8vo. 6. cap. 2.——In all precedents of pleadings founded upon the ſtatute of 21 H. 8. it is expreſsly alleged that the 1ſt benefice at the time of accepting the 2d, was of the annual value of 8l. and ſo are the precedents in Co. Ent. 369. c. 512. a. Winch. 670 and 857. And it ſeems alſo that where a *verdict found that the 2d benefice is now of the clear yearly value of* 50*l.* it is utterly immaterial; for in a trial at bar of B. R. Hill. 2 W & M. in ejectment by Jones leſſee of Dr. Rascard dean of Windſor v. Dr. Sambre dean of Guernſey, for the rectory of H. in the county of Oxford, it was agreed by all the juſtices that the value ſhall be according to the valuation in the king's books; and the ſame reſolution was per tot. Cur. in the Exchequer, 6 Nov. 1692. in a cauſe between Stamp and Aylieffe, by bill. 2 Lutw. 1305. in the caſe of Sharpe v. French, the reporter ſays he had this by good information; and adds, that if the value ſhall be taken as it was ſo many years before the verdict, to what purpoſe can it be to find by the verdict, that then it was of the real annual value of 50l. For if the value thereof ſhall be taken, as it was in the laſt book of the Firſt Fruits, this was 26 H. 8.

In quare impedit the plaintiff ſet forth, that he was ſeiſed in fee of the advowſon, and preſented A. who took another benefice, and ſo the church became void per acceptationem alterius beneficii; and the defendant demurred, becauſe he doth not ſhew the value of the 2d benefice, nor that there was cure of ſouls belonging to it; and reſolved per Curiam, that he need not, the plaintiff himſelf being rightful patron; but otherwiſe it is the plaintiff did go to intitle himſelf by a lapſe, there he ought to ſhew theſe particulars, that it might appear to be a ceſſion within the ſtatute that the patron ought to take notice of; but to the patron it is ſufficient that the benefice be void; and although the ſecond benefice be but of the value of 20s. per ann. yet the patron may take notice of it, if he will; but he is bound to take notice of it according to Holland's case, 1 Co. And if iſſue be taken on vacavit per ceſſionem, yet if it be found quod vacavit per mortem, it is for the plaintiff if he be patron, according to 1 Inſt. 282. And ſo the demurrer was over-ruled. Freem. Rep. 241, 242. pl. 253. Hill. 1677. Pridgeon's caſe.

If there are *two parſons of one church*, and each of them has the entire cure of the pariſh, and both the benefices of the value of 8l. per ann. *one dies, and the other is preſented*, this is a plurality within the 21 H. 1. 13. and is within the intent of the ſtatute, that none ſhall have two livings or benefices with cure. Cro. E. 351. Anon.——Hob. 158. S. P. but ſays, that if the churches had been united before, and then a parſon had been preſented, &c. to the united churches, it had been otherwiſe.

Let the *value* of the church *be what it will*, the patron, if he pleaſes, may preſent upon the taking of the 2d benefice.

S. 10. *It ſhall be lawful for the patron thereof to preſent another as if the incumbent had died or reſigned, any licence, union, or other diſpenſation to the contrary notwithſtanding.*

Per Vaughan Ch. J. in delivering the opinion of the Court. Freem. Rep. 51. pl. 64. in caſe of Shute v. Higden.

Since the ſtatute of 21 H. 8. there have been divers *general pardons*, and no pluralities were ever conceived to be within them. Cro. C. 358. in caſe of the King v. Pryſt.

S. 11.

S. 11. *Every licence, union, or other diſpenſation obtained contrary to this act ſhall be void.*

The *pope* * *cannot grant* to a man *to have three biſhoprics.* Br. Parliament, pl. 13. cites 11 H. 4. 6, 7. Per Horton, to which Hankford agreed. —— [* All the editions of Br. have the word (not), but the Year Book is in the affirmative, if with the conſent of the patrons.] —— And in the caſe of Edes v. Walter biſhop of Oxford. Vaugh. 23. Vaughan Ch. J. cites S. C. accordingly, and that if it were without the conſent of the patrons, it was not diſpenſing to hold, but was a granting away the property of the patrons, which a diſpenſation could not —— Gulielmus *Cotton* D. D. archidiaconus † Lewenſis [in Suſſex] & eccleſiæ Paulinæ canonicus reſidentiarius conſecratus eſt in epiſcopum eccleſiæ Exonienſis una cum Sariſburienſi & Bangorienſi Novembris 12, 1598. Godwin de Præſulibus, 478. ſ. 38.

A. had a diſpenſation from the archbiſhop of Canterbury to hold a *trialty*, and the *queen confirmed the diſpenſation*, with a *non obſtante* aliquo ſtatuto. A. had one benefice before of the gift of the queen, and now took two more; but adjudged that the firſt was void by the 21 *H.* 8. D. 351. b. pl. 25. Cox's caſe. ——If a man takes a trialty which is not allowed him, he cannot by that take two benefices, becauſe his diſpenſation is void. Per Hobart Ch. J. Hob. 158. in caſe of Colt and Glover v. Biſhop of Coventry.

If a parſon has a benefice above 8l. per ann. and then he *takes a 2d benefice with a diſpenſation*, and then takes *a 3d*, his *firſt benefice is only void.* Adjudged per Curiam. Godb. 153. pl. 201. Mich. 5 Jac. C. B. Anon. —— Reſolved that the firſt is void by the ſtatute of 21 H. 8. cap. 13. 4 Le. 237. pl. 378. Anon. ſeems to be S. C. ——S. P. And the queſtion was, Whether both the firſt benefices or the firſt only ſhould be void? And Heron ſaid it was adjudged that both of them ſhould be void. Noy, 149. The King v. the Biſhop of Chicheſter.

If a man has a benefice with cure worth above 8l. he cannot without qualification and diſpenſation *procure another with cure to be united to it after*, though they make but one benefice; for this cautel of union is provided for by expreſs name. But of unions before I am of another mind, and tolerations are alſo excluded, which is a proper word for this caſe of commendam temporary; for it is not allowed but tolerated, non præcepto ſed permiſſione, as the canon ſpeaks. Per Hobart Ch. J. Hob. 158. in caſe of Colt and Glover v. Biſhop of Coventry and Litchfield. —— Watſ. Comp. Inc 8vo. 328. cap. 16. cites S. C. But Dr. Watſon ſays, he rather thinks that the ſtatute is not prohibitory of perpetual unions, but hath reſpect to temporary unions only, as for the life of one incumbent, which the archbiſhop may make, and ſometimes hath made.

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S. 13. *Provided that every ſpiritual perſon of the king's council may purchaſe licence or diſpenſation to keep* 3 *benefices with cure, and the* ‡ *chaplains of the king, queen, king's children, brethren, ſiſters, uncles or aunts, may ſo keep each of them* 2 *benefices with cure.*

‡ The king's chaplain extraordinary is not capable of a plurality within this ſtatute. 1 Salk. 161. Adjudged Mich. 12 M. 3. in B. R. and affirmed in Cam. Scacc. by a majority of one. Brown v. Mugg.

S. 20. *The brethren and ſons of temporal lords (born in wedlock) may purchaſe ſuch licence or diſpenſation, to keep as many benefices with cure, as the chaplains of a duke or archbiſhop.*

S. 21. *The brethren or ſons (born in wedlock) of every knight may keep two with cure.*

S. 22. *Provided that the chaplain, ſo keeping benefices with cure, ſhall (where need ſhall be) have letters under the ſign or ſeal of the king, or other their lord and maſter, teſtifying whoſe chaplains they be, or elſe not to enjoy ſuch plurality of benefices.*

A retainer within this ſtatute muſt be *ſigned and ſealed* with the hand and ſeal of the qualifier. Jenk. 273. pl. 91. —And ſo are the words of the ſtatute, and ſo ſealing only is not ſufficient. Godb. 41. Queen v. Savacre. ——By the retainer of the number allowed by the ſtatute, the ſtatute is executed, and the perſon ſo qualified to retain has no further power to qualify another, by doing it under ſeal; for the act is *provided always, that they ſhall have, &c.* Savil. 100. The Queen v. Biſhop of Lincoln and Skilling. —— *Having ſeen* the *retainer* under the hand and ſeal of the peer that gives the qualification, is good *evidence* of the retainer. Litt. R. 1. The King v. Frankwell.

On a queſtion whether a leaſe granted to W. the plaintiff, by a parſon of a firſt living with cure, and above 8l. a year, was good, he having accepted a 2d living with cure and of 8l. before the leaſe was

was confirmed by the biſhop, and he being chaplain to queen Eliz. but no teſtimonial being produced (the parſon having been dead 30 years, and the leaſe continuing, as being made for 81 years) it came in debate whether a *retainer by parol only* by the queen, was not ſufficient? Coke Attorney general inſiſted that chaplain may be retained by parol without teſtimonial, and that qualification *comes timely enough, if made before he is impleaded*; ſo that he has it in pugno to ſhew to the Court, though he had it not at the time of taking the ſecond benefice. And adjudged accordingly for the reaſons aforeſaid. Sav. 135. pl. 213. Whetſtone v. Hickford.——Cro. E. 424, 425. Mich. 37 & 38 Eliz. B. R. S. C. Popham held that the queen could not retain by parol only; but Fenner e contra. It was ſhewn that Y. during his life was reputed her chaplain, and performed the office of chaplain as well in her private cloſet as elſewhere, and had all the benefits as her chaplain, &c. Wherefore the Court ſaid that it ſhould be intended that he was her chaplain, and well and duly retained; and therefore it was held that he was a perſon able to make ſuch leaſe; and the jury found for the plaintiff.——1 Salk. 162. in a nota, in the caſe of Brown v. Mugg, cites S. C.

S. 28. *Doctors and bachelors of divinity, doctors of law, and bachelors of law canon, admitted to the ſaid degrees by either of the univerſities of this realm, and not by grace only, may purchaſe ſuch licence to keep two benefices with cure.*

[365] S. 29. *It ſhall be lawful to ſpiritual perſons, being chaplains to the king, to accept (of the king's gift) any benefices, to what number ſoever, without the incurring the penalty of this act.*

If one being the *king's chaplain takes a biſhopric*, he ceaſes to be the king's chaplain, and biſhops are not in that reſpect chaplains to the king within the meaning of this law; ſo that the clauſe of the ſtatute which gives the king power to give as many benefices as he will of his own gift to his chaplain, will not ſerve them. Per Hobart Ch. J. Hob. 157. in caſe of Colt and Glover v. Biſhop of Coventry.——The *king by a ſpecial proviſo in the ſtatute* 21 H. 8. *may give to any of his chaplains as many benefices as he pleaſe.* But otherwiſe it is of a common perſon; for they are ſtinted by the ſtatute. Adjudged 4 Le. 247. pl. 402. Trin. 11 Jac. C. B. Biſhop of Exeter v. Wallop.

The archbiſhop's chaplain having one benefice of the gift of the queen, procured a diſpenſation to have and enjoy 3 *benefices incompatible*, which the queen confirmed under the great ſeal, ita quod, &c. Abique impedimento alicujus ſtatuti, aut aliqua alia re quacunque non obſtante, by virtue whereof he obtained two others incompatible. And it was a queſtion whether the firſt was void by the ſtatute 21 H. 8. or not? And the next term judgment was given for the queen without argument. D. 351. b. pl. 25. Trin. 18 Eliz. Coxe's caſe.——The reporter adds a nota, that ſo much of the act of 21 H. 8. as concerns the procuring diſpenſations from Rome for pluralities or non reſidents, and all words and ſentences concerning it, and alſo the entire act of the 25th for granting diſpenſations at Canterbury, are repealed by the act of 1 & 2 P. & M. cap. 8. And by the act of Eliz. 1. the entire act of the 1 and 2 P. & M. is repealed, and alſo this part of the 21 H. 8. and no words of reviving thereof; for this had been merely contrary to the intent of the act; but in the act of the 25th which is revived, there is a proviſo and reſtraint to Canterbury, for diſpenſations derogatory or contrary to the act of 21. which affixes the 21 to be in eſſe and force. D. 352. pl. 25. at the end.

S. 15. *Every marquis and earl may have 5 chaplains.*

S. 16. *Every viſcount and biſhop may have 4*

An *infant lord* of 10 years of age *retained* a chaplain, and held good within the ſtatute. 4 Rep. 119. cited in Acton's caſe, as of the Queen v. the Biſhop of Saliſbury. Paſch. 44 Eliz. upon a retainer by the earl of Southampton.——Watſ. Comp. Inc. 8vo. 29. cap. 3. cites S. C.

If the *ſon and heir apparent of a lord* retains a chaplain, his father dies; this retainer is not ſufficient, but there muſt be a *new retainer*. Jenk. 272. pl. 91.—Watſ. Comp. Inc. 8vo. 33. cap. 3. cites C. S.

S. 17. *The chancellor, and every baron and knight of the garter, may have 3.*

S. 18. *Every dutcheſs, marchioneſs, counteſs, and baroneſs, * being widows, may have 2.*

* By theſe words it ſuffices, that ſhe be a widow at the time of the retainer. 4 Rep. 118. b. Hill. 45 Eliz. C. B. in Acton's caſe.

S. 19.

S. 19. *The treaſurer and comptroller of the king's houſe, the king's ſecretary and dean of his chapel, the king's almoner and maſter of the Rolls, may each of them have* 2, *and the chief juſtice of the King's Bench, and warden of the Cinque Ports, each of them one, and each of the aforeſaid chaplains may purchaſe licence or diſpenſation to keep two benefices, with cure.*

The chaplain of a lord having two benefices with cure, without a ſpecial licence or diſpenſation of 21 H. 8.

of the metropolitan, ſeems not to be in danger of loſing his plurality by force of the act becauſe the words are not that he muſt ſue for a licence, &c. but that he may ſue for ſuch licence, &c. but he is thereby in danger by the ſpiritual law. Quære bene inde. D. 312. b. pl. 83. Anon.

S. 24. *Provided that every archbiſhop, becauſe he muſt uſe at conſecration of biſhops* 8 *chaplains, and every biſhop, becauſe he muſt uſe at the giving of orders and conſecration of churches* 6 *chaplains, may have two chaplains over and above the number limited, whereof every one may purchaſe diſpenſation, and take as many benefices with cure as is before aſſigned.*

S. 25. *No perſon, to whom any number of chaplains by the proviſions aforeſaid is limited, ſhall advance any ſpiritual perſon, above the number appointed, to receive more benefices with cure than is above limited; and if they do, every ſuch perſon ſo advanced above the ſaid number ſhall incur the penalty in this act.*

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S. 33. *Provided that every dutcheſs, marchioneſs, counteſs, and baroneſs (widows) who ſhall take huſbands under the degree of a baron, may take ſuch number of chaplains as if they had remained widows, and theſe may take ſuch number of benefices.*

After marriage with a peer, ſhe cannot retain, though after marriage with a gentleman ſhe may. Jenk. 273. pl. 91.—Watſ. Comp. Inc. 8vo. 34. cap. 3. cites C. S.—

6. 25 *H.* 8. 16. *ſ.* 2. enacts, That *every judge of the King's Bench and Common Pleas, the chancellor and chief baron of the Exchequer, the king's attorney and ſolicitor-general may each of them retain one chaplain, having one benefice with cure of ſouls.*

7. Diſpenſations are *inrolled in Chancery* in a paper-book kept there by way of memorandum; as for inſtance, 25*th Auguſt, anno* 29 *Reginæ* 1587. *Diſpenſatum fuit cum Roberto Merick artium magiſtro capellano dominæ Borough, ut ipſe una cum rectoria eccleſiæ parochialis de Horton eccleſiam de Staines recipere & quoad vixerit retinere poſſit.* Mo. 434. in caſe of Robins v. Gerrard and Prince.

Goldſb. 162. S. C.—This enrolment was agreed by the juſtices not to be good either for the manner or the matter, but conditional to the diſpenſation. Mo. 447. ut ante.——S. C. cited Vent. 313 in caſe of the Ironmongers Company v. Naller, that where the * 21 H. 8. appoints the inrolment of diſpenſations in Chancery, yet the not doing it does not invalidate the diſpenſation.—Popham held the inrolment good, and that it was an offence in the clerk only, and finable, but no offence in the party; for he may not procure the clerk to make his entry in another courte than the cuſtom is, and conſequently no fault in him. Goldſb. 164, 165. in S. C. of Robins v. Prince.——* [The act appointing the inrolment is not the 21 H. 8. but the 25 H. 8. cap. 21.]

should be in a roll; but the neglect of that is only the contempt of the clerk, and not

8. P. *rector* of C. was *elected biſhop* of Oxford. *Before his conſecration* the *archbiſhop gave him a diſpenſation* purſuant to the ſtatute of H. 8. *to retain* his ſaid rectory with the biſhopric, which the *king confirmed* by letters patents under the great ſeal, and that

the biſhop might enjoy, &c. ſo long as he continued biſhop of Oxford, *with a non obſtante* aliquo ſtatuto, or other matter. P. died; W. was elected biſhop of Oxford, and got letters of diſpenſation, &c. to hold the ſaid rectory in commendam, &c. The patron of C. brought a quare impedit. Judgment was given by the opinion of the whole Court, that the avoidance was by death, and not by ceſſion. Vaugh. 18 to 27. Paſch. 19 Car. 2. Edes v. Walter biſhop of Oxford.

See (I. b) pl. 5. in the notes.

(I. b. 2) *What ſhall be* ſaid to be *Pluralities.*

1. IN the ſtatute of 21 *H.* 8. 13. is a *proviſo, That no deanry, * archdeaconry, chancellorſhip, chanterſhip, or † prebend, nor parſonage that hath a ‡ vicar endowed, nor any benefice perpetually appropriate, be taken to be a benefice with cure of ſouls in any of the articles of this act.*

* S. having one benefice was preſented to a 2d, and then purchaſed a diſpenſation, (which was too late,) and then was qualified, and afterwards accepted the archdeaconry of Glouceſter. Wray ſaid, that a doctor of the civil law affirmed to him, that their law is, that if one having a benefice with cure of ſouls accepts an archdeaconry, the *archdeaconry* is void; but Wray ſaid, that he conceived that upon the ſtatute of 21 H. 8. the law is qualified by this proviſo. Le. 316. pl. 442. Paſch. 31 Eliz. B. R. Underhill v. Savage.—S. C. ſhortly ſtated 4 Le. 88. pl. 185. by name of Savage's caſe. —— † *Taking a prebend* does not make a church void. Mo. 261. pl. 411.

‡ It was ſaid, that the 21ſt of H. 8. againſt pluralities does *not extend to rectories where there are vicarages endowed*; and Lindwood deſcribes a benefice without cure, viz. cujus cura vicariis perpetuo exercenda eſt; otherwiſe, where the vicar is temporal and removable. Arg. Vent. 15. Paſch. 21 Car. 2. B. R. in the caſe of Heath v. Pryn. —— A man was *preſented to a church with a vicarage* endowed, the parſon *accepted of* a preſentation to *the vicarage without diſpenſation*; whether this were a plurality by the law, and by the ſtatute of 21 H. 8. was the queſtion. Hobart Ch. J. was of opinion, that notwithſtanding they were ſeveral advowſons, and ſeveral quare impedits might be brought of them, and ſeveral actions maintained for their ſeveral poſſeſſions, yet the preſentment of one man to the parſonage and vicarage was no plurality, becauſe the parſonage and vicarage *are but one cure*; and there is a proviſo § in the ſtatute, that no parſonage, that hath a vicar endowed, ſhall be taken by the name of a benefice with cure within the ſtatute, as to make it a plurality. Godolph. Rep. 296. cap. 26. ſ. 5. cites Mich. 22 Jac. B. R. Woodley and the Biſhop of Exeter and Manwaring's caſe. Cro. par. 2.—[But I do not obſerve this point there.]

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2. In quare impedit, it appeared, that the *incumbent of a church in England* was *made a biſhop of Ireland*; and *afterwards the king granted* to the ſaid biſhop *to have and retain* the ſaid church *for* 6 *years in commendam.* It was held that the commendator, notwithſtanding this grant for 6 years, hath yet power to retain during his life, and cannot be abridged by the limitation for 6 years; and it is like a confirmation or attornment, or aſſent to a legacy, and cannot abridge the eſtate which is confirmed, but that it ſhall enure according to the eſtate which is limited. Per Hutton & Winch Juſtices. Cro. J. 692. Mich. 22 Jac. C. B. in the caſe of Woodley v. Manwaring, &c.

(I. b. 3) *Voidance. At what Time* by Pluralities.

1. IT was held per Cur. that if any *parſon* who was *ouſted* of his parſonage *in the late wars*, by that which they then called ſequeſtration, for not conforming to the preſbytery, &c. had *accepted another benefice by preſentation*, and confirmation *by the commiſſioners* or triors, (there being then no biſhops) this was *not any voidance of the 1ſt* living *unleſs he continued in* ſuch *ſecond* living the 25th of December anno 1659 (which is the time mentioned in the new ſtatute), *and ſhewed his liking* thereto. Sid. 163. Mich. 15 Car. 2. B. R. Brown v. Spence.

2. It has been reſolved in HOLLAND'S caſe, and likewiſe in DIGBY'S caſe, in the 4 Rep. and often before ſince the council of Lateran, anno Domini 1215. that if a man has a benefice with cure, *whatever the value be*, and is admitted and inſtituted into another benefice with cure, of what value ſoever, having *no qualification* or diſpenſation, the *firſt is ipſo facto void*, *ſo as* the patron may preſent another to it if he will; but if the *patron* will not preſent, then if *under the value*, *no lapſe* ſhall incur *until* deprivation of the firſt benefice, * and *notice*; but if of the value of 8l. or above, the patron at his peril muſt preſent within 6 months by 21 H. 8. 13. Vaugh. 131. Hill. 22 & 23 Car. 2. C. B. Shute v. Higden.

S. P. Lane, 20. in the caſe of Dennis v. Drake — cites 4 Rep. 79. b. in Digby's caſe.—But in Mo. 12. it ſeems to be allowed, that admiſſion and inſtitution do not make the firſt *cure void* without induction. Trin. 1 & 2 Ph. & M. Agar v. Biſhop of Peterburgh and Denn.—By the taking the ſecond benefice, and by the induction thereto, the firſt is clearly void. Cro. E. 601. Mich. 39 & 40 Eliz. B. R Armiger v. Holland.——The incumbent after taking the ſaid benefice may officiate the cure until the king himſelf takes care to do it, or until another ſhall be admitted and inſtituted to it, and ſhall be ſubject to payment of tenths, and ſubject to diſtreſs for rent-charge and other charge which lies upon the rectory, becauſe he takes the profits as one that enters without admiſſion, and inſtitution ſhall be, but neither the one nor the other can bring action of juris utrum, or writ of annuity, nor ſue for either, nor plead as incumbent in poſſeſſion in quare impedit, without a qualification and diſpenſation. Jo. 339. Hill. 9 Car. the King v. Prieſt.—— * Godb. 23. pl. 33.

3. Where a parſon is preſented to a 2d benefice there is a *difference between non-ſubſcribing and not reading after ſubſcription*, as to the making the firſt church void; for the ſtatute 13 *Eliz.* prohibits admiſſion before ſubſcription, and makes the admiſſion, inſtitution, and induction void; and in ſuch caſe the party never was lawful parſon, and ſo the firſt church not void; but otherwiſe, where he ſubſcribes and does not afterwards read them within the two months; for in ſuch caſe, the firſt is void and the ſecond alſo. Per Vaughan Ch. J. and that the value is not material. And judgment accordingly. 2 Jo. 18. Shute v. Higden.

S. C. Vaugh. 129. Hill. 22 & 23 Car. 2. C. B. Adjudged.—— S. C. & P. Per Vaughan Ch. J. And he ſeemed to incline that the not reading the articles ſhould not make the benefice void ab initio; but the ſtatute is, that admiſſions, inſtitutions, and inductions made contrary to the act ſhould be void ab initio; now he that does not ſubſcribe is † not inſtituted &c. according to the act, and ſo it is void ab initio. Judgment for the plaintiff per tot. Cur. Freem. Rep. 52. pl. 64. Mich. 1672.

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(I. b. 4) *Diſpenſations.* Granted *by what Words, and neceſſary in what Caſes.*

Though he has not the diſpenſation of the archbiſhop, he ſeems not to be in danger of loſing his plurality by force of the act of 21 *H.* 8. becauſe the words are only, that *he may ſue for a licence*, &c. but he is in danger by the *ſpiritual law*. Quære, bene inde. D. 312. b. pl. 88.

1. CHAPLAIN *advanced* to two benefices with cure *ought to have the king's diſpenſation for non-reſidency*, and ought to be *reſident upon one of them*. Confirmation of the king and diſpenſation *of the archbiſhop* are neceſſary regularly to maintain pluralities. Jenk. 273. pl. 91. cites Rep. Drury's caſe.

Watſ. Comp. Inc. 8vo. 38. cap. 3. cites S. C.

2. Quare impedit by the queen for having taken a 2d benefice, and a lapſe incurred; the *defendant pleads a diſpenſation from the archbiſhop*. Upon over of the diſpenſation, *which recited the two benefices to be of ſmall value*, and then ſaid, *unimus, incorporamus & annexamus* the one to the other *for the life of the preſent incumbent, without* the word *(diſpenſamus)* for the taking thereof, it was objected, that this clauſe could not enure as a diſpenſation, becauſe there was no ſuch intention, but to make an union; and this cannot be an union, becauſe there is not the concurrence of the patron and ordinary, ſed non allocatur; for per Curiam, though there cannot be a perpetual union without the concurrence of the patron and ordinary, becauſe it is a loſs to them, yet there may be a *temporary union*, i. e. to the perſon; as in this caſe, for the life of the incumbent, and this (as was ſaid at the bar, and not denied by the Court) *might be* done *by the metropolitan alone*; for after the death of the incumbent the union is diſſolved, and no loſs accrues either to the patron or ordinary in the mean time, for one of them had his preſentation and the other his admiſſion; and this is a complete diſpenſation, and allowed by the ſtatute 21 H. 8. (viz.) any licence, uſe, union, or diſpenſation to the contrary, and no neceſſity for the word (diſpenſation). Cro. E. 719. Mich. 41 Eliz. C. B. the Queen v. Page and the Biſhop of London.

Jo. 374. S. C. where the words are *dummodo non ſit ultra* 10 miles the one of the other; and that the juſtices agreed, that it made no condition to make the firſt void.—Watſ. Comp. Inc. 8vo. 39. cap. 3. cites S. C.

3. A parſon who had one benefice, and being chaplain to an earl, got a diſpenſation to hold another, *modo ſit infra* 10 *miles of the firſt*; and he accepted another, with cure, and was inſtituted and inducted, but it was 17 miles diſtant from the firſt; and the patron not preſenting to the firſt benefice within 6 months, the biſhop collated to the firſt, and his collatee was inſtituted and inducted; and in ejectment, the queſtion was, Whether the words *(modo ſit)* made it a conditional diſpenſation, and the firſt benefice void, when he took the ſecond. Adjudged, that though theſe words uſually made a condition, yet by the civil law they were only a caution or admonition, unleſs other words are added, viz. that if he do otherwiſe, then it ſhall be void; and therefore in this caſe all the court reſolved, that they ſhall not make a condition, and the rather becauſe of the great inconveniency

niency which might follow, to make a great many benefices void by lapſe, which have been quietly enjoyed under ſuch diſpenſations. Cro. Car. 475. Trin. 13 Car. B. R. Dodſon v. Lynne.

4. The defendant was chaplain extraordinary to the king, being incumbent of Stockton, and afterwards inducted to the rectory of Inkborough, being above the yearly value of 8l. by reaſon whereof Stockton was void, and ſo continued two years; and then he was again preſented to it by the king, as upon his title of lapſe, and was inſtituted, and inducted again to Stockton, being likewiſe above 8l. value. Per Cur. *1ſt*, A *preſentation of the king of his own chaplain* * *imports a diſpenſation*, which the king himſelf hath power to grant as ſupreme ordinary, and ſuch preſentee ſhall hold a plurality without any previous diſpenſation; *but if* ſuch a chaplain be *preſented to a ſecond benefice by a ſubject, he muſt have a diſpenſation* before he be inſtituted to it. 2dly, A chaplain extraordinary is not a chaplain within the benefit of the act 21 H. 8. cap. 13 & 14. but only his chaplains in ordinary. Judgment for the plaintiff, which was affirmed in Cam. Scac. by a majority of one. Nota, He has no waiting time, but his name is only entered in the book of the king's chaplains; whereas a chaplain within that ſtatute ought to be retained under ſeal. 1 Salk. 161. Mich. 12 W. 3. B. R. Brown v. Mugg. [369]

* S. P. D. 212. b. Marg. pl. 88. cites Trin. 11 Jac. C. B. Adjudged in the caſe of Sir Henry Wallop v. the Biſhop the Exeter.

(I. b. 5) *Qualification.* What is *good*, or may become good. *Ex poſt Facto.*

1. IN *quare impedit* by the queen to preſent to the church of M. which was void by the incumbent's taking another benefice, not being qualified, the *defendant pleaded, that he was chaplain to* Sir James Croſts, *comptroller of the houſehold*, and who by the ſtatute of 21 H. 8. might have two chaplains, and might qualify them to take two benefices, and that he had a diſpenſation accordingly. The *plaintiff replied, that* the ſaid Sir James Croſts *had two other chaplains* advanced to two benefices, and who are *ſtill alive*, and ſo the third could not be qualified, &c. The *defendant rejoined, that* one of thoſe two chaplains *was diſcharged* by the ſaid Sir James Croſts to be his domeſtic chaplain, ſo he hath now but two chaplains, of which the defendant is one; and upon demurrer it was adjudged, that *after a perſon hath retained his full number, and* they are *certified* ſub ſigno & ſigillo to be his chaplains, and thereby qualified to have two benefices, though he afterwards remove them for any diſpleaſure, or otherwiſe, out of his ſervice, yet during their lives *he can qualify no other*, for they are ſtill his chaplains at large, though not his domeſtic chaplains, and ſo are chaplains within the ſtatute. Godb. 41. pl. 47. Trin. 28 Eliz. C. B. Rot. 1130. The Queen v. Savacre.

Owen, 51. S. C. Adjudged.—Sav. 79. pl. 157. S. C. and that the opinion of the Court was accordingly.—And. 200. pl. 236. S. C.

2. A *lord retains 6 chaplains at one and the ſame time* by letters teſtimonial, where he is only entitled to retain three.—All ſix are preferred to ſix ſeveral pluralities.—The three who are firſt promoted

D. 312. b. pl. 83. S. P. Jenk. 272. pl. 91. ſays, that neither

of them is qualified.

promoted are warranted by the ſtatute, and yet the retainer was not according to the ſtatute, but *in æquali juri melior eſt conditio poſſidentis.* 4 Rep. 90. Trin. 43 Eliz. in Drury's caſe.—cites D. 132.

4 Rep. 90. S.C.—Jenk. 272. pl. 91. S. C.—D. 312. b. pl. 88.

3. *Retainer* of a chaplain more than the act allows is *not made good by the death of the other chaplains* afterwards, but he muſt have a *new retainer.* Per 3 J. v. Gawdy; and adjudged accordingly, and the judgment affirmed. Cro. E. 839. Trin. 43 Eliz. Drury v. the Queen.

4. If a man be a *qualified chaplain* to any ſubject, and then be *made a biſhop*, his qualification is void, ſo as he cannot take two benefices de novo after by force of that qualification. Per Hobart Ch. J. Hob. 157. in the caſe of Colt and Glover v. the Biſhop of Coventry.

[370] See (I. b) pl. 5. f. 29. in the notes.

(I. b. 6) *Retainer. How.* And *Qualification* annulled or *deſtroyed* by what Act.

1. A Lord's chaplain being ſufficiently qualified with his maſter's teſtimonial ſigned and ſealed, that he is his chaplain, and having alſo a ſpecial diſpenſation for a plurality, and being once advanced to the plurality, ought to enjoy it during his life, notwithſtanding his *maſter's death*, or *departure from his maſter's ſervice.* Per Catlin, Saunders, and Dyer. D. 312. b. pl. 88. Trin. 14 Eliz. Anon.

But the reporter adds a quære, by reaſon of the caſe of Whetcomb [Whetſtone] v. Hickford.—

2. A counteſs had 2 *chaplains by patent, and a 3d without. He without was firſt retained*, and took 2 benefices by diſpenſation, and adjudged lawful; for the patent is not of neceſſity, but only in caſe where he has cauſe to ſhew it. The retainer is good without patent. Mo. 277. pl. 432. Paſch. 31 Eliz. C. B. The Queen v. Biſhop of Lincoln and Skifling.

Sav. 101. pl. 181. S. C.——4 Rep. 89. b. S. C.—Jenk. 272. pl. 91.—Mo. 561. pl. 763. Mich. 41 & 42 Eliz. adjudged by Anderſon, Glanville, and Kingſmill, that he who was firſt retained ſhould be preferred, and not he that firſt took a 2d benefice and got diſpenſation; but Walmſley e contra. The Queen v. Drewry, as to the *firſt retainer.*—Cro. E. 724. 2 juſtices, who before inclined otherwiſe, changed their opinions; and ſo it was adjudged that the 3d chaplain was not within the benefit of the ſtatute 21 H. 8. 13. The Queen v. Drury.

4 Rep. 118. Acton's caſe. S. C. Watſ. Comp. In. 8vo. 34. cap. 3. cites S. C. And ſo Dr. Watſon ſays he conceives, that if any

3. *Baroneſs widow* retains 2 chaplains, and they purchaſe a diſpenſation, and the baroneſs *marries* before the chaplains accept a double benefice; yet they may take two benefices, becauſe the marriage is no diſcharge of the ſervice; but otherwiſe it is if *ſhe dies*, or if the *baron diſcharge the chaplains*, as he may, but if he does not diſcharge them, but dies, there needs no new retainer. Mo. 678. pl. 924. Mich. 44 & 45 Eliz. C. B. The Queen v. Biſhop of Peterborough.

other perſon capable of qualifying a chaplain to hold a plurality, diſcharges his chaplain before he has taken the benefit of his being qualified, he cannot afterwards lawfully hold two benefices within the ſtatute 21 H. 8.

4. *Attain-*

4. *Attainder of the lord*, &c. is diſcharge of the ſervice and power to qualify; and thoſe chaplains retained and qualified before, who have not taken double benefices, are *diſabled* by the attainder. Mo. 678. pl. 924. Mich. 44 & 45 Eliz. in caſe of the Queen v. Biſhop of Peterborough.

The earl of Weſtmoreland retained a chaplain, and after was attainted of high treaſon, and afterwards during his life, the chaplain having one benefice of the value of 8 l. accepted a ſecond benefice with cure. And it was adjudged that the firſt benefice was void; for though the earl was alive, yet the quality of his perſon was altered; for by the judgment he was become ignoble. 4 Rep. 117. b. Hill. 45 Eliz. C. B. in Acton's caſe.—Cites it as the Earl of Weſtmoreland's caſe.

5. If an *officer* allowed by the ſtatute to have one, two, or three chaplains, *retains* a chaplain, and *after is removed* from his office, in this caſe the retainer at the common law remains, but the retainer upon the ſtatute is determined; for after the remotion the chaplain cannot be non-reſident or accept another benefice. 4 Rep. 118. Acton's caſe.

(K. b) Advowſon. *Avoidance. What* will be an Avoidance. *Acceptance of* a *Biſhopric.*

[1. IF an *incumbent* be made biſhop, the church is void. D. 4, 5. Ma. 159. 34. Doctor and Student, 136. b. 7 H. 4. 25. b. 11 H. 4. 37. b. 24 E. 3. 26. b.]

The church is void in fact immediately, and the patron * may preſent. Br. Quare Impedit, pl. 51. cites 11 H. 4. 37. 59.——All his benefices void, and the king ſhall preſent, whoſoever be patron. Br. Quare Impedit, pl. 47.

[2. If the *incumbent of a provoſtry* be elected *biſhop of the biſhopric which is patron of the provoſtry*, and afterwards the *king grants the temporalties to him*, yet the provoſtry is void before conſecration; for he may refuſe before, and he is not biſhop *before conſecration*. 41 E. 3. 5. b. Adjudged.]

Watſ. Comp. Inc. 8vo. 385. cap. 20. cites S. C.

[3. *But after conſecration* the provoſtry is void. 41 E. 3. 5. b. Admitted.]

[4 *So* ſhall it be *of a prebend*. 11 H. 4. 37. b.]

[5. If an *incumbent* be created a *biſhop of the ſame dioceſe* where he was incumbent, the church is void thereby; for he cannot be ſovereign and ſubject. Da. 1. Commendam, 69.]

[6. *So* if he be created biſhop *of another dioceſe*, the church is void thereby. 11 H. 4. 37. b. 77. Becauſe he who has taken upon him the office of a ſovereign, ſhall not retain the office of a ſubject.]

[7. If an *incumbent* be elected biſhop, yet the church is not void thereby *before conſecration*. 11 H. 4. 37. b.]

[8. If an *incumbent in England be made a biſhop in Ireland*, yet the church here is not void thereby. 24 E. 3. 2. b. If † *dean of York be made biſhop of Limerick in Ireland*, this makes a voidance of the deanry as well as if he had been made biſhop of any place in England. P. 3 Car. Regis, between EVANS AND ASCOUGH. Reſolved per Curiam upon a ſpecial verdict, and ordered per

† S. P. So of a parſon, agreed clearly; for the conſtitution and council that made it void is gene-

ral, and not limited to any place,

per Curiam, that this ſhould not be ſpoke to any more but only to the points in the caſe.]

and ſo it is reſolved 3 E. 3. Fitzh. Trial. And ſo it was adjudged 21 Jac. C. B. in the caſe of Woodley and the Biſhop of Exon and Manwaring. Jo. 158, 159. S. C.—In this caſe, the dean, before conſecration or confirmation, obtained a patent, with large words of non obſtante retinere valeat in commendam the ſaid deanry, &c. and afterwards he was choſen biſhop of Briſtol, and then alſo before inſtallation he obtained another patent with a more ample diſpenſation of retaining the ſaid deanry in commendam. It was agreed by all, that the church or deanry, &c. in England ſhall be void by ceſſion, if the parſon or dean, &c. be made a biſhop in Ireland; for the canon law in that point is one through all the world; alſo Ireland is governed by the laws of England, and is now as part of England by ſubordinary. The judges argued two days, and reſolved that all commendams are diſpenſations, and that ceſſion commenced by the canon and council of Lateran. Secondly, That the king may diſpenſe with that canon, 11 H. 7. 12. for the pope might, and now by the ſtatute 21 H. 8. that power is given to the king cumulative, by way of expoſition veteris, and not by introduction novi juris, and by that ſtatute a concurrent power is given to the archbiſhop of Canterbury, and may be granted by the king, or by the archbiſhop, &c. 3dly, That that diſpenſation, after election to the firſt biſhopric and before conſecration, &c. and alſo the diſpenſation after election to the ſecond biſhopric and before the confirmation, is good enough in both caſes, and he remains a good dean, to confirm, &c. And afterwards the judgment in the caſe, being an action of treſpaſs, was given accordingly. Noy, 93, 94, 95. H. 22 Jac. B. R. Evans and Kiffin v. Aſcuith.——Latch. 233. S. C.—Palm. 458. S. C.

[9. If an *incumbent* had been created biſhop, this had made a voidance *by the common law*. 11 H. 4. 38. 60. 77. 29 E. 3. 44. it was ſaid that heretofore when the *conſtitutions* were made, by which *plurality* was *ouſted*, the which conſtitutions commenced from Rome, yet from that time it was cauſe of voidance in Banco Regis.]

[10. 26 E. 3. 55. b. it is ſaid, That the *pope J. made conſtitution that a parſon ſhall not have but one benefice with cure, &c.*]

S. C. Show. 413 to 425. & 441 to 505.

11. In a quare impedit, for hindering to preſent to the pariſh church of St. James, the plaintiff declared, that St. Martin's being a large pariſh, by a ſtatute made 1 Jac. 2. the *pariſh* of St. James's *was to be taken out* of it, *and made a pariſh of itſelf with cure, and Dr. Tenniſon, then vicar of St. Martin's, firſt rector, and* appointed *the patronage after his death to the biſhop of London* and his ſucceſſors, *and to the lord Jermyn* and his heirs *alternately*; that *Dr. Tenniſon was afterwards made biſhop of Lincoln*, ſo that it belonged to the king to preſent by his prerogative; to this declaration the biſhop of London demurred, and Dr. Birch pleaded the ſtatute 25 H. 8. and that by virtue thereof, the archbiſhop [372] of Canterbury granted a diſpenſation to Dr. Tenniſon, to hold this church in *commendam*, which the king confirmed *from the 22d of October till the firſt of July following*, &c. To this plea the Attorney General demurred. The Court held, that the king's turn is not ſerved by * confirming this commendam, becauſe the diſpenſation was only to ſave the avoidance, and the confirmation continued the poſſeſſion, but transferred no right; it was objected, that † nobody can ſay the king ſhall preſent, when the act of

* For that which he had before cannot be properly ſaid to be commended to him; it is true, *if the incumbent had died during the continuance of ſuch title, the king might have loſt his title to preſent.* Per Cur. 4 Mod. 212. S. C.—Show. 489. S. P. by Eyre J. and ſays this appears by PARKHURST'S CASE, D. 228. b. & 233. a. & 2 Roll. 344.

† Holt Ch. J. ſeemed at the firſt to incline to this, but afterwards it was reſolved, that this act *only directed the method, and turns of preſenting between the patrons, and not to exclude the king of his prerogative.* 3 Lev. 382. S. C.—— And notwithſtanding this objection, the right of patronage even in this caſe is veſted immediately; it is like a reverſion for life granted cum acciderit per mortem of the tenant for life, which veſts an intereſt immediately, though to commence in poſſeſſion in futuro. Per Cur. 4 Mod. 214. S. C.

parlia-

parliament ſays otherwiſe, and that this was therefore a caſe exempt from the prerogative; but the Court held that this act did not interfere with the prerogative, becauſe a *new advowſon muſt be ſubject to the prerogative as an old one is*; like an eſtate-tail created by act of parliament, it is ſubject to ſuch bars as other eſtates-tail, and the wife ſhall be endowed of it. Then it was objected, that this new church, as to Dr. Tenniſon, was a kind of donative, he coming in without inſtitution and induction; and that by the very words of the ſtatute, the preſentable right doth not commence till after him; and that in * caſe of a *donative*, the promotion of the incumbent makes no ceſſion. But Curia contra; for in point of eſtate the right of preſentation commences by the paſſing of the act immediately, but in point of intereſt, not till the avoidance. 2 Salk. 540. Mich. 7 W. 3. B. R. The King v. Biſhop of London and Dr. Birch.

* The Court ſaid, That this muſt be admitted to be law; but if an *incumbent of a donative* is made rector *by act of parliament*, as Dr. Tenniſon was in this caſe, then the king has a prerogative to preſent upon the promotion of ſuch rector. 4 Mod. 213. per Cur. S. C.

(L. b) *Taking* of *ſecond Benefice.*

[1. IF an *incumbent* takes a 2d benefice, the firſt is void *ipſo facto* without any deprivation, ſo that the patron may preſent. 24 E. 3. 30. Adjudged. 26 E. 3. 55. b. Co. 4. HOLLAND, 75. b. Reſolved. D. Reports. Commendam, 69. 81. Doctor and Student, 126. b. 29 E. 3. 44. Co. 4. DIGBY, 79. 26 E. 3. 1. 9 E. 3. 22. † Hobart's Reports, 224. Contra 11 H. 4. 37. b. 66. ‡ Tr. 14 Car. B. R. between the KING AND BALDOCK. Adjudged per Curiam in writ of error upon ſuch judgment in Bank upon demurrer. Intratur Hill. 13 Car. Rot. 1259.]

By the inſtitution and induction to the 2d benefice, the firſt is void, though the firſt be under 8l. as well as if it was above that value.

‡ Fol. 361.

Per Jones J. Jo. 404, 405. the King v. Baldcock. —— Dr. Watſon ſays, if one of our clergy be created a biſhop ſuffragan of England, not any (as he conceives) of the preferments he had before, do become void; but on the other hand, if he exerciſe the office of a ſuffragan by commiſſion he is thereby qualified to hold at one time two benefices with cure, and cites ſtat. 26 H. 8. cap. 14. However, his benefice with cure, taken after he is ſuffragan, may (unleſs diſpenſation prevent) void any dignity he had before. Watſ. Comp. Inc. 8vo. 43. cap. 3.—† Hob. 158. 166.

[2. *At common law*, if an incumbent had taken a 2d benefice, with cure, neither the firſt nor ſecond had been void. Co. 4. HOLLAND, 75. b.]

[3. *But by the* general *council of Lateran*, held *anno Domini* 1215, it was ordained, that if a man takes divers benefices *with cure* of ſouls, the firſt ſhall be void, *if he has not the diſpenſation of the pope*. Co. 4. DIGBY, 79.]

Pluralities were firſt *prohibited by the Council of Lateran*, held under

* pope Alexander the third at Rome, in palatio Lateranenſi ibidem inceptum in anno 1170 & continuatum uſque annum 1179, which was anno 26 H. 2. Arg. Mo. 436, in the caſe of Robins v. Gerard.—4 Rep. 79. in S. C. by name of Digby's caſe, it is ſaid by the reporter to have been under Innocent the third. —— Knighton's Chronicle inter decem Scriptores, pag. 2422. l. 19, 20. ſays this council was held under Innocent the third in anno 1213. —— 2 Inſt. 361. mentions it in the year 1179.

[4. This is ſo recited in Linwood, fol. 81. in the *Conſtitutions of Peckham*, where by the provincial ſynod the conſtitution of the general

general council is confirmed, and the conſtitutions *of Othobon* in Linwood, that the laſt ought to be void, is *repealed* as too hard and ſtrict. Co. 4. DIGBY, 79.]

[5. 27 E. 1. Rot. Pat. M. 16. in appellationibus. *Papa diſpenſavit cum J. de Langeton cancellario ſuper pluralitate beneficiorum ſuorum cum curis* ſive cura, quæ obtinet, & ulterius diſpenſavit quod duo alia beneficia cum prioribus recipere & retinere poſſit *ſi regi placuerit*, & eidem cancellario convenienter offerantur & rex beneplacitum ſuum intimat per patentes literas.]

S. C. cited 2 Lutw. 1307. in caſe of Sharp v. French.— S. P. Cro. C. 356.— Watſ. Comp. Inc. 8vo. 9. cap. 2.

[6. If an *incumbent* takes a ſecond benefice with cure, by which the firſt is void by the *canon* againſt the *patron*, ſo that he *may preſent before any deprivation, yet till deprivation it is not void as to a ſtranger*; for if he ſue for tithes againſt a pariſhioner, it is not any bar againſt him that he has taken a ſecond benefice. Tr. 13 Car. B. R. ſaid by Juſtice Barkley, that Juſtice Yelverton in his argument of the caſe of PRUST ſaid, that ſo it was adjudged.]

Watſ. Comp. Inc. 8vo. 10, 11. cap. 2. cites S. C. by which caſe the Dr. ſays it appears, that if the church, void by ceſſion upon account of the canon, be of the gift of the biſhop, and within his dioceſs, it may go in lapſe by the biſhop's neglect to collate, though no deprivation be made of the incumbent, or notice given of the avoidance.

[7. H. 11 E. 3. B. R. Rot. 21. The biſhop of Durham *preſented B. to the prebend of W.* of the church of St. Andrew, *and after* preſented the ſame *B. to the deanry of the ſame church.* Et pro eo quod non liceat aliqui duas præbendas in una & eadem eccleſia collegiali poſſidere, [it was] adjudged quod *rex recuperet præſentationem ad eccleſiam de W. prædicta.*]

But it was ſaid elſewhere, that this *ought to have been certified by the biſhop* or the metropolitan, and that *it is no voidance in fact till he be deprived by the ſpiritual law*, and it is only a voidance in law before. Ibid. cites 11 H. 4. 37. 59.

8. Quare impedit by the king, and *counted by the poſſeſſions of the biſhop of B. (who was patron* of the benefice) *being in his hands*, and that A. the clerk and *incumbent accepted another benefice*, by which this benefice is void, and remained void quoſque, &c., and it was admitted for a clear voidance. Br. Quare Impedit, pl. 98. cites 24 E. 3. 32.

9. If a man *preſents one, who has a benefice, and is admitted and inducted*, this is a ceſſion without more; *but in quare impedit* the *Court ſhall not take thereof notice before it be certified*, becauſe it is a thing ſpiritual; per Brown Serjeant. Br. Quare Impedit, pl. 87. cites 14 H. 8. 16, 17.

10. Where the *king preſents by reaſon of* a plurality and want of qualification, and verdict is found for him; inaſmuch as the firſt benefice is abſolutely void by the taking a 2d, the *verdict* ſhall be, that the *church was full of the king's preſentment* modo & forma, as was alleged, *and now is void*; for Crook ſays, that if it be found that the church is full of the defendant by the preſentment of the king, that it ſhall be intended that it was void by the 2d benefice, and that the king preſented him anew. Litt. R. 1. Hill. 2 Car. C. B. the King v. Frankwell.

(L. b. 2) Avoidance, by *not reading* the *Articles*, &c.

1. 13 *Eliz.* 12. *ſ.* 3. ENACTS, That *every perſon hereafter to be admitted to a benefice with cure ſhall,* * *within two months after his induction, publicly read the articles of religion in the church whereof he hath the cure, in common-prayer time, with declaration of his aſſent thereunto, and be admitted to adminiſter the ſacraments within one year after his ſaid induction, (if he be not admitted before) in pain upon every ſuch default to be deprived ipſo facto.*

S. 7. *All admiſſions, inſtitutions, and inductions to benefices, and all tolerations, diſpenſations, qualifications, and licences whatſoever to the contrary hereof, ſhall be void in law.*

A preſentee read the articles, and ſaid, *I give my aſſent unto them ſo far forth as they agree with the word of God.* It was adjudged, That this was not ſuch unfeigned aſſent as the ſtatute intended, but that it ought to be abſolute and without condition. Cro. E. 252. pl. 19. Mich. 33 & 34 Eliz. B. R. Smith v. Clerke.

* Upon a trial at bar in quare impedit, the plaintiff proved, that he read the articles *upon the 5th of November, where his induction was 5 September*; this was ruled inſufficient, becauſe not within two months after the induction, computing 28 *days to the month*. Lev. 101. Paſch. 15 Car. 2. B. R. Brown v. Spence.

In quare impedit, the plaintiff proved, that he *read them in a porch of a chapel of eaſe within the ſame pariſh* within a month after his induction, the keys of the chapel being detained from him by the defendant, and this was admitted by the Court to be a ſufficient reading of the articles within the ſtatute. Lev. 101. Brown v. Spence.

Immediately upon not reading the articles according to the ſtatute, the incumbent is deprived ipſo facto; and the patron may preſent upon ſuch a deprivation preſently if he will, and his clerk ought to be admitted and inſtituted. Vaugh. 132. in caſe of Shute v. Higden.——[But no lapſe ſhall accrue till after notice to the patron. 13 El. 12. ſ. 8.]

A man had a benefice compatible, and without ſufficient diſpenſation took another benefice compatible, but did *not ſubſcribe* the articles as required by this ſtatute, and yet he *was admitted, inſtituted, and inducted* to the ſecond benefice [and died]. And upon iſſue whether the church voided per mortem, &c. a ſpecial verdict found as above. And the opinion of the Court was, that the firſt benefice voided per mortem, and not by the taking the 2d benefice; for he never was lawful parſon thereof, by reaſon of this ſtatute. D. 377. b. pl. 31. Mich. 23 & 24 Eliz. Anon. —— S. C. cited Vaugh. 133. in caſe of Shute v. Higden. —— In ſuch caſe the admiſſion and inſtitution are void, ſo that he *never was incumbent there*, and conſequently cannot be deprived. And. 63. pl. 136. Trin. 24 Eliz. in caſe of the Queen v. Biſhop of Lincoln and Cock.——Reſolved by all the Juſtices, abſente Popham, That in caſe of the preſentee's not reading the articles, the church becomes void preſently, and there *needs not any deprivation*; for otherwiſe the ſtatute would be defeauded at the pleaſure of the ordinary, if he would not deprive. Cro. E. 679, 680. Trin. 41 Eliz. B. R. Baker v. Brent and Robinſon.—— The church in ſuch caſe voids preſently, without any ſentence declaratory; for the ſtatute provides, that he ſhall be ipſo facto deprived, and the admiſſion, inſtitution, and induction are merely void in law; and voidance by act of parliament need not have any ſentence declaratory. 6 Rep. 29. b. Trin. 44 Eliz. B. R. Green v. Baker & al.

2. In debt, &c. the plaintiff counts, that H. dean of Lincoln by indenture dated 24 July, demiſed to the defendant the rectory of M. &c. who therein covenanted to find a ſufficient prieſt to ſerve in the church of M. to be approved of by the dean and his ſucceſſors, and to pay him 40 marks per annum at the leaſt; and then ſets forth the ſtatute 29 *Car.* 2. for perpetuating augmentations to poor vicarages, which enacts, *that every augmentation made payable to any vicar, curate, &c. ſhould continue payable to them; and that they might recover the ſame by diſtreſs or action of debt*; then he ſays, that 5 July, 32 Car. 2. by the approbation of the dean at the nomination of the defendant, and with the licence of the biſhop he was admitted; and from that time to this was curate of the church of M. and for 40 marks penſion, due for a year,

year, he brings this action. The defendant pleaded in bar, and confeſſed the leaſe and covenants; but ſays, that the plaintiff was nominated, &c. 5 Nov. 1677, and had poſſeſſion; but further ſays, that the *act of conformity* 13 Car. 2. by which it is enacted, *that all miniſters, &c. ſhall, within two months after the actual poſſeſſion of their vicarage or curacy, declare their aſſent and conſent* to all matters in the book of Common Prayer, *and upon neglect*
[375] *thereof ſhall be ipſo facto deprived; and that the patron may preſent, &c. as if the incumbent was dead;* and that the plaintiff did not within two months after his poſſeſſion declare his aſſent, and that at no time after the 5th of November the defendant did nominate the plaintiff to the dean to be curate, &c. The plaintiff in his replication confeſſed the nomination 5 Novemb. and that he continued in poſſeſſion till the 5th of July following, and being in poſſeſſion by the conſent and permiſſion of the defendant, and by the approbation of the dean and licence of the biſhop, he, within two months after the ſaid 5 July, declared his aſſent and conſent according to the ſtatute. The defendant demurred; the Court agreed, that ſuch ſtipendiary may be within the act of conformity, though that is, that the patron ſhall preſent as if he were dead, and here was no preſentation requiſite in this caſe, but only a nomination. And that though he was ipſo facto deprived for his neglect in not declaring his aſſent within two months after his firſt nomination and poſſeſſion, yet this ſtatute not diſabling him from being nominated de novo, and he continuing always in poſſeſſion, and performing his office by the allowance of the defendant and the dean till the 5th of July; this amounts to a new nomination, and therefore his declaring his aſſent within two months after the 5th of July, makes him a curate within the ſtatute, and enables him to bring action, and judgment was given for him by the whole Court. 3 Lev. 82. Mich. 34 Car. 2. C. B. Carver v. Pinkney.

(M. b) * *Deprivation.* [And of *Caveats* to prevent Inſtitution, &c.]

* Deprivation is a diſcharge of the incumbent of his dignity or miniſtry, when ſufficient cauſe

[1. IF the incumbent *be deprived*, the church is void by it. 11 H. 4. 60. b. 77.]

againſt him is conceived and proved; for by this, he loſes the name of his firſt dignity, and herein two manner of ways, either by a particular ſentence in the ſpiritual court, or by a general ſentence by ſome poſitive or ſtatute law of this realm. 1ſt, Deprivation is in the ſpiritual court for that, that it is grounded upon ſome defect in the party deprived, although it be by act of law, yet it is deemed as the act of the party himſelf. The cauſes of deprivation, by cenſure in the ſpiritual court, are to be referred to the common law. 1ſt, *Want of capacity.* 2dly, † *Contempt.* 3dly, ‡ *Crime.* As concerning the firſt, although by the common law, if a *lay perſon* be preſented, inſtituted, and inducted to an eſpecial benefice, which curate is altogether uncapable of the ſame, yet the church is not therefore to be ſaid void as if no preſentation had been, but it is ſtill full of an *incumbent de facto licet non de jure, until* by *ſentence declaratory*, for his want of capacity, the church be adjudged void, and upon this no lapſe ſhall incur againſt the lay patron, without notice (of ſuch incapacity and ſentence of deprivation thereupon) to him given. Dod. of Adv. 73, 74. Lect. 14.

† Contempt may likewiſe be a cauſe of deprivation, as if the parſon or other incumbent be *excommunicate, and* he ſo *remains* in his obſtinacy for the ſpace of 40 *days*, he is for this deprivable of his benefice,

benefice, and yet the church is not void in fact, without ſentence of deprivation given againſt him; and if before ſuch deprivation the king, as ſupreme ordinary and the head of the church, would give a diſpenſation to the incumbent, that for all the ſentence of deprivation for his contempt had, he ſhall hold his benefice, ſuch diſpenſation were void [good, quære] and ſhould reſtrain the patron from his preſentation accrued to him by means of ſuch deprivation after enſuing. Dod. of Adv. 76. Lect. 14.

§ The 3d cauſe is crime, within which may be comprehended *dilapidation*, or ſpoil of the church benefice, once in our books worthy of deprivation, likewiſe *ſchiſm* or *hereſy*; for the which, or if for ſome other cauſes the incumbent were deprived in ancient time in the court of Rome, upon ſuch deprivation coming in queſtion in our law, the iſſue ſhould be upon the avoidance, and it ſhould be tried where the church or dignity is. Dod. of Adv. 76.

[So that] 1ſt, Our law adjudges *not* the church actually *void, without a ſentence* of deprivation, as has been before proved. 2dly, That though ſuch *ſentence* of deprivation be merely *wrongful*, yet the dignity is void, and the *ſentence remains in* his *force until* it be *releaſed*. 3dly, and laſtly, If the *party deprived* within time require by this law an * *appeal*, (upon ſuch ſentence of deprivation given againſt him at the court of the high juriſdiction) ſuch is the nature of an appeal that *it holds (the ſentence* upon which it was firſt brought) *in ſuſpence*; becauſe in the common law it is ſaid to have effectum ſuſpenſum prioris pronuntiati; and therefore if it be brought upon deprivation, it voids the vigour thereof, and revives the former dignity; for ſuch church ſhall not be void until the firſt ſentence of deprivation chance to be affirmed in the appeal, and thus much of deprivations in the ſpiritual court ſhall ſuffice at this time. Dod. of Adv. 76, 77. Lect. 14. ——— * The church is *not* † *void pending the appeal*; for if the ſentence be reverſed, he ſhall not be inſtituted and inducted again. Br. Depoſition, pl. 13. cites 2 R. 2. and Fitzh. Quare Impedit, 143.

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[2. If an incumbent *be deprivable*, yet the church is not void before deprivation. Contra, 17 E. 3. 59. b.]

If a parſon takes ſeveral benefices incompatible without licence or plurality, this is *a voidance in law*, but *not in fact*; for he *ought firſt to be deprived* by the biſhop, and then the patron may preſent, and the *patron may ſue for the deprivation*. Br. Quare Impedit, pl. 51. cites 11 H. 4. 37. 59. ——— Parſon took a 2d benefice above 8 l. per annum, by which the firſt was void. But *by patron's conſent continued poſſeſſion*. Per Richardſon J. He cannot be any way removed till lapſe incur. Het. 116. Fowler's caſe.

[3. If *after caveat* entered, &c. *a clerk be preſented, inſtituted, and inducted*, though it is not good by the *canon law*, yet the church is ſtill in our law; for the breach of the caveat is but a breach of the canon, and does not make the inſtitution void. Mich. 15 Car. between PHIPPS AND HAYTER, per Curiam, and prohibition granted to ſtay a ſuit in the Arches after the induction, to avoid the inſtitution for this cauſe.]

If a church become void, and a ſtranger enters a caveat with the regiſter of the biſhop, that none be inſtituted to that church until he be made privy thereunto, and the *biſhop before* that he have *notice* of the caveat *inſtitutes an incumbent*, the inſtitution is merely void in the ſpiritual law; for the regiſter ought to notify the caveat to the biſhop; and his negligence in that ſhall not prejudice him that entered the caveat; and if the biſhop have notice of the caveat, and gives day to him that puts it in, and before that day he inſtitutes an incumbent, this is merely void; for the *entering of a caveat is as a ſuperſedeas* in our law. Goldſb. 146. Hill. 43 Eliz. cites it as ſaid per Dr. Amias in the Lord Zouch's caſe. ——— Inſtitution and induction ſtand good, though a caveat was entered before; and the eccleſiaſtical court cannot meddle with it. Litt. R. 165. Stephens v. Criſp.

A caveat was entered with the biſhop *not to admit without giving notice*, yet admiſſion is good; but if he admits one that has no right, he is a diſturber, but otherwiſe the caveat does nothing but only to make the biſhop careful what perſon he admits. 2 Brownl. 119. Anon. ——— A caveat is *of force* for 3 months, and any one may ſafely preſent after the end of 3 months, as if no caveat had been entered; per Dr. Talbot. Cro. J. 464. Hutchings v. Glover.

The *king was patron* of the church of D. and *B. incumbent*. *W. entered a caveat in the life-time of B. then lying in extremis*, viz. caveat epiſcopus, ne quis admittatur, &c. niſi convocatus the ſaid W. ——*B. dies*. J. S. a *ſtranger preſented M. who was* inſtituted and *inducted*, and *W. preſented his clerk, who was* likewiſe inſtituted and *inducted*; the *king likewiſe preſented his clerk, who was* inſtituted and *inducted*; and it being a queſtion in the ſpiritual court, which of thoſe clerks had the beſt right, ſentence was given there, that the firſt inſtitution was void by reaſon of the caveat, and then the church being full of the 2d incumbent, the king was put out of poſſeſſion, and ſo his preſentment void. But it was reſolved, 1ſt, That the caveat was void, it being ‡ entered in the life-time of the incumbent. 2dly, That the church was full by inſtitution againſt all perſons but the king, and then the preſentation by W. was void, by reaſon of the ſuper-inſtitution of the clerk of the ſtranger; and ſo the preſentation of the king was good. Poph. 133. Hill. 15 Jac. B. R. Morgan v. Roan. ——— ‡ S. P. per Mountague Ch. J. Cro. J. 464. Hutchings v. Glover.

4. If the patron preſent one that is merely a *layman within the age of* 25, and he upon this be admitted, *inſtituted, and inducted*, and afterward a *qua. imp.* be brought againſt the patron and the ſame incumbent, whereof *judgment is given by the default of the incumbent, where* indeed the *incumbent was never* at any time duly *ſummoned* according to the law, by reaſon of which judgment the ſame *incumbent is removed*; if upon this afterward the ſaid incumbent *by ſentence* declaratory be *deprived* in the ſpiritual court *for want of capacity* in ſuit there, for the cauſe of his incapacity exhibited againſt him, ſuch ſentence is good, and available in the common law, although the ſaid incumbent were before removed from his beneſice by the judgment given againſt him in the qua. imp. For though ſuch declaratory ſentence given againſt him by the ſpiritual law cannot remove him that is removed already, yet it ſhall make this incumbent *anſwerable to the next incumbent for all the mean profits* received by him that was the firſt incumbent, from the time of his induction. Yet if the firſt incumbent ſo deprived will afterward *bring a writ of deceit upon the judgment* given againſt him in the quare impedit by default, *becauſe he was not ſummoned* as aforeſaid, he ſhall have judgment herein, and *the ſame deprivation* had in the mean ſeaſon in the ſpiritual court *is no impediment* [377] *thereunto*; for in the ſaid ſuit of deceit the incumbency ſhall not be in queſtion, but only the diſturbance of the plaintiff in the quare impedit. Dod. of Adv. 74, 75, 76. Lect. 14.

Fol. 362.

(N. b) Entry into *Religion*.

It is a rule of the canon law, that beneficium non vacat per religionis ingreſſum ante profeſſionem, niſi de conſenſu ingreſſi.

[1. IF an incumbent enters into religion, the *church is void* thereby. 11 H. 6. 60. b. 76.]

[2. *But* otherwiſe where the *diſpenſation is after*. Contra, 11 H. 4. 60.]

(O. b) *Lapſe*. *What* it is, and the Commencement.

[1. Mich. 3 E. 1. B. Rot. 105. Staff. The biſhop of Coventry and Litchfield *pleaded a collation by lapſe autoritate concilii* againſt the prior of Landa to the church of Patingham.]

[2. 6 E. 1. Rot. Patentium Memb. 25. In a quare non admiſit by the abbot of St. Mary Eborum againſt the biſhop of Norwich; the biſhop *made title* by lapſe, ſcilicet, that he collated *autoritate concilii poſt lapſum ſemeſtre*, ſcilicet, tali die, &c. and there after in the judgment it is ſaid, *quia tempus ſemeſtre autoritate concilii non incipit verſus patronum niſi a tempore ſcientiæ mortis, &c.* (*Quære, what council* is intended.) P. 9 E. 1. B. Rot. 51. it appears that lapſe was *given per concilium Lugdunenſe* poſt tempus

pus ſemeſtre. In a writ in the time of E. 2. cited Co. 6. *Cateſby*, 62. according.]

[3. Bracton. liber 4. fol. 241. Lapſus temporis *de Conſtitutione Lateranenſi.*]

2 Inſt. 273. in the comment on the Statute de Bigamis, cap. 5. takes notice of the difference between Bracton and Briton, as to the council whether of Lyons and Lateran, and ſays that Fleta, lib. 1. cap. 32. [ſ. 34.] mentions Lyons; he adds, That the pope endeavoured to take away the preſentations from princes and lay patrons to preſent by lapſe; for that the

[4. Britton. fol. 225. If the church remains diſcounſelled beyond 6 months, then according to the *Council of Lyons* by the diſcord of the parties the biſhop ſhall be in the place of a counſellor, and ſhall give the church to any clerk ſaving every one's right. But Maſter Selden, in his Book of Tithes, 390. ſays that the *manuſcripts of Breton have* for de *Lions* de *Latt.* which is without doubt for de *Lateran.*]

[5. Selden in his Book of Tithes, fol. 388. holds that lapſe was *received in the laws of England from the* General *Council of Lateran* held in anno 25 H. 2.]

[6. In Hoveden, fol. 326. there, among the canons of the *Council of Lateran held under Alexander the Third*, anno domini 1118. in time of king H. 2. there is ſuch canon, *cum vero præbendas, eccleſias, ſeu qualibet officia in aliqua eccleſia vacare contigerit, vel ſi etiam modo vacant, non diu maneant in ſuſpenſo, ſed infra ſex menſes perſonis, qui digne adminiſtrare valeant, conferantur. Si autem epiſcopus, ubi ad eum ſpectaverit, conferre diſtulit, per capitulum ordinetur.*]

[7. *Before the ſaid council* the patron was not limited to any time, but might preſent at his pleaſure without any lapſe. Selden in his Book of Tithes, 387. Bracton. lib. 4. 241.]

Conſtitution ſays, quod collatio beneficii eſt res ſpiritualis & aliter credentes eſſent hæretici. And the common law ſays, That a preſentation to a benefice is temporal, * and is ſo declared by divers acts of parliament. At this council, after 6 months, the diocefan ſhall preſent. The Regiſter ſaith, That to preſent by lapſe was diocefanis ſpecialiter indultum after 6 months, and yet if after the 6 months the patron preſents before the diocefan collate, he ought to receive his clerk, notwithſtanding the general council; but when the king's turn came to preſent jure coronæ by lapſe, the Regiſter ſaith, Nullum tempus occurrit regi ex conſuetudine hactenus obtenta in regno Angliæ; ſo as the council did not bind the right of the king, nor could the diocefan preſent by lapſe, until it was ei indultum; that is, until it was allowed to him by conſent of the realm, with ſuch limitations and reſtrictions, and with binding him in many caſes to give notice, as was thought juſt and reaſonable in ſubjects caſes, for the better ſervice of God and inſtruction of the people; but the king, who is ſupremus dominus, loſeth not his preſentation by any lapſe at all, the ſaid conſtitution notwithſtanding.—Ante concilium Lateranenſe nullum currebat tempus contra præſentantes, but the biſhop was to provide one to ſerve the cure in the mean time, and the patron might preſent when he would; but our lapſe is not according to the times and perſons expreſſed in the canons; for they give four months to a lay patron, and ſix months to an eccleſiaſtical, &c. neither hath therein the king any ſupreme title by them to confer by lapſe; and by the council tempus ſemeſtre is to be accounted per dies, & non per menſes anni; and therefore we hold, that the time and title to preſent by lapſe, is per legem Angliæ, occaſioned and eſtabliſhed it may be by reaſon of the ſaid general council. 2 Inſt. 361. And ſays, ſee lib. 6. fol. 62. in Cateſbye's caſe.

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[8. In the book which is in the Exchequer, whereof the title is Tranſcriptum Chartarum Comitis Cornubiæ, there is a charter 60. & 168. by which the biſhop of Norwich recites, *Cum per lapſum temporis autoritate concilii de priore præficiendo in Monaſterio de Eya quod eſt de patronatu Ricardi Comitis Cornubiæ hac vice ad nos devoluta ſit poteſtas, and* left this ſhould draw a right to him and his ſucceſſors, they put their ſeal thereto, &c.]

[9. Regiſtrum Originalium, fol. 42. b. Inter prohibitiones, *quia ſecundum legem & conſuetudinem regni noſtri Angliæ* epiſcopi per lapſum temporis, ante 6 menſes conferre non debent, &c.]

Fol. 363. 2 Inſt. 361.

[10. P. 9 E. 1. B. Rot. 51. In aſſiſe of darrein preſentment by the *abbot of Lyra* againſt the archbiſhop of Canterbury, the defendant ſays that the church is full of his *collation ratione concilii Lugdunenſis*, and being demanded, per quem articulum ejuſdem concilii contulit eandem eccleſiam, dicit quod ipſe eſt archiepiſcopus & primas Angliæ & quod non vult nec debet ad hoc concedere in **curia iſta**, and becauſe the plaintiff *preſentavit ante lapſum temporis ſemeſtris*, & archiepiſcopus nihil dicit ſed quod ipſe ad eccleſiam contulit autoritate concilii Lugdunenſis nullam certam rationem ſuper eo exprimendo & ſic poſſit omnibus de regno præſentationes auferre, & *conſuetudo regni Angliæ ſit quod nullus patronus debet a preſentatione eccleſia ſuæ excludi autoritate concilii, niſi negligens ſit, & remiſſus in præſentando infra tempus ſemeſtre, ideo querens recuperet*, &c. and writ to the biſhop granted, &c.]

Watſ. Comp. Inc. 8vo. 107. cap. 12. Lapſe to the ordinary is *in reſpect of* his epiſcopal

11. A lapſe *is* an act and office of truſt repoſed by law in the ordinary, metropolitan, and laſtly in the king to provide the church of a rector in default of the patron, and yet as for him and to his behoof. Hob. 154. Mich. 10 Jac. in the caſe of Colt v. Glover.

care, but to the king is as ſupreme patron, and is the reaſon that Rome did not claim it. Per Doderidge, Roll. R. 464. in the caſe of Colt v. Glover, cites Doctor and Student.——It is not an *intereſt* but a truſt or adminiſtration. Per Hobart Ch. J. Roll. R. 475. in S. C.

(P. b) By *what Time* the Patron may preſent before *Lapſe* ſhall *incur*.

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Watſ. Comp. Inc. 8vo. 185. cap. 12. cites S. C.

[1. BY the common law of England *as well clerks as laymen ſhall have 6 months* to preſent before lapſe ſhall incur. Doctor and Student, 116. b.]

Godolph. Rep 245. cap. 22. ſ. 2. S. P. cites the ſame book, and ſays we need not inquire into the reaſon of that difference or diſproportion; let it

*[2. By the common law of *Scotland laici patroni quadrimeſtre ſeu quatuor menſium, eccleſiaſtici vero ſex menſium ſpatium* habent ſibi conceſſum ad præſentandum perſonam idoneam eccleſia vacanti. Skene Regiam Majeſtatem. 10. b.]

[3. *But* Ja. 6. pl. 1. cap. 7. pl. 7. cap. 102. pl. 12. cap. 119. 158. *concedit patrono laico ſpatium ſex menſium*, infra quod præſentare debet. By the *petit cuſtoms of Normandy*, the patrons as well laic as eccleſiaſtic have ſix months to preſent after the death of the laſt poſſeſſor. Quod vide Chapter of Patronage, f. 70.

ſuffice the ſafety, that it was the canoniſts pleaſure to have it ſo, for reaſons beſt known to their own intereſt; the common law impartially levels them both to one and the ſame equal ſtandard of ſix months.

(P. b. 2) *How* the *ſix Months* ſhall be *reckoned*.

But Mich. 3 Jac. C. B. where the church voided by deprivation

1. QUARE impedit againſt the biſhop of A. who juſtified for lapſe, the plaintiff replied, that before the 6 months ended, he preſented, &c. The defendant rejoined, that the church to which the preſentment was, is a church with cure of ſouls,

ſouls, and the pariſhioners there are Welchmen, and ſpeak and underſtand no other language but Welch, and that the preſentee could not ſpeak or underſtand the Welch language; for which cauſe he refuſed him, and gave notice of the plaintiff of the refuſal and cauſe thereof; and it was agreed and reſolved by the whole Court, that the computation of the ſix months in ſuch caſes, ought *not to be according to the kalendar* January, February, &c. *but ſecundum numerum ſingulorum dierum, allowing* 28 *days to every month.* Le. 31. Trin. 27 Eliz. C. B. Albany v. the Biſhop of St. Aſaph.

of the incumbent, it was adjudged that the 6 months ſhould be accounted according to the kalendar ſix months, and not according to 28 days to a month, and this judgment was affirmed in error. Rep. 62. Cateſby's caſe.——Yelv. 100. S. C. by name of Cateſby v. the Biſhop of Peterborough.—— Cro. J. 141. Trin. 4 Jac. S. C. —— Jenk. 282. pl. 8. cites S. C.——S. P. 2 Inſt. 361. and ſays it was ſo reſolved in the time of E. 2. and in the time of H. 8.—Verba accipienda ſunt ſecundum ſubjectam materiam, and therefore, becauſe this computation of months concern thoſe of the church, there is great reaſon that the computation ſhould *be according to the computation of the church which they beſt knew.* 6 Rep. 62. Mich. 3 Jac. C. B. Cateſby's caſe.—S. P. 2 Inſt. 361.

(Q. b) How the ſix Months ſhall be reckoned. *From what Time.*

[1. TEMPUS ſemeſtre *autoritate concilii* non incipit verſus patronos niſi *a tempore ſcientiæ mortis perſonæ* (that is to ſay of the laſt incumbent). 6 E. 1. Rot. Patentiam Membrana. 25. Adjudged in a writ of the time of E. 2. cited Co. 6. CATESBY 62. accordingly, and ſays *per legem & conſuetudinem regni hactenus uſitatas.*] Godolph. Rep. 248. cap. 22. ſ. 6.

[2. *As* if the *incumbent dies beyond ſea*, the 6 months ſhall not by reckoned from the death, but from knowledge of the death by the patron. 6 E. 1. Rot. Patentum Membrana. 25. between the abbot St. Mary Chorum and the biſhop of Norwich, adjudged in a quare non admiſit.] Godolph. Rep. 248. cap. 22. ſ. 6.

* [380]

[3. The ſix months ſhall not be reckoned from the death of the laſt incumbent, but *from the time that the patron might by computation per rationabiles dietas*, having regard to the diſtance of the place where he *was at the death of the incumbent, if he was within* * *the realm* at the time, *come to the knowledge of the death* of the incumbent; for he ought afterwards to take notice at his peril, and † not before, inaſmuch as he *was in other county* than where the church is, and than where the incumbent died. 5 E. 1. 75. adjudged. QUEEN ELEANOR's caſe. Contra, Co. 9. CATESBY, 62. b.] Godolph. Rep. 248. cap. 22. ſ. 6. —As to the notice in ſuch caſe, conſideration ought to be had to the † Fol. 362.

diſtance of the place where the patron is. D. 327. b. Marg. pl. 7. cites S. C. Mich. 5 E. 1. Rot. 100. Lib. Record, fol. 14. Queen Eleanor v. Biſhop of Lincoln.

[4. *So* a fortiori it would be, if the *patron were over the ſea at the time* of the death of the incumbent. 5 E. 1. QUEEN ELEANOR's caſe. 75. agreed.] Godolph. Rep. 248. cap. 22. ſ. 6.

[5. *Apud Scotos*, by the common law of the realm the time limited for the patron to preſent, is to be computed *a tempore ſcien-*

tiæ non autem a tempore *vacationis* beneficii. Skene Regiam Majeſtatem, 10. b.]

[6. See the *petit cuſtoms of Normandy*, Chapter of Patronage, f. 70. The 6 months ſhall be counted *from the day that the death of the laſt poſſeſſor is commonly known.* In the ancient book, fol. 40. b.]

[7. Regiſtrum Originale, fol. 42. Inter prohibitiones. *Quia ſecundum legem & conſuetudinem regni noſtri Angliæ epiſcopi, &c. beneficia, &c. vacantia per lapſum temporis ante ſex menſes a tempore vacationum eorundem tranſactos conferre non debent nec conferre conſueverunt temporibus retroactis, &c.*]

S. P. Per Cur. 2 Salk. 539. Mich. 3 W. & M. B. R. Hele v. the Biſhop of Exeter.

[8. If the ordinary *refuſe a clerk* becauſe he is *criminoſus*, in this caſe the patron ſhall not have 6 months to preſent *after notice* given, *but from the voidance.* 14 H. 7. 21. Curia, 18 H. 7. Kell. 50. b. Quære.]

For the crime is as much in the conuſance of the patron as the Biſhop.

Godolph. Rep. 249. cap. 22. ſ. 6 —— 2 Salk. 539. ſays, that the lapſe ſhall incur from the refuſal.

[9. If the ordinary *refuſe* a clerk for cauſe of *illiterature*, the patron ſhall not have 6 months from the *notice thereof but from the voidance.* D. 15, 16 El. * 227. 7. per Curiam.]

Per Cur. B. R. Hele v. the Biſhop of Exeter.—— * This ſhould be 327. pl. 7.

† S. P. Browni. 165. Auſtin v. the Biſhop of Lond n.— S.P. D. 327. b. pl. 7. Mich. 15 & 16 Eliz. Anon.

[10. If a church voids *by reſignation or* † *deprivation*, the 6 months ſhall be reckoned *from the notice thereof* to the patron, and *not from the voidance.* ‡ 1 H. 7. 9. b. D. 15, 16. El. 327. 7. Dr. and Student, 116. 5 E. 4. 3. b.]

—— Godolph. Rep. 240. cap. 22. ſ. 6.——‡ Br. Quare Impedit, pl. 162. cites S. C.——S. P. Br. Quare Impedit, pl. 159. cites Doct. & Stud. lib. 2. But *upon the death, creation, and ceſſion of the incumbent*, the 6 months ſhall be accounted *from the time of the death, creation, and ceſſion.*——S. P. Godolph. Rep. 245. cap. 22. ſ. 2.—— S. P. By Lord Dyer, becauſe it may be done ſecretly in the chamber of the ordinary; and therefore the biſhop is to give notice thereof to the patron. 3 Le. 45. pl. 66. Mich. 15 Eliz. Anon.

11. In quare impedit the time of the lapſe ſhall be accounted *from the voidance*, and *not from the time of the preſentation made.* Per Cur. Br. Quare Impedit, pl. 90. cites 14 H. 7. 21.

The ſix months ſhall be accounted from the inſtitution between common perſons to bar the right patron of his quare impedit by the ſtatute of

12. The ſix months ſhall be *accounted from the time of the admiſſion and inſtitution as to an uſurper*, and not from the time of the voidance; but *the biſhop as to the lapſe ſhall count* the 6 months *from the time of vacation*; and *againſt* a *common perſon*, it is full *by admiſſion and inſtitution* without induction, and from the induction the 6 months ſhall be accounted there; and ſo *where the king preſents*, he ſhall account the 6 months *from the time of inſtitution.* Br. Preſentation, pl. 46.

West. 2. Fin. Law, 8vo. 196.

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S. P. Warſ. Comp. Inc. 8vo. 380. cap. 20.—

13. If the *incumbent dies*, and the *patron preſents* another, and the *biſhop* upon examination *finds him unable* for literature, in this caſe the Juſtices were of opinion that the 6 months ſhould be *accounted a tempore mortis*, &c. D. 327. b. pl. 7. Mich. 15 & 16 Eliz.

S. P. Becauſe the patron ought to preſent a clerk that is qualified, otherwiſe his preſentation is void, and

and ſhall not prevent the lapſe. 4 Mod. 140. Trin. 4 W. & M. B. R. in caſe of Hele v. the Biſhop of Exeter.

14. If an avoidance be *cauſed by* an *union* (for ſo it may be) then the 6 months ſhall be computed *from the time of the agreement* upon that union; for in that caſe the *patron is* not ignorant of, but *privy* to the avoidance; for there can be no union made, but the patron muſt have the knowledge thereof; and then it is to be appointed who ſhall preſent after the union, as whether one or both, either jointly, or by turns one after another, as the agreement is upon the union. Godolph. Rep. 245. cap. 22. ſ. 2.

(R. b) Lapſe. Notice. In what Caſes Lapſe ſhall incur without *Notice*, and where with Notice. *Refuſal*, [*&c.*]

[1. IF the ordinary refuſe a clerk becauſe he * is *criminoſus*, he ought to give notice thereof to the patron; otherwiſe no lapſe ſhall incur. 38 E. 3. 2.] Br. Quare Impedit, pl. 64. cites S. C. Per Finch.——

S. P. Per Billing, quod Needham conceſſit Br. Quare Impedit, pl. 130. cites 8 E. 4. 2.—D. 293. b. pl. 3. cites Fitzh. N. B. Tit. Quare Impedit.——* *As* for being a heretick. Dal. 51. pl. 19.——Where the ordinary, after that the patron has preſented, inquires, and *finds the clerk criminoſus*, and the time of lapſe by this paſſes, there he ſhall not make collation by lapſe, but muſt firſt give notice to the *patron* if he be a *layman*; *contra* if he be a *ſpiritual man*. Note the difference; for he *may know his own clerk*. Br. Notice, pl. 6. cites 14 H. 7. 21.——Br. Quare Impedit, pl. 90. cites S. C.——S. C. Cited by Mounſon J. 3 Le. 47. Mich. 15 Eliz. Anon.——Watſ. Comp. Inc. 8vo. 309. cap. 20. cites S. C.——But 2 Salk. 539. ſays, that if the ordinary refuſe quia criminoſus, he need not give notice of his refuſal; for the crime is as much in the conuſance of the patron as of the biſhop. Per Cur. Mich. 3 W. & M. B. R. Hele v. the Biſhop of Exeter.

[2. If the ordinary refuſe a clerk *for a private cauſe*, as if the clerk upon the examination of the ordinary *confeſſes himſelf to be a common adulterer, or that he comes to the preſentation by uſury and the like;* in this caſe the ordinary is bound to give notice thereof to the patron, or otherwiſe no lapſe ſhall incur. 18 H. 7. Kell. 50. b.]

[3. *So* notice ought to be given of a refuſal *for a notorious crime*, as becauſe he is a *common adulterer, or a common murderer*. 18 H. 7. Kell. 50. b. Contra per Frowick.]

[4. If a *lay patron* preſents a *clerk* who is refuſed becauſe he is *not well lettered*, no lapſe ſhall incur without notice given to the patron of this refuſal. 18 H. 7. Kell. 49. b.] S.P. F.N.B. 35. (I)—— But *on notice* lapſe ſhall be to the biſhop if the parſon does not preſent another within the 6 months after the church became void. And. 30. pl. 70. Paſch. 3 Eliz. Anon.——If I preſent my *clerk* to the biſhop, and he *finds him not able*, and refuſes him, there if he gives notice to me, and I do not preſent within 6 months, he may preſent by lapſe; but if he does not give notice, but preſents by lapſe, there after the 6 months I may have quare impedit againſt him. Per Newton and Paſton. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

[5. If a *ſpiritual patron preſents* a clerk who is refuſed *for default of literature*, there lapſe ſhall incur without notice, becauſe the law intends, that he might have ſufficient knowledge See (T. 3) pl. 1, 2.

of his ſufficiency before he preſented him. 18 H. 7. Kell. 49. b.]

[382] But if the firſt was * Fol. 365. above 8 l. the patron muſt take notice at his peril; for it is void by act of parliament, and the words are, that it *ſhall be void as if the incumbent was dead.* Per Jones J. Jo. 405. S. C. —— If a man be preſented to a benefice of 6l. per ann. and after to another of 20l. if he is *deprived for plurality*, the biſhop muſt give notice to the patron; for it is at the common law, and until deprivation it is no ceſſion. Goub. 23. Patch. 26 El. C. B.

[6. If an *incumbent of a church with cure of* the value of 5l. *per annum, takes a 2d benefice which is not within the ſtatute of* 31 *El.* though no lapſe ſhall incur to the ordinary by this voidance by the canon before notice given to the patron, yet after notice lapſe ſhall incur if he does not * preſent within 6 months. Trin. 14 Car. B. R. in BALDOCK's caſe, by Jones and Barkley.]

Where an *avoidance* is *by ſtatute*, no notice need be given to the biſhop. Brownl. 16.

S. P. Br. Notice, pl. 10. cites 1 H. 7. 9. — B. Quare Impedit, pl. 117. cites S. C.

[7. If a *reſignation* be made to the biſhop, no lapſe ſhall incur without notice thereof given to the patron. 18 H. 7. Kell. 49. b. 18 El. D. 347. 12.]

—— The patron ſhall take notice *of every avoidance* of an advowſon, *except reſignation*, and of this the ordinary ſhall give notice to him. Br. Notice, pl. 27. cites Frowick's Reading, 117. —— If the avoidance of a church is by *reſignation, or* ſuch like, *where the biſhop is privy*, or party *to the cauſe of the avoidance*, &c. notice muſt be given of ſuch avoidance to the patron, or otherwiſe the ordinary ſhall not take benefit of the lapſe. D. 273. b. pl. 3. Mich. 12 & 13 Eliz. in the caſe of Pedinfield v. Pickering. —— If an *uſurper preſents within the 6 months, and* the preſentee *is in for* 6 *months, no notice being given of the reſignation*, yet that ſhall bind him, and he ſhall be put to his right of advowſon. Secus if the ordinary had *collated*, becauſe the induction is notorious to the country, and the patron ought to take notice of it at his peril to prevent the uſurpation of a ſtranger. Noy, 65. Servien v. Biſhop of Lincoln.

[8. So if the *biſhop dies who took the reſignation*, yet lapſe ſhall not incur to his *ſucceſſor* without notice given. 18 H. 7. Kell. 49. b.]

In caſe of *reſignation and deprivation* no lapſe ſhall incur to the king, but after notice given to the patron. Jenk. 244. pl. 28.

[9. So after ſuch *reſignation* no lapſe ſhall incur to the king after a year and a half for default of the ordinary and metropolitan; becauſe *no lapſe ſhall incur to the king where no title of lapſe was to the inferior ordinary.* D. 18 El. 348. 12.]

† S. P. For it is a ſpiritual act, of which the patron is not bound to take conuſance before notice given. Br. Quare Impedit, pl. 127, cites S. C. —— The notice of *deprivation or reſignation* ought to be given *by the ordinary* himſelf, and *not by a ſtranger*. Br. Notice, pl. 25. cites Doct. & Stud. lib. 2. cap. 31. —— If a patron be *deprived* by the ordinary, *or reads not his articles*, in which caſes the church is void, yet *notice muſt be given to the true patron for the time*, [or turn,] or elſe the lapſe incurs not, (which is inconvenient for the church, and a prejudice to the ordinary;) for how ſhall he in this caſe aſſure himſelf of a ſufficient notice? for if he give *notice to him that is not patron for this very turn*, his notice *is vain*, and the true patron perhaps knows not of the deprivation; or if he knows it, needs not preſent without notice given him. In this caſe Sir H. Hobard Ch. J. holds, that *his way is to award a juſt patronatus*, with ſolemn premonitions quarum intereſt; and then inquiry being made who is patron, to give him notice; and if he preſents not within 6 months, then the ordinary may collate, *though that ſhall not bind the very patron*, yet it ſhall excuſe the biſhop from diſturbance upon ſpecial matter ſhewed; but if the other ſuppoſed patron preſent, and the 6 months incur, quære if the true patron be bound, ſince there was no notice given him. And the opinion of Hobart is, that though without notice the patron is not bound by the lapſe, yet that is nothing to ſave the uſurpation of another pretended patron, who is not ſubject to give notice. Godolph. Rep. 181. cap. 16. ſ. 4. cites the caſe of Elvis v. the Archbiſhop of York.

[10. *Upon* † *deprivation* the ordinary ſhall give notice. But it is ſaid elſewhere, that of *voidance, ceſſion, and creation*, the patron ſhall take notice at his peril; and the ſame law of *reſignation* as of deprivation. Br. Notice, pl. 24. (bis) cites 5 E. 4. 4.]

11. In

11. In quare impedit againſt the biſhop and his collatee the biſhop pleaded, *that A preſented J. S. to him at B. and he being getting on horſeback, commanded J. S. to attend him at N. within the ſame dioceſe within 3 days, that he might examine him and inquire of his ability; but J. S. came not then, nor in 6 months after, by which he collated by lapſe, abſque hoc, that the ſaid W. L.* [as the plaintiff had counted] *gave the ſaid manor to E. L. in tail, priſt, &c.* And it was at length held, that the ordinary ſhall have time to be adviſed; for in examination he is judge, and not officer; and that the time and place given were convenient, and that he need not give notice to the patron, that J. S. came not to be examined, becauſe he had not refuſed him. Br. Quare Impedit, pl. 91. cites 14 H. 7. 21. 15 H. 7. 6, 7, 8. [383]

12. If the biſhop refuſe a clerk *becauſe he is a villain*, as he may do, he ſhall give notice thereof to the patron, whether he be lay or ſpiritual. Br. Quare Impedit, pl. 92. cites 14 H. 7. 28. Per Brian and the greater part of the Juſtices and Serjeants. Br. Notice, pl. 7. cites S. C.

13. Patron preſents a *mere layman*, who is admitted and inſtituted, notice muſt be given before lapſe ſhall incur. And. 16. pl. 34. Paſch. 12 Eliz. Bennefield v. Pickering. S. C. Bendl. 195. pl. 234. Adjudged. S. C. D. 292. b. pl. 1. Mich. 12 & 13 Eliz. Adjudged.——2 Show. 54. Per Scroggs Ch. J. Paſch. 31 Car. 2. B. R. in the caſe of Hill v. Boomer. S. P.

14. 13 *El.* 12. enacts, That *no lapſe ſhall accrue until 6 months after notice of deprivation for being under age, not reading the 39 articles, or oppugning the ſame, given to the patron by the ordinary.* Where one under the age of 23 years was preſented to a benefice, the queſtion was, whether the patron ſhould have notice, or that lapſe otherwiſe ſhall not incur to the biſhop, which is grounded upon this ſtatute. And it was held clearly by Mallet, Heath, and Brampſton Juſtices, that the notice ought to be given, or otherwiſe that lapſe ſhall not incur. But they agreed, that if the act had avoided the preſentation alſo, as well as the admiſſion, inſtitution, and induction, that in ſuch caſe the patron ought to have taken notice at his peril, being an avoidance by ſtatute, if the proviſo help it not. Mar. 119. Mich. 17 Car. the Biſhop of Hereford v. Okeley.

(S. b) In what Caſes, and in what not, Lapſe ſhall incur without Notice for *Collateral Cauſe*, where de Jure Notice ought to be.

[1. IN ſuch caſes *where of itſelf no lapſe would incur without notice, if the ordinary* who ought to give the notice *dies before notice*, yet no lapſe ſhall incur to the *ſucceſſor* without notice. 18 H. 7. Kell. 49. b.]

[2. Where notice is to be given, and *none is given within a year and a half*, by which lapſe ought to run to the *king* if notice had been given, yet no lapſe ſhall incur to the king, becauſe * no lapſe ſhall run to the king, where *no title of lapſe was to the inferior ordinary*, inaſmuch as he comes to ſupply their default. D. 18 El. 348. 12.] * S. P. Hob. 154. in the caſe of Colt and Glover v. the biſhop of Coventry and Litchfield.——S. P. Cro. J. 93. in the caſe of Lancaſter v. Lowe.

[3. If

Warſ. Comp. Inc. 8vo. 50. cap. 4.

[3. If notice ought de jure to be given, *the temporalties* of the ordinary *being in the hands of the king*, yet it ſeems that no lapſe ſhall run to the king without notice to the patron; for it ſeems that the *guardians of the ſpiritualties* ought to give notice. D. 22 El. 369. 54. will prove this.]

[384] (T. b) *What* ſhall be *ſufficient* Notice where it is requiſite.

* S. P. 2 Salk. 539. in the caſe of Hele v. the Biſhop of Exon.—— The biſhop refuſed a clerk, becauſe the *ſervice to be read* in the church, to which the preſentment was, *muſt be in the Welch tongue*, and the *preſentee could not ſpeak Welch*, and that the *pariſhioners underſtood not the Engliſh*, and therefore he refuſed him; and all the juſtices held this a good cauſe of refuſal, for he cannot inſtruct his flock according to his duty and charge; but in this caſe the *plaintiff* had *preſented* 16 *days within the* 6 *months*, and the biſhop gave *no notice* of the inability of the clerk, *till* 3 *days after the* 6 *months expired*; and the court held that notice ought to be given to the patron himſelf, if he be reſident in the county, and if not, a public intimation ought to be on the church door, and notice of this matter ought to have been given immediately, when he was preſented and examined, or within ſuch convenient ſpeed as might be; but when the biſhop is to inquire of the behaviour of the clerk, he ſhall have longer time; and for this cauſe judgment was given for the plaintiff. Cro. Eliz. 119. Mich. 30 & 31 Eliz. B. R. Albany v. Bp. of St. Aſaph.—Le. 31. pl. 39. S. C. And Anderſon ſaid, that 22 days between the preſentment and the notice was too large a delay, and the defendant has not ſhewn in his plea any cauſe for the juſtifying or excuſe of it, and therefore upon his own ſhewing we adjudged him a diſturber.——S. P. Carth. 312. in the caſe of the Biſhop of Exeter v. Hele, where not giving notice till 32 days after refuſal, was inſiſted to be too long a delay, and to amount to a diſturbance ipſo facto, becauſe in ſuch caſe the biſhop is bound to give notice to the patron with all poſſible ſpeed. But the Court gave no opinion in this point.

[1. If an ordinary *refuſe* a clerk *for illiterature*, and notifies it to the patron by *publick intimation fixed on the door of the church to which* the clerk was preſented, it is not good without notice * *to the perſon* of the patron. D. 16 El. 327. 7. Adjudged.]

[2. *But* where the *patron cannot be found*, peradventure ſuch publick intimation ſhall be ſufficient. D. 16 El. 327. 7.]

3. The 6 months ſhall be accounted *upon the death, creation, and ceſſion of the incumbent, from the time of the death, creation, and ceſſion*; but upon *reſignation or deprivation*, it ſhall be accounted *from the time of the notice given by the biſhop*; and if another biſhop gives notice, this is void as it ſeems. Br. Quare Impedit, pl. 159. cites Doct. et Stud, lib. 2. But ſee F. N. B. that notice of reſignation ſhall be given by the biſhop, where he intends to preſent by lapſe. Quod vide ibid. fol. 35.

The ſtatute provides, that lapſe ſhall not accrue without notice, and therefore though the patron made no preſentation within two years after deprivation of this preſentee, for not

4. In quare impedit, &c. the biſhop, as ordinary, entitled himſelf to preſent by lapſe, by reaſon of a deprivation, for *not ſubſcribing the* 39 *Articles*; and on iſſue taken, if notice of the deprivation was given by the ordinary to the patron, it was found that the *biſhop notified in the church* the not ſubſcribing, *by a certain intimation ſealed* by him, viz. R. epiſcopus C. univerſis rectoribus, vicariis, curatis, non curatis, clericis & literatis *quibuſcunque* infra dioceſim noſtram C. ſalutem. *Cum R. T.*, &c. *non ſubſcripſit*, &c. *juxta ſtatut.*, &c. commanding them all, and eſpecially the curate of C. to declare in the ſaid church of C. the ſaid non-ſubſcribing, &c. This, though found to have been *publickly read in Engliſh in the pulpit* of the church, &c. *and afterwards*

wards fixed at the church door, was held by all the Juſtices in Cam. Scacc. except Harper and Mounſon, abſente Gawdy, to be inſufficient to prejudice the patron, becauſe it is upon a *penal ſtatute* to the incumbent, and alſo to the patron, to make him loſe his preſentment, and therefore ſuch notice to the patron *ought to have been perſonal*, and the intimation ought to have notified, that the ordinary had deprived him by declaratory ſentence for his not aſſenting and ſubſcribing to the articles according to the ſtatute; for otherwiſe it ſhall be intended, that the ordinary is contented to permit him, &c. D. 346. pl. 7, 8. Hill. 18 Eliz. Bacon v. the Biſhop of Carliſle & Witton.

ſubſcribing the articles, yet no advantage can be taken of lapſe againſt the patron. And. 62. pl. 136. The Queen v. the Biſhop of Lincoln and Cock. —— S. P. D. 369. b. pl. 54.

Paſch. 22 Eliz. ſeems to be S. C. and that it ſeemed to the Court, that the queen ſhould not preſent by lapſe, though the patron had notice of himſelf of the not reading of the articles by his preſentee, notice not having been given by the ordinary.

5. If *A. a ſpiritual man has the preſentation, and B. a layman the nomination*, the preſentation ſhall be made only in A's name that hath the preſentation, and not in B's name that hath the nomination; therefore if the ordinary ſhould *refuſe the clerk for diſability*, notice ſhall be given only by him, to him that hath the preſentation, and not to him that hath the nomination. Dod. of Adv. 66. Lect. 12. [385]

(U. b) *In what Caſes* Lapſe ſhall *incur to the Ordinary.*

See (B. c. 2) pl. 3.

[1. IF the *church* be *litigious* between two patrons, and the one brings his *quare impedit*, *or* aſſize of darrein preſentment againſt the other, *without naming of the biſhop*, and recovers againſt him, if the 6 *months be paſſed pending the writ*, lapſe ſhall incur to the biſhop; for no default was in the biſhop. 1 E. 1. Rot. Patentium. M. 15. 6 E. 1. Rot. Patentium. Memb. 25. between the Abbot Saint Mary Eborum and the Biſhop of Norwich admitted. 33 E. 3. Quare Impedit, 194.]

In a quare impedit, if the *ordinary be not named*, he may preſent by lapſe, if the 6 months *incur pendente brevi*; but being named

he cannot take advantage of any lapſe, but ought to ſee that the *cure be ſerved*, by allowance out of the profits to be taken by ſequeſtration, and as he can take no advantage of the lapſe, ſo neither can the *metropolitan*, or the *king*; for no lapſe being againſt the ordinary, there cannot be any lapſe againſt them, and one DUKE'S CASE was cited by Coke to have been ſo adjudged. Cro. J. 93. in the caſe of Lancaſter v. Low. —— Jenk. 281. pl. 7.

If *two preſentments ſeverally*, there ſhall be awarded *two commiſſions* de jure patronatus: and if the *one be found patron by the one, and the other by the other*, there the church is litigious, and if their titles are not diſcuſſed within the 6 months, the biſhop may preſent by lapſe. Br. Quare Impedit, pl. 80. cites 21 H. 6. 44.

[2. *But* if the biſhop *refuſes* my clerk *without cauſe, and after the church* * *becomes litigious*, no lapſe ſhall incur to the biſhop; for this comes by his *own act*. 5 E. 1. 75. Queen Eleanor's caſe. 33 E. 3. Quare Impedit, 194.]

* Fol. 366.

[3. In a *quare impedit* againſt a diſturber, the *biſhop not* being *named in the writ*, if the plaintiff *recovers within the 6 months*, yet if the 6 months *incur before the writ to the biſhop* taken out, the lapſe ſhall incur to the ordinary. 17 E. 3. 75. Fitzh. Na. 48. b. 5. E. 1. 75. Admitted.]

Where a man *recovers in quare impedit after* 6 *months*, and the *church remains void*, when writ to the biſhop comes to him he ought to receive his clerk. Per Hill quod nullus negavit.

negavit. Contrs, where he had made collation by lapſe before. Br. Quare Impedit, pl. 53. cites 11 H. 4. 480.

If a man brings *quare impedit, and 6 months paſs before recovery*, and after he recovers, he cannot have execution by force of his recovery, and yet the law adjudges this advowſon in him, and writ of right of advowſon ſhall be brought againſt him that recovers, and yet he ſhall *never have execution*. Kelw. 109. pl. 28.

[4. *So* if *after the recovery within the* 6 *months* the defendant brings *writ of error, and the* 6 *months paſs pending it*, lapſe ſhall into the ordinary. 17 E. 3. 75.]

[5. If the *biſhop be a diſturber*, no lapſe ſhall run by his diſturbance, though the church be void by 6 months. Tr. 3 Ja. B. R. between PALMER and SMITH. Reſolved per Curiam.]

[6. *As* if the patron preſents to the *biſhop*, and he *will not examine the clerk, but delays him, by which the* 6 *months paſs*, yet no lapſe ſhall run to the biſhop; becauſe he is a diſturber, and this comes by his own diſturbance. Tr. 3 Ja. B. R. between PALMER and SMITH. Reſolved per Curiam.]

7. Lapſe may be of a *vicarage* appendant to a prebend. Br. Preſentation, pl. 26. cites 24 E. 3. 26.

[386] 8. Of a *chantery*, which has not cure, the ordinary ſhall *not* have advantage of lapſe, *unleſs* it be *expreſſed in the foundation*. Br. Quare Impedit, pl. 131. cites 13 E. 4. 3.

9. If a mere *layman* be preſented and inſtituted, and no ſentence of nullity or deprivation given, the ordinary cannot collate by lapſe. Fin. Law, 8vo. 89.

10. If in a quare impedit againſt the *ordinary*, he *confeſſes the diſturbance*, he cannot afterwards have lapſe. Br. Quare Impedit. 103. cites 39 E. 3. 15.

11. No lapſe can be after *inſtitution*, though there be no induction. Per Popham Ch. J. Goldſb. 164. in the caſe of Robins v. Prince.

(X. b) Lapſe. In what Caſes it ſhall be *prevented by* the *naming* of *him in a Writ.*

See (U. b) pl. 1. in notis.

[1. IF a church becomes void by the death of the incumbent or otherwiſe, and the *patron within the 6 months brings a quare impedit againſt the biſhop, and after 6 months paſs without any preſentment* by the patron to the biſhop, lapſe ſhall incur to the biſhop, notwithſtanding the pendency of the writ; for it is not reaſon that the ordinary ſhould loſe his title of lapſe without any tort done by him, by a fraudulent action of the patron without cauſe, by which the ordinary ſhall be put to expences without cauſe; and by ſuch fraudulent means the patron may keep the church perpetually void. Hobart's Reports, 270.]

Hob. 197. pl. 250. Mich. 15 Jac. Brickhead v. Archbiſhop of York.—— Acid there, pag. 201.

Hobart Ch. J. puts another caſe, viz. If a church becomes void, and *A. the true patron preſents* a clerk, *and likewiſe J. S. a ſtranger*, who has no right, preſents another, in this caſe the biſhop, though he may receive either of them at his peril, yet receives neither (as he may lawfully do) till the right be inquired, without doing himſelf any act of diſturbance; in this caſe if *A. brings* his *quare impedit againſt B. only*, the biſhop may collate by lapſe without queſtion. *But* in that caſe, *if A. names the ordinary a de-*

fend-

defendant, together with the diſturber, and then the biſhop comes and pleads that he claims nothing but as ordinary, &c. and then the *plaintiff hath a writ to the biſhop with a ceſſet executio*, &c. and then recovers againſt the diſturber, and the *biſhop* in the mean time *collates* by lapſe; in that caſe perhaps the biſhop's clerk may be removed, for it differs much from the former caſe, for *here was a true and not a feigned diſturbance*, whereunto the ordinary gave way ſo far, that the plaintiff could not get his clerk received, but was driven to his quare imp. For if he had proceeded to his jure patronatus without quare impedit, and the time had incurred, the biſhop might have preſented to lapſe remedileſs; and therefore ſince he did his endeavour to preſent, and was interrupted by a ſtranger, and the ordinary alſo refuſed his clerk, for which he had rather have an excuſe than a juſtification, and now both being made defendants, and the plaintiff's title is proved againſt them both, as if it had been ſo from the beginning, it ſhould be hard that the biſhop ſhould make advantage of this refuſal, which now appears to have been againſt right and [he] the party to the ſuit. Hob. 201. Mich. 15 Jac. Brickhead v. Archbiſhop of York. ——— Ibid. in Marg. there is the following note, (viz. That it is not ſo much the preſentation of the diſturber, as the biſhop's refuſal of the patron's clerk that preſents, which intitles him to the quare impedit; and therefore it is enough for a biſhop to eſcape the charge of a diſturber, and not alſo to make advantage of a lapſe cauſed by himſelf. ——— If *quare impedit* is brought againſt the biſhop *without any preſentation* made to him, or *without naming any diſturber* with him, or where *no diſturbance was made*, in this caſe though the biſhop was party to the quare impedit, yet he ſhall not loſe his lapſe; for fiction ſhall not take away right. Jenk. 281. pl. 7.

[2. If a man *recovers againſt J. S. in a quare impedit within the ſix months, and the defendant brings* writ of *error, and plaintiff ſues a quare incumbravit* againſt the biſhop, and after the 6 *months paſs*, yet no lapſe ſhall incur to the ordinary; for the quare incumbravit ſhall prevent it. 17 E. 3. 75.]

[3. If a man brings a *quare impedit againſt patron, ordinary, and incumbent*, and the *ordinary pleads that he claims nothing but as ordinary*, and after the *plaintiff recovers*, and the *patron and incumbent bring* writ of *error* in B. R. *pending which the biſhop dies*, and another is made biſhop, and after the *incumbent takes a 2d benefice*, by which the firſt is void by the ſtatute of pluralities, 6 *months paſs, and after the judgment is affirmed*, no lapſe ſhall incur to the ordinary. P. 3 Ja. B. R. between James and Bolton adjudged, this matter being returned by the new biſhop upon the writ to the biſhop to him directed.] [387]

4. A church is *void for a year*, where a *quare impedit* was *brought within ſix months againſt a biſhop and a diſturber*; neither the metropolitan nor the king ſhall have any lapſe; for the biſhop being made a party has no lapſe; and where the biſhop ſhall not have a lapſe, neither the metropolitan nor the king ſhall have it. Jenk. 281. pl. 7. cites 1 Inſt. 344. b.

(Y. b) *Againſt what Perſon* being *Patron*, Lapſe ſhall incur. Fol. 367.

[1. If an *infant* patron does not preſent within ſix months, lapſe ſhall incur. 33 E. 3. Quare Impedit, 46.] Watſ. Comp. Inc. 8vo. 186. cap. 12. cites S. C. F. N. B. 34. (T) S. P.

[2. So lapſe ſhall incur againſt a *feme covert*, if ſhe does not preſent within ſix months. 33 E. 3. Quare Impedit, 46.]

3. 17 *E.* 2. 8. enacts, That *lapſe for ſix months ſhall not prejudice the king's preſentation to a church.* If the *king permits a lapſe*, the *ordinary cannot preſent* by lapſe, but *ſequeſter the profits*, and find the cure till the king will preſent. Br. Quare Impedit, pl. 90. cites 14 H. 7. 21.

4. If

Br. Quare Impedit, pl. 151. cites S. C. and anno 8 E. 3.

4. If the *king has preſentation in any other right than in right of the crown*, lapſe ſhall incur againſt him as well as againſt any other perſon. But Brooke ſays, quære legem inde, becauſe it ſeems not. Br. Preſentation, pl. 56. cites the Regiſter, fol. 31.

5. Where the *king's tenant grants proximam præſentationem, and dies*; this ſhall hold place againſt the king, and the biſhop may preſent by lapſe upon the king before office found; but when office is found, the king ſhall have the preſentment, and the incumbent ſhall be removed. Br. Preſentation, pl. 24. cites 14 H. 7. 21.

(Z. b) Lapſe. *To whom* it ſhall accrue [for a Collateral Reſpect.]

Watſ. Comp. Inc. 8vo. 194. cap. 12. cites S. C.

[1.] IF a metropolitan *archbiſhop viſits an inferior biſhop, and inhibits him during the viſitation* as uſual, and after during the viſitation and inhibition, and *before any releaſe made by the archbiſhop, a lapſe incurs to the ordinary*; though the acts of juriſdiction of the ordinary are ſuſpended during the viſitation, ſo that he cannot inſtitute his clerk, yet he ſhall have benefit of the lapſe and not the archbiſhop, but he ſhall collate to the archbiſhop, and he ought to inſtitute his clerk. Trin. 13 Car. B. R. between DODSON AND LYNN. Agreed by the civilians in their arguments.]

If the lapſe incur, and then the *ordinary dies*, the king ſhall preſent, and not the executors of the ordinary; for it is rather an adminiſtration than an intereſt. Hob. 154. cites F. N. B. 34. (G) 25 E. 3. 24.—The maſter and fellows of Merton college in Oxford were patrons of a benefice within the biſhopric of Durham; the incumbent died; the church remained void for 6 months and more. The *biſhop was deprived*. It was a queſtion before the chancellor of England, whether the collation belonged to the king or to the archbiſhop of York, who was the metropolitan, or not. Quære. D. 87. b. pl. 103.——Ibid. Marg. cites 18 Eliz. as awarded that it belonged to the guardian of the ſpiritualties; and ſays it ſeems to be, becauſe it comes by reaſon of the ſpiritualties; and ſays, quære if the patron may now preſent, inaſmuch as living the biſhop he might, notwithſtanding the lapſe, preſent at any time before the collation.

[2. If a biſhop dies, by which the *temporalties are in the hands of the king*, if *during this time tempus ſemeſtre paſſes*, by which a lapſe happens, the *king* ſhall have it, and *not the guardian of the ſpiritualties*. Bracton, lib. 5. fol. 404. f. 10. where in his writ it * is ſaid, *cum vobis & univerſis de regno noſtro notorium ſit, & eſſe debet, quod eccleſiæ vacantes & pertinentes ad collationem epiſcoporum, abbatum & priorum ſede non vacante dum viverent, pertinere debent ad nos ratione cuſtodiæ tempore vacationis*. (But it ſeems this intends voidances, to which they have right as patrons.]

* [388]

Godolph. Rep. 244. cap. 22. f. 1. (i) S. P. And the ſame law of metropolitan.

[3. If the *patron preſents and his clerk is inſtituted*, and *remains without induction* 18 *months*, no lapſe ſhall incur to the king; for the † king cannot have a lapſe but where the ordinary might have had it before. Hobart's Reports, 208.]

Hob. 154 Mich. 10 Jac. in caſe of Colt and Glover v. the Biſhop of Coventry and Litchfield.——Cites 5 Rep. 52. a.——Watſ. Comp. Inc. 8vo. 196. cap. 12. cites S. C.—† S. P. Co. Litt. 344. b.

S. P. Br. Preſentation, pl. 58.

4. If the *patron* does not preſent within 6 *months*, the *ordinary* ſhall have other 6 *months*, and if he does not preſent within this,

the *metropolitan* ſhall have other *6 months*, as it is ſaid; and if they do not make collation within this *6 months*, *the king* ſhall have it, as it is ſaid. Br. Quare Impedit, pl. 53. ——S. P. Br. Plenarty, pl. 15. cites Doct. & Stud. lib. 2. 94. S. P. Becauſe it is but a meer truſt in law, and has no relation to the temporalties, which go to the king. Watſ. Comp. Inc. 8vo. 195. cap. 12. cites S. C.

5. If a lapſe devolves to the ordinary, and within thoſe months he is *tranſlated* to another biſhopric, per Noy attorney general, in default of the patron's preſenting, the *warden of the ſpiritualties* ſhall preſent, whoſoever he be. Noy, 69. Anon. Cites D. 87. pl. 103.

(A. c) Lapſe. In what Caſes after Lapſe incurred it ſhall be *taken away*.

[1. IF lapſe incurs to the ordinary, yet if the *patron preſents before the church is full*, the ordinary ought to receive his clerk; for the lapſe to the ordinary was, becauſe upon neglect of the patron he ought to ſee the church ſerved, which is now performed by the patron. * 11 H. 4. 80. 18 E. 3. 21. † 38 E. 3. 2. b. Adjudged 27 E. 3. 85. 18 H. 7. Kell. 50. ‡ Hobart's Reports, 208.] * Br. Quare Impedit, pl. 53. cites S. C.—— S. P. Br. Quare Impedit, pl. 131. cites 13 E. 4. 3.

——† Br. Preſentation, pl. 51. cites S. C.—Br. Quare Impedit, pl. 64. cites S. C.——If the *patron does not preſent within 6 months*, the *ordinary may make collation within other 6 months*; and *if he fail*, the *metropolitan within other 6 months*, and *in default of him the king*; but during all this time, if the patron preſents, the church being void and the lapſe not taken, the ordinary ought to admit his clerk. Br. Preſentation, pl. 58.——S. P. Though it be two years after the avoidance. Brooke ſays, and from hence it ſeems, that *as long as the church is void*, the *patron* who is diſturbed *ſhall have quare impedit*; for plenarty is no plea, unleſs it be by 6 months before the writ purchaſed, as to him who pretends to be patron; but *where the biſhop or metropolitan makes collation by lapſe*, the *plenarty by one day before the preſentment* of the patron, is a good plea. Br. Plenarty, pl. 15. cites Doct. & Stud. lib. 2. 94. S. C.——Lapſe incurred *to the king*, and yet the clerk of the right patron is admitted, inſtituted, and inducted by the metropolitan, whether this prejudices the king? D. 277. pl. 55. Trin. 10 Eliz. Anon.——‡ Hob. 152. 166.

[2. *But* if the *ordinary collates* by lapſe, and after *and before induction the § patron preſents*, the ordinary is not bound to receive him. D. 10 El. 277. 56.] [389] ‖ Fol. 368.

[3. If *pending a quare impedit* lapſe incurs to the *ordinary* who is *not named in the writ*, and the plaintiff has *writ to the biſhop*, at which time the church is not full, yet if the ordinary *callates before the receipt of the writ*, his clerk ſhall not be removed. 11 H. 4. 80.] Br. Quare Impedit, pl. 53. cites S. C.

[4. If lapſe *incurs to the inferior ordinary*, and *within his 6 months* after *the ſuperior ordinary collates*, by which the church is full, yet if the *patron preſents his clerk within theſe 6 months* he ought to be received; for the collation of the metropolitan is tortious, and a collation ſhall not put the party to a quare impedit, and therefore this tortious collation againſt the patron is, as if no collation had been. Dubitatur. 11 H. 4. 80. where it is objected, that the tort is between the ordinary and the metropolitan, and not to the patron.] Br. Quare Impedit, pl. 53. cites S. C.—Watſ. Comp. Inc. 8vo. 198. cap. 12. cites S. C.

[5. If the *ordinary collates within the 6 months, and after 6 months paſs*, yet the *patron may preſent before a new collation* by the ordi-

ordinary; for the firſt collation was by tort, and therefore cannot become rightful; and the firſt does not put the patron to his quare impedit, becauſe it was but a proviſion for the time, and therefore there ought to be a new act before it ſhall be a good collation.]

Watſ. Comp. Inc. 8vo. 199. cap. 12. cites S. C.—If the firſt 6 months are paſſed, ſo that the title to preſent is *devolved to the archbiſhop*, or to the king if the *biſhop collates though the right be paſſed*,

[6. If the *ordinary collates, and his clerk is inſtituted and inducted within the 6 months of the lapſe incurred to the metropolitan*, and after his 6 months which he himſelf had are paſſed; though this collation be tortious to the metropolitan, yet it ſeems, that this ſhall take away the preſentation of the patron ſo that he ſhall not preſent. Summer vacation at the aſſiſes in the county of Somerſet, between SIR FRANCIS POPHAM plaintiff, AND THE BISHOP OF BATH AND WELLS AND HIS SON defendants in a quare impedit, this was a queſtion, but ſo held by the lord Finch, the judge of the aſſiſes; for there was a right of collation. And though his time was paſſed, yet this reſts only between him and the metropolitan, and an uſurpation only to the metropolitan.]

and his incumbent be in, the patron by quare impedit ſhall not remove him; becauſe his poſſeſſion is not taken away; for the collation does not toll the poſſeſſion of a patron, as a preſentment ſhall do, for by this the wrong is done to the metropolitan or the king, and not to the patron. As if the *archbiſhop preſents within the 6 months to the biſhop in the place of the biſhop*, the patron ſhall not have quare impedit thereupon, becauſe the church is full by one who does it *jure epiſcopali* as officer, and by colour of this; but if any *ſtranger* who has no colour preſents, it is otherwiſe; for by this the ſhall be put out of poſſeſſion; per Dyer and Walſhe J. but Weſton and the Serjeants contra in both caſes; for by preſenting an auter temps they are diſturbers as any ſtranger. Dal. 59. pl. 9. 6 Eliz. Anon.

The *archbiſhop has a title to collate by lapſe*; the *biſhop collates before him*, this ſhall bind the archbiſhop; for at common law when a clerk was once admitted, he was not removeable; and collation *remains at common law*. Weſt. 2. helps only in caſe of preſentation. Jenk. 281. pl. 7.

(B. c) Lapſe *to the King*. [In what Caſes; and in what Caſes taken way.]

If the *king* has title to preſent by lapſe, or by outlawry, or wardſhip, and does not preſent in his turn, he ſhall loſe it. Cro. J. 54. the King v. Biſhop of Winton and Campion.

[1. VIDE in caſe of the king when lapſe may be *taken away*. Stamford's Prerogative, title Advowſon.]

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The patron's title continues againſt the ordinary and the king till the lapſe is executed. Hob. 152. in caſe of Colt v. Glover.——But Doderige J. ſaid, that the patron cannot preſent againſt the king, becauſe he has the lapſe not as ordinary, but as patron. Mo. 900. in caſe of Colt v. Glover.——Though the 6 months paſs, yet if the *patron preſents*, the biſhop ought to admit, though it be *after title devolved to the metropolitan*; and this the court held clearly; *and* they thought it ſeemed reaſonable alſo, that he ought to admit though title by lapſe be accrued *to the king*; for *he claims it as ſupreme ordinary*. Hutt. 24. in caſe of Booton v. Biſhop of Rocheſter.——Watſ. Comp. Inc. 8vo. 198. cap. 12. cites S. C.—Palm. 311. Mich. 20 Jac. B. R. it was reſolved in the caſe of THORNTON V. SAVIL, that the preſentation of the king by lapſe is as ſupreme patron, and not as ſupreme ordinary, and the king is never ſaid to collate.——S. P. Cro. J. 651. in S. C. by name of Sir George Savile v. Thornton.

[2. If lapſe comes to the king for default of the ordinary and metropolian, if the *patron preſents to the king before any perſon is preſented by him*, yet the king is not bound to receive him; for the preſentation being once ſettled in the king, ſhall not be deveſted. Dubitatur. D. 10 El. 277. 55.]

[3. After

[3. After a lapſe incurred to the king for default of the ordinary and metropolitan, if the *patron preſents, and his clerk is inducted*, yet this ſhall not toll the lapſe from the king, but he may remove him by quare impedit. Co. 7. Baskervill, 28. Admitted. 27 E. 3. 85. Adjudged. Dubitatur. D. 277. 55.]

S. C. cited Roll. R. 460. in caſe of Colt v. Glover.—Mo. 260. cites it as ſo adjudged in the caſe of Rindleton v. Thornwell.——D. 277. Marg. pl. 55. S. P.——Gibb. 37. in the Houſe of Peers. The King v. the Archbiſhop of Armagh and Whaley.

The *queen had a title to preſent by lapſe*, but before ſhe preſented a clerk, the *patron preſented E. who was* admitted, inſtituted, and *inducted, and died.* The queen has loſt her preſentation, becauſe ſhe had unam & unicam præſentationem hac vice, which cannot extend to the ſecond avoidance, otherwiſe ſhe may ſuffer one or more ſtrangers to preſent, and take her turn when ſhe pleaſe; and the *ſtatute de prerogativa* regis, which enacts, that nullum tempus occurrit regi, *muſt be intended* when the king has *an intereſt permanent and certain*, and *not when* it is *ſpecially limited when and how he ſhall take and not otherwiſe*; for the time is the ſubſtance of his title; and in ſuch caſe tempus occurrit regi. 7 Rep. 28. Trin. 27 Eliz. Baſkervill's caſe.——Ibid. ſays the ſame was adjudged, Paſch. 28 Eliz. C. B. between Beverley and Cornwall.——S. P. Mo. 269. Beverley v. Cornwall.——And. 148. S. C.——S. P. Arg. Show. 425.

[4. If lapſe comes to the king *to preſent a prebendary of his free chapel*, becauſe the dean thereof does not collate thereto within 6 months, and after *before the king preſents the dean collates*, yet the king ſhall have it, and ſhall remove the clerk. 27 E. 3. 84. b. Adjudged.]

If the *dean of the king's free chapel does not give the prebends within ſix months*, the king ſhall give them. Br. Prerogative, pl. 129. cites F. N. B. fol. 33.——*And* if the *temporalties of a* biſhop are in the *hands of the king*, and advowſon becomes void, and the biſhop and patron do not preſent within 6 months, the king ſhall preſent as the biſhop ſhould do if there was a biſhop there. Ibid.——Br. Quare Impedit, pl. 156, cites F. N. B. fol. 34. S. C.

[5. If a lapſe incurs to the king for default of the ordinary and metropolitan, and after the *ordinary collates, and his clerk is inſtituted and inducted*, the which clerk ſo *dies ſeiſed of the church*, it ſeems the king may preſent, for the lapſe devolved to him; for it ſeems the church was never full, neither againſt the patron nor againſt the king, in as much as the collation of the ordinary gains no poſſeſſion againſt the king, but the king might have preſented without being put to his quare impedit; and it ſeems that the church was not full againſt the patron. (But quære this.)]

If the king has a title to preſent by lapſe, and the patron preſents, yet the *king may preſent at any time as long as that preſentee is incumbent.* Cro. J. 216. Hill. 6 Jac. B. R. Cumber v. the Biſhop of Chicheſter and Green.

6. When the queen's preſentee by lapſe has *loſt the incumbency by ill pleading*, which he may do as well as by reſignation or deprivation, yet the ſame ſhall not turn to the advantage of the *queen*; for where the queen preſents for lapſe, and her clerk is inſtituted and inducted, ſhe has no more to do, but the *incumbent muſt ſhift* as well as he can *for the holding of it*; for by what manner ſoever he *loſes his incumbency*, the *queen ſhall not preſent again*. Otherwiſe if the queen be patron. Le. 194. Mich. 31 & 32 Eliz. C. B. Arundel v. Bp. of Glouceſter and Chaffin. [391]

7. Quare impedit; the caſe was, after *lapſe incurred to the queen* the *biſhop being patron preſented*, and afterwards the *ſucceſſor of the biſhop certified, that this incumbent had refuſed to pay the tenths, and* that the biſhop *collated the defendant who was inducted*; the queen brought a quare impedit, and it was adjudged, that the

Mo. 259. pl. 406. S. C. thus, the biſhop being patron and ordinary collated D.

queen had not loſt her preſentation, but if the incumbent had died it were otherwiſe; for here the church became void by the *incumbent's own act*; ſo if he had reſigned or been deprived; and it would be inconvenient if the queen ſhould loſe her preſentment by the incumbent's own act. Cro. Eliz. 119, 120. Mich. 30 & 31 Eliz. B. R. the Queen v. the Biſhop of Lincoln and Ligh.

In 8 Eliz. D took another benefice without qualification, whereby the firſt avoided; but nothing was done thereupon till 18 Eliz. when C. biſhop of Lincoln preſented again one E. but non conſtat, whether by death, avoidance, or reſignation. Afterwards E. being in, C. was removed to Wincheſter. F. the ſucceſſor biſhop certified, that E. did not pay the tenths, whereby the church avoided, and thereupon F. collated Lee. The queſtion was, if the queen might now remove Lee, and to have her preſentment which accrued by lapſe upon avoidance of D. who took another benefice without plurality [qualification]? In arguing this caſe, the caſe of RINDLETON v. THORNEWELL was agreed, that if lapſe is devolved to the queen, and a *ſtranger preſents, and the incumbent dies*, the queen ſhall not take the next preſentation; but ſome ſaid, there was a difference if the incumbent * reſigns, becauſe reſignation may be *by covin* to defraud the queen, as if lapſe accrues to the queen, and then the patron preſents by covin, that the incumbent ſhall reſign, *and ſo preſentment ſhall accrue to the patron upon a new avoidance, and the queen be barred of her old lapſe*, which is not reaſonable. Others ſaid, that in ſuch caſe the covin ought to be averred; but they agreed, that *no covin is intendable upon this certificate*; *becauſe it is a judicial act*, which the biſhop muſt make by command of an act of parliament, as of deprivation, which he muſt do by the laws of the church as judge. And the juſtices inclined againſt the queen. Notwithſtanding which, it was afterwards adjudged for the queen againſt the biſhop. ——S. C. Goldſb. 53. pl. 3. 78. pl. 10. 83. pl. 4. & 86. pl. 9. Judgment was given for the queen. ——Ow. 89, 90. S. C. adjudged for the queen.——4 Le. 95. pl. 195. S. C. adjudged.——* In the caſe of CUMBER v. THE BISHOP OF CHICHESTER AND GREEN. Cro. J. 216. pl. 2. Hill. 6 Jac. B. R. it was held, that by death or reſignation before the king in ſuch caſe has preſented, his preſentment was loſt, unleſs it be by covin to take away his title, in which caſe he ſhall have his preſentment. *But that if the parſon dies, or reſigns the firſt benefice, and the patron preſents, and this preſentee reſigns upon covin or dies*, the king has loſt that preſentment; for lapſe is but unica proxima vice.

8. *P.* was *tenant for life* of an advowſon, *remainder in fee to A.* ——*P. preſented* his clerk, who was admitted, inſtituted, and *inducted*; but by the ſtatute 13 Eliz. the benefice was void for *want of reading the* 39 *Articles*; however, he *continued in the church*, and by reputation was parſon during his life; afterwards *P. died*, and then the *incumbent died*; then the *queen* reciting her title to preſent by lapſe, *preſented* her clerk, who was admitted, inſtituted, and *inducted*; and *A. preſented* his clerk, who was admitted, &c. *no notice was* ever *given to P. of the* avoidance for *not reading*, &c. Adjudged, that the queen's preſentation was void, and that the other was good, though it was objected, that it belonged to the executors of P. becauſe as to P. himſelf, the church was full till notice. Yelv. 7. Trin. 44 Eliz. B. R. Grendit v. Baker.

Jo. 334. S. C.——Het. 124. S. C. Litt. Rep. 238. 302. S. C.

9. If a *church* becomes *void by acceptance of a* 2*d benefice* with cure, and continues void ſeveral years by lapſe *in the time of one king, who dies*, the *ſucceſſor* of the king *may preſent*, and is not reſtrained by the ſtatute 25 *E.* 3. 1. for by the expreſs words of the ſtatute, *all rights and titles to preſent in his own time until before this ſtatute*, and *in his time after, and all his heirs, after the death of E.* 3. *are ſaved*; and it ſhall not bar the titles which the king had in another's right fallen, or to fall in his own time, or in the time of his heirs; and that there was ſuch a ſaving appeared by the copy out of the parliament roll, and by an ancient book in the Exchequer wrote in parchment, which has ſuch a ſaving; per all the Juſtices and Barons beſides Vernon. And they held, that the words in the ſaid ſtatute (of *old titles*) is intended in the time of the

the progenitors of E. 3. and not of any titles of preſentments to fall in the time of E. 3. or of any of his heirs, but intended to exclude E. 3. and all his heirs from titles of preſentation in others right fallen before the time of E. 3. whereof any church was full, and which title is only in another's right; and that the *expreſs intent of that ſtatute was to take away the ſtatute of* 14 *E.* 3. *cap.* 2. *in this point.* Cro. C. 354. Hill. 9 Car. in Cam. Scacc. The King v. Pryſt and the Archbiſhop of Canterbury.

(B. c. 2) In what Caſes Lapſe ſhall be to the King or Others; and *what may be done after.*

1. VIDE many precedents, that by determination of *commendams retinere*, be it by *death*, *reſignation*, *tranſlation*, *or promotion*, it belongs to the king to preſent. Noy, 138. ——And it is ſaid there, that there are infinite numbers of ſuch precedents.

2. In the time of H. 3. there were in Com. Northampt. 2 *rectories*, ſc. Maidwell and Kelmarſh, whereof there were 2 *patrons*; afterwards the patron of M. in the time of H. 3. purchaſed the advowſon of K. and always after they were *come into one hand* the purchaſer *preſented only to the church of M. cum capella de K.* as it appears by the biſhop's regiſter. The queen preſented B. who brought bill in the Exchequer againſt the incumbent of Maidwell, who occupied the glebe of K. It was decreed for B. that though the patron of M. after his purchaſe had preſented only to Maidwell, yet K. remained a church in right, and the franktenement is in ſuſpence and not in the patron of M. as a diſſeiſor. For entry of the patron in the time of vacation is no tort, nor gains any franktenement. Per tot. Cur. Savil. 17. pl. 46. Paſch. 22 Eliz. Lewis v. Predreth.

3. If after alienation in *mortmain* the church voids, and the abbot preſents and 6 months paſs, the *lord* at any time within the year may remove the incumbent; for the act of parliament gives all this time to the lord to enter, and therefore when he *purſues the ſtatute* no laches ſhall be imputed to him. D. 25. b. Marg. cites it adjudged. Mich. 19 Jac. C. B.

4. When a lapſe is in the king he is not compellable to preſent, and *until he preſents* the ordinary has the cure de animis, and he ſhall provide for it; ſo the difference is between the *cura animarum* and the *patronage*. Per Doderidge J. Roll. R. 464. Trin. 14 Jac. in Cam. Scacc. in the caſe of Colt v. Glover.

5. The king *cannot grant over a* preſentation which he has by lapſe. Per Croke J. Roll. R. 467. in the caſe of Colt v. Glover, cites D. 18 Eliz. 339. and 4 Eliz.

(B. c. 3) *Pleadings* in caſe of Lapſe.

1. 25 *E.* 3. *ſtat.* 3. *cap.* 7. ENACTS, That *when the ordinary preſents by lapſe, and the king takes the ſuit againſt the patron, who in deceit ſuffers the king to recover; in this caſe, when the king's*

In quare impedit againſt W. and N. by the *king*, and

counted that T. was ſeiſed of the *king's right is not tried, the ordinary or incumbent may counterplead the king's title.*

manor and advowſon, and preſented one P. and from T. it deſcended to R. as ſon and heir, and that R. adhered himſelf to the enemies of the king in Scotland, by which he was outlawed; and the church voided by reſignation, and the king ſeiſed the manor and advowſon, and preſented, &c. and is diſturbed. Chelre demanded judgment of the count; for it does not appear if the king had tenure of the manor and advowſon ut antrum et uſtum et non allocatur. Chelre, judgment of the count; for it does not appear if the advowſon was appendant or not, et non allocatur. And after, all except W. pleaded ne diſturba pas, and W. the incumbent pleaded, that the ſame R. who was outlawed, a long time before the outlawry, leaſed the manor and the advowſon to J. S. for life, the remainder to T. in fee, and A. preſented this ſame W. who was received and inſtituted, abſque hoc that R. had any thing the day of the felony, or after. Priſt, judgment if any diſturbance, priſt, &c. The king pleaded eſtoppel, that it was found by office, that R. was ſeiſed the day of the felony; and he in remainder after the death of A. traverſed the office in this point, and found againſt him, judgment if againſt this matter found againſt the patron he ſhall be received; and becauſe the ſtatute does not give, that the incumbent ſhall be received but where the patron pleads faintly; and when he traverſes, and it is found againſt him, this is not faintly, and ſo he and the incumbent eſtopped; and becauſe that which is found againſt the patron ſhall be tried by the incumbent again, and he claims by the patron, therefore he ſhall be bound by that which binds the patron; by which it was awarded, that the king have writ to the biſhop. Br. Quare Impedit, pl. 66, cites 38 E. 3. 31.

* [393]

Pol. 369.

(C. c) *Uſurpation.* The *Effect.*

Watſ. Comp. Inc. 8vo. 284. cap. 13. cites S. C. ——— Uſurpation *gains* the church, ſo that the advowſon cannot be granted over. Cro. E. 811. in the caſe of Leake v. the Biſhop of Coventry and Babington. ——— S. P. Watſ. Comp. Inc. 8vo. 222. cap. 13.

1. HE who uſurps *gains the fee* thereby. 9 H. 6. 30. b. 31.

So if the tenant for life, the remainder over, ſuffers uſurpation and dies, he in remainder is without remedy of the uſurpation. Ibid.

2. If an *infant, ſeiſed of a manor with advowſon appendant, ſuffers uſurpation,* and after he *makes feoffment of the manor cum pertinentiis,* neither the feoffee nor the feoffor has any remedy of the uſurpation. Br. Preſentation, pl. 62. cites 16 E. 3.

3. If I *grant advowſon to a parſon and his ſucceſſors,* and the *church voids,* and a *ſtranger preſents* his *clerk,* who *is inſtituted and inducted,* and the 6 *months paſs,* he has loſt the advowſon for ever; for the parſon *cannot have writ of right, becauſe neither he nor any of his predeceſſors were thereof ſeiſed;* and he can *not* have *quare impedit, becauſe the 6 months are paſſed;* and he can *not* have aſſize of *darrein preſentment,* for *he never preſented,* and this lacheſſe ſhall bind the ſucceſſor for ever. Br. Preſentation, pl. 20. cites 19 H. 6. 40. Per Aſcue J. Quod non negatur.

4. If the king *confirms the patronage of* an uſurper that has preſented ſeveral times, and the ſeveral clerks inducted, ſuch confirmation is void, for the uſurper has no patronage; but if the king confirms the *incumbent,* it is good to the incumbent, for he is incumbent de facto, and the king cannot remove him without quare impedit by the ſtat. 25 *E.* 3. 13 R. 2. Jenk. 312. pl. 96.

5. If a man preſent by uſurpation to my advowſon within 6 months, I may have a *quare impedit;* but *after the 6 months* if the church become void, I cannot preſent, but am put to my *writ of right* of advowſon. And if a man uſurps *on the king,* he is put

to

to his quare impedit within the 6 months, and that a double uſurpation on the king puts him to his writ of right. Godb. 263. pl. 362. Mich. 13 Jac. C. B. Anon.

(C. c. 2) Uſurpation at *Common Law. How; and remedied by Statute.* [394]

1. 13 *Ed.* 1. *cap.* 5. *WHEREAS of advowſons of churches there be but three original writs; that is to ſay, one* writ of right, *and two of poſſeſſion, which be* * darrein preſentment *and* quare impedit.

* An aſſiſe of darrein preſentment no man can have without *alleging a preſentment in his own time.* 2 Inſt. 356.

And hitherto it hath been uſed in the realm, that when any having no right to preſent, had † *preſented* ‡ *to any church, whoſe clerk was* § *admitted, he that was very patron could not recover his advowſon* ‖ *but only by a* writ of right, *which ſhould be tried by battail or by great aſſiſe; whereby heirs within age, by fraud, or elſe by negligence of their wards, and heirs both of great and mean eſtate, by negligence or fraud of tenants by the courteſy, women tenants in dower, or otherwiſe, for term of life, or for years, or in fee tail, were many times diſherited of their advowſons, or at leaſt (which was the better for them) were driven to their writ of right; in which caſe hitherto they were utterly diſherited.*

It appears by this ſtatute, that every preſentment which was admitted would put the very patron out of poſſeſſion at common law, and to his writ of right of advowſon.

Br. Preſentation, pl. 46. —— Br. Plenarty, pl. 16. cites S. C. ——By the order of the *common law*, if *one* had preſented to a church whereunto he *had no right*, and the biſhop had admitted and inſtituted his clerk, this *incumbent* could not be removed for divers reaſons; 1ſt, for that he *came in* to the church *by a judicial act* from the biſhop, (who the law intended, ſcrutatis archivis, to do right,) the incumbent *could not be removed* neither by writ of right of advowſon, nor aſſiſe of darrein preſentment, nor quare impedit, only the patron ſhould recover his advowſon in a writ of right of advowſon, which by the uſurpation was diveſted from him. 2dly, That by the common law, in every town and pariſh there ought to be perſona idonea, and this appeareth by the words of the writ of quare impedit, &c. Quod permittat preſentare idoneam perſonam, &c. And *when the biſhop had admitted him able*, which implied that he was idonea perſona, then the law had its final intention, viz. That the church ſhould be ſufficiently provided for, and then *the church was ſaid to be plena* & conſulta. 3dly, That the incumbent having curam animarum might the more effectually and peaceably intend ſo great charge the common law provided, that *after inſtitution he ſhould not be ſubject to any action*, to be removed at the ſuit of any common perſon, without all reſpect of age, coverture, impriſonment, or non ſane memory, and without regard of title, either by deſcent or purchaſe, or of any eſtate; wherein you may (as often it hath been ſaid) obſerve what inconveniencies follow when the right inſtitution of the common law is not obſerved. 2 Inſt. 357.

† By this word *(preſented)* it appeareth that no *plenarty* doth put the patron, that hath title to preſent, out of poſſeſſion, but only plenarty *by preſentation*; but plenarty *by collation* doth put him that had right to collate out of poſſeſſion. 2 Inſt. 357. ——S. P. 6 Rep. 30. in Green's caſe. ——S. P. Cro. E. 207. Smallwood v. biſhop of Coventry and Marſh.

If *tenant for years* or *guardian in chivalry* bring a quare impedit, although the defendant hath a writ to the biſhop againſt the termor or guardian, and his clerk is admitted, inſtituted, and inducted, notwithſtanding the tenant of the free old of the advowſon is not put out of poſſeſſion. Note a diverſity beeween a *mere uſurpation and* him that comes in by *courſe of law*. 2 Inſt. 357.

‡ This is intended of a church *preſentative*. 2 Inſt. 357.

§ Albeit that *admiſſus* in its proper ſenſe is, when the biſhop upon the examination findeth him able, (that is) idonea perſona, yet here it *is taken for inſtitution*; for here is implied *ad eandem eccleſiam*, and therefore of neceſſity it muſt be here taken for inſtitution, and the rather for that before inſtitution the rightful patron is not put out of poſſeſſion. And it is to be obſerved, that by the inſtitution *the church*, as to all common perſons, *is plena* & conſulta *as to the ſpiritualty*; that is to ſay, the cure of ſouls; for when the biſhop doth inſtitute him, he ſaith, inſtituo te ad tale beneficium & habere curam

animarum, & accipe curam tuam & meam; *but* before induction the parſon hath *not the temporalties* belonging to his rectory. 2 Inſt. 358.

But the church is *not* full *againſt the king* before induction, becauſe in the king's caſe plenarty is to be intended of a full and compleat plenarty as well to the temporalties as to the ſpiritualties. And nota, preſent, [preſentations] admiſſions, inſtitutions, &c. are the life of advowſons; and therefore, if patrons ſuſpect that the regiſter of the biſhop will be negligent in keeping of them, he may have a certiorari to the biſhop to certify them into the chancery. 2 Inſt. 358.

‖ This is to be underſtood where the patron had a *fee ſimple*, and that he or ſome of his anceſtors *had preſented*; *but if* the patron claimed the fee ſimple of the advowſon *by purchaſe, and had never preſented*, there he could have no writ of right of advowſon, but, before this ſtatute, had loſt the advowſon; and likewiſe if tenant in tail or tenant for life had ſuffered any uſurpation, they had been remedileſs by the cemmon law, becauſe they could have no writ of right. 2 Inſt. 358. —— At common law *if tenant for life*, or *by the courteſy*, or *in dower*, or *the guardian or* tenant *in tail*, had ſuffered preſentment, thoſe *put him in reverſion or the heir to his writ of right of advowſon*; and ſo as to the *feme, if the baron had ſuffered uſurpation*; and ſo if the *biſhop, archdeacon, parſon*, and the like, had ſuffered uſurpation; and thoſe are remedied by this ſtatute, and that the heir, or he in reverſion, or the feme or ſucceſſor *ſhall have quare impedit at the next avoidance*. Br. Preſentation, pl. 46. —— Br. Plenarty, pl. 16. cites S. C. —— S. P. 6 Rep. 50. Mich. 3 Jac. B. R. in Boſwell's caſe.

If a *biſhop, abbot*, or prior, &c. *purchaſe* an advowſon, *and ſuffer an uſurpation* before they preſent, they and their ſucceſſors are barred for ever, unleſs by force of this act the uſurpation be avoided in a quare impedit. 2 Inſt. 358. —— *So* if a man *purchaſes* a manor with the advowſon appendant, *and ſuffers uſurpation* at the firſt avoidance, he is *without remedy for ever*, for he cannot have quare impedit after the 6 months, and he cannot have writ of right of advowſon, becauſe he never had poſſeſſion. Per Thorp. Nota. Br. Quare Impedit, pl. 29. cites 43 E. 3. 14 —A purchaſer is not within the aid of this ſtatute; for he cannot have an action poſſeſſory, becauſe he cannot allege a preſentation in himſelf as he ought to do in his count; and he cannot have a † writ of right, becauſe he cannot allege ſeiſin in the eſplees as he ought to do by the law. Per Doderidge J. 3 Bulſt. 40. Trin. 13 Jac. B. R. Harris v. Auſtin. —† S. P. But he may have a quare impedit, and *allege a preſentation in him from whom he purchaſed* the ſame; and to that end, ſaith Britton, was the quare impedit provided, for remedy of ſuch *purchaſers*; but the quare impedit is *more ancient than the time of E.* 1. as appeareth by Glanville. 2 Inſt. 356.—In 8 E. 1. it appeareth quod ſunt tria brevia de advocatione placitabilia, brevia de recto, quare impedit, & ultimæ præſentationis, but yet the original writs of *dower* and *ceſſavit*, &c. do lie of an advowſon, and ſo doth the judicial writ of *ſcire facias*. 2 Inſt 356.

* [395]

‡ The preamble extends only to heirs in ward, per

‡ *It is provided, that ſuch preſentments ſhall not be ſo prejudicial to the right heirs,* ‖ *or to them unto whom ſuch advowſons ought to* § *revert after the death of any perſons.*

fraudem & negligentiam cuſtodum, &c. And the words of the body of the act are, quod hujuſmodi præſentationes, *(ſuch preſentations,)* but theſe words are to be *expounded*, ſuch preſentations as be *in the ſame miſchief*; and therefore this act *extends to heirs* of advowſons, *though* they be *out of ward*. 2 Inſt. 358.

And this being a law that ſuppreſſeth wrong and advanceth right, doth *bind the king*, though he be not named in the act. 2 Inſt. 359. —— —— The king being informed that he had intereſt, preſented during non-age of the patron; and on another avoidance, the patron preſented, and the king brought quare impedit, and he pleaded as before; and it was held, that the ſtatute of Weſtminſter 2, does not aid the defendant, though he be an infant; for the *ſtatute mentions, where* uſurpation is had upon an infant, feme covert, termor, tenant for life, or the like, *by negligent keeping*, that he ſhall have the ſame action and exception as their laſt predeceſſor might have had; and *this of heirs who come in by deſcent*, who may be in ward, or have actions as heirs of their anceſtor. *But* ** *infant purchaſer has no guardian or action anceſtrel* of that which is purchaſed, and therefore uſurpation had upon him now ſhall bind him, as *it ſhould have bound an infant or feme covert at common law*, by the opinion there, and this immediately within 6 months; †† for the 6 months is given by the ſtatute to bring the quare impedit to reform it. Br. Quare Impedit, pl. 18, cites 35 H. 6. 59.—** S. P. 2 Inſt 358.—†† S. P. Br. Preſentation, pl. 46. —— Br. Plenarty, pl. 16. cites S. C. —— And it was held, that if the ſtatute ſhall ſerve the infant, yet the *king ſhall not be bound thereby*; for where by the ſame ſtatute preſentment had and enjoyed 6 months by laple ſhall bind, yet the king ſhall not be bound thereby, but ſhall have quare impedit after the 6 months, by which the defendant amended his plea. Br. Quare Impedit, pl. 18. cites 35 H. 6. 59.

A *prior* was ſeiſed of an advowſon, and *granted the two next preſentations to W. F. and his heirs*. The church voided. *W. preſented and died*. The church voided again, and his *ſon and heir preſented where this is only a chattle*; and it was agreed, that this is an uſurpation, which put the party to his writ of right of advowſon at common law; but now this is expreſsly aided by this ſtatute. Br. Quare Impedit, pl. 14. cites 34 H. 6. 27.

§ Nota (thoſe) hoc eſt illis heredibus, *to thoſe* heirs that have the reverſion of the advowſon by deſcent; for the preamble ſaith, hæredes et iam five majores, five minores, &c. And the perciſe of this branch is, qualem haberet ultimus anteceſſor hujuſmodi hæredes, &c. So as this ſtatute doth help the heir

heir of him *in the reverſion*, and not the leſſor himſelf; but the heir of him in remainder is not within the purview of this act. 2 Inſt. 359.

§ That is of tenant by the courteſy, tenant in dower, or otherwiſe for life, or for years, or in fee tail. 2 Inſt. 359.——Uſurpation had *upon tenant in tail ſhall bind himſelf for his life*, but not the *iſſue* in tail; for he *is aided by the ſtatute*. Per Belk. Br. Quare Impedit, pl. 29. cites 43 E. 3. 14——If the advowſon was *in groſs*, then the preſentments are but uſurpations, and ſhall not prejudice the heir in tail by reaſon of the ſtatute. Br. Quare Impedit, pl. 31. cites 43 E. 3. 24.

*The * ſame ſhall be obſerved in preſentments made unto churches, being of the* † inheritance of wives, *what time they ſhall be under the power of their huſbands, which muſt be aided by this ſtatute by the remedy aforeſaid.*

* If a feme covert hath an advowſon *by purchaſe*, ſhe is not within the remedy of this act. 2 Inſt. 360.—† This is intended of an advowſon *by deſcent*. 2 Inſt. 360.

Alſo religious men, *as biſhops, archdeacons, parſons of churches, and other ſpiritual men, ſhall be aided by this ſtatute, in caſe any having no right to preſent, do preſent unto churches belonging to prelacies, ſpiritual * dignities, parſonages, or to houſes of religion, what time ſuch houſes, prelacies, ſpiritual dignities, or parſonages be vacant.*

By this, preſentation and uſurpation in *time of vacation*, albeit the freehold and inheritance is in abeyance in gremio legis, yet the uſurper gaineth a fee-ſimple in the advowſon; like as if one entereth into lands during the vacation, and claim the ſame as his inheritance, he gaineth an inheritance by wrong; but yet, as the dying ſeiſed of lands in that caſe during the vacation ſhall not take away the entry of the ſucceſſor, no more ſhall the uſurpation during the vacation take away his right of preſentation when the church becomes void; and if he be diſturbed, he ſhall have his quare impedit. 2 Inſt. 360.——See ſupra, pag. 394, 395.

* [396]

Sect. 2. *Neither ſhall this act be ſo largely underſtood, that ſuch perſons, for whoſe remedy this ſtatute was ordained, ſhall have the recovery aforeſaid,* furmiſing, *that guardians of heirs, tenants in tail, by the courteſy, tenants in dower, for term of life, or for years, or huſbands, which* faintly *have* defended *pleas moved by them or againſt them.*

So great regard the law hath to *judgments*, as this act provideth, that by any general words of this act they *ſhall not be avoided by pretence of faint defence*; quia judicia in curia regis reddita pro veritate accipiuntur; & judicia ſunt tanquam juris dicta. 2 Inſt. 360.

Becauſe the judgments *given in the king's courts ſhall not be annulled by this ſtatute, the judgment* ſhall ſtand in his force, until *it be* reverſed *in the court of the king* as erroneous, *if error be found.*

Here is one of the maxims of the common law; that,

"Judicia in curia regis reddita non adnihilentur, ſed ſtent in ſuo robore quouſque per errorem, aut attinctam adnullentur."

"Nihil tam conveniens eſt naturali æquitati unumquodq; diſſolvi eo ligamine, quo ligatum eſt."

"Intereſt reipublicæ res judicatas non reſcindi." 2 Inſt. 360.

Or by *aſſiſe of* darrein preſentment, or *by inqueſt by a writ of* quare impedit *if it be paſſed, or be annulled by attaint or certification, which ſhall be freely granted.*

And ſometimes ‡ *when an* agreement *is made between many claiming one advowſon, and inrolled before the juſtices in the rolls or* by fine *in this form,* that one ſhall preſent the firſt time, *and* at the next avoidance another, *and the* third time another; *and ſo of many, in caſe there be many.*

‡ This clauſe *extends* as well *to ſtrangers of blood* as to coparceners that are privy in blood; and if one of the parties or his heirs, or any ſtranger uſurp in the turn of another, the party wronged is not driven to his quare impedit; for ſo it may be, that the quare impedit, or aſſiſe of preſentment, may fail, and yet he may have remedy by this branch of the act; for albeit there be a plenarty

nanty by 6 months, yet the party may have a ſcire facias upon the roll or fine, and therein recover the preſentation and damages. 2 Inſt. 362.

See (G. a) (H. a) (K. a)

And when one has preſented, and had his preſentation, which he ought to have according to the form of their agreement and fine; and at the next avoidance, he to whom the ſecond preſentation belongeth is diſturbed by any *that was* party to the ſaid fine, or *by ſome* other in his ſtead,

It is provided, that from henceforth they that be ſo diſturbed ſhall have no need to ſue a quare impedit, but *ſhall* reſort to the *roll or fine;*

And if the ſaid concord or agreement be found in the roll or fine, then the ſheriff ſhall be commanded, that he give knowledge unto the diſturber, that he be ready at ſome ſhort day, containing the ſpace of 15 *days or* 3 *weeks, (as the place happeneth to be far or near) for to ſhew if he can allege any thing wherefore the party that is diſturbed ought not to preſent.*

And if he come not, or peradventure doth come and can allege nothing to bar the party of his preſentation, by reaſon of any deed made, written ſince the fine was made or inrolled, he ſhall recover his preſentation with his damages.

No damages by this act are to be * recovered but *againſt* him that is impetitor or *diſturber.*

Sect. 3. *And if the* 6 *months be not paſſed, but the* preſentment *be* dereigned within *the ſaid time*, then damages *ſhall be awarded* to the half year's value *of the church.*

And if the diſturber have not whereof he may recompence damages, in caſe where the biſhop conferreth by lapſe of time, he ſhall be puniſhed by two years impriſonment.

2 Inſt. 363. —— In a quare impedit againſt the patron and incumbent, the *plaintiff recovers the advowſon poſt ſeneſtre tempus*; and becauſe the *incumbent* was impeditor, for that he had *counterpleaded the title of the plaintiff*, therefore he recovered the *value for two years* as well *againſt the incumbent* as the patron. 2 Inſt. 363.

*[397]

And if the advowſon be dereigned within the half year, *yet the diſturber ſhall be puniſhed by the* impriſonment of half a year.

2. 7 *Annæ, cap.* 18. *Foraſmuch as the pleading in a quare impedit is found very difficult, whereby many patrons are either defeated of their rights of preſentation, or put to great charge and trouble to recover their right, which is occaſioned by the law as it now is; for remedy whereof, be it enacted by the queen's moſt excellent majeſty, by and with the advice and conſent of the lords ſpiritual and temporal, and commons, in parliament aſſembled, and by the authority of the ſame, that no uſurpation upon any avoidance in any church, vicarage, or other eccleſiaſtical promotion, ſhall diſplace the eſtate or intereſt of any perſon entitled to the advowſon or patronage thereof, or turn it to a right; but he or ſhe that would have a right if no uſurpation had been, may preſent or maintain his or her quare impedit upon the next or any other avoidance, (if diſturbed) notwithſtanding ſuch uſurpation.*

(D. c) *Upon what Thing* Uſurpation may be.

[1. IF a *donative* becomes void, and after a ſtranger preſents thereto, and his clerk is admitted, *inſtituted, and inducted*, yet this is not any uſurpation to the true patron; but all this is merely void. Co. Litt. 344.]

[2. If the ordinary *deprives* an incumbent *for crime or other cauſe in which he ought to give notice* thereof to the patron, but he *does not give notice* thereof to the patron, but after a *ſtranger preſents* his clerk, who is inſtituted and *inducted, and 6 months paſs*; it ſeems that this is an uſurpation upon the patron; for though the ordinary ſhall not have any advantage of any lapſe without notice, yet the church of itſelf is void, and againſt ſtrangers the patron is bound to take notice of it at his peril. See Trin. 44 El. B. R. GREENE AND BAKER's caſe.] Watſ. Comp. Inc. 8vo. 750. cap. 40. cites S. C. See the ſtatute of 7 Annæ, cap. 18. at (C. c. 2) ſupra.

[3. If my clerk, being inſtituted and inducted, *reſigns* into the hands of the ordinary *by covin* between him, the ordinary, and J. S. of purpoſe that J. S. ſhall preſent J. D. to the intent *to defeat me, the very patron, of my preſentation*, and *J. S. preſents J. D. accordingly, and 6 months paſs*, yet this ſhall not be any uſurpation, becauſe the ordinary hath not given to me any notice of the reſignation; for otherwiſe every one may be defrauded by ſuch covenous dealing. Tr. 40 El. B. between LACON and the BISHOP OF LINCOLN. Per Curiam.]

(E. c) Uſurpation. *What Act* or Thing will make an Uſurpation, or put a Man out of Poſſeſſion.

[1. IF a man *recovers in a quare impedit, and has execution*, every other is out of poſſeſſion thereby. 9 H. 6. 57.] Br. Quare Impedit, pl. 7. cites S. C.

[2. If a man brings *quare impedit againſt the incumbent only* without the patron *and recovers, and by writ to the biſhop the incumbent is removed, and the clerk of the recoveror inſtituted*, this ſhall put the patron out of poſſeſſion though he was no party to the ſuit. Dubitatur. 9 H. 6. 32.] [398] Br. Quare Impedit, pl. 6. cites S. C. —*Recovery againſt a ſtranger, or* againſt *the incumbent the patron not named*, ſhall not bind the patron; quod nota. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37. ——And Brooke ſays it appears elſewhere, that where the *king or* the *pope preſents* the quare impedit ſhall be againſt the incumbent alone, and in other caſes it ſhall be more commonly againſt the patron and incumbent, or againſt the patron alone, unleſs in ſpecial caſes. Br. Quare Impedit, pl. 47.

[3. If the *biſhop be a diſturber*, no lapſe ſhall incur by his diſturbance, though the church be void by 6 months. Tr. 3 Ja. B. R. between PALMER AND SMITH. Reſolved per Curiam.]

[4. *As if the patron preſent* to the *biſhop*, and he *will not examine the clerk but delays him, by which the 6 months paſs*, yet no lapſe ſhall incur to the biſhop; becauſe he is a diſturber, and this comes

comes by his own diſturbance. Tr. 3 Ja. B. R. between PALMER AND SMITH. Reſolved per Curiam.]

[5. If a *ſtranger preſents* to my church being void without any right or title, but *merely by tort*, but he preſents *by ſimony*, and *his clerk is* admitted, inſtituted, and *inducted*, *and 6 months paſs*, yet this is not any uſurpation to me; becauſe the preſentation, admiſſion, and inſtitution are made void by the ſtatute of 31 El. and the preſentee is *not incumbent de facto*. Co. Litt. 120.]

6. If I *preſent my clerk*, *who is admitted*, and after *another preſents and ouſts my preſentee without title*, now notwithſtanding that *preſentee will not ſue ſpoliation*, yet *I am not out of poſſeſſion*, *but after the death of my preſentee I ſhall preſent again*. Br. Conſultation. pl. 1. cites 44 E. 3. 33. Per Tank.

7. In ſcire facias it was agreed, that if the *king ſeiſes advowſon of a prior alien for war and preſents*, and after the *prior is reſtored*, this does not put the prior out of poſſeſſion, nor ſhall the preſentment of the guardian in chivalry put the heir out of poſſeſſion; for the *poſſeſſion of the king affirms the title of the prior* alien, and of the heir; *but* the heir nor the prior alien *ſhall not make title by this preſentation of the king*. Br. Preſentation, pl. 47. cites 46 E. 3. 6.

8. Where the defendant *preſents in jure uxoris*, yet if *ſhe has no right*, this does not veſt poſſeſſion in him. Br. Quare Impedit, pl. 108. cites 14 H. 6. 23.

9. Between patrons, if one of them be preſented and admitted, and *inſtituted by the ordinary*, *and is in by 6 months*, this ſhall gain poſſeſſion; *contra where he preſents a clerk*, *and puts him in poſſeſſion without the ordinary*; *as* where I have a *free chapel*, to which I may make collation, and put my clerk in myſelf without preſenting to the biſhop, there if a man at an avoidance puts in his clerk who is in by 6 months, this does not put me out of poſſeſſion, nor if he preſents him to the ordinary, who admits and inſtitutes him. So where an abbot is *elective*, *and not preſentable*, there *preſentation does not gain poſſeſſion*, per Markham, quod Danby conceſſit; but *Newton* held *contra*, and that in thoſe caſes of preſentation to the biſhop, where the clerk is admitted and inſtituted, he is a clear gainer of poſſeſſion; otherwiſe it ſeems clearly to be, where he puts him in poſſeſſion of his own authority, by which he continues till the 6 months paſs; this does not gain poſſeſſion clearly as it ſeems, contra of the biſhop who makes collation by lapſe; for there 6 months make poſſeſſion. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

[399] 10. A *prior* was ſeiſed of an advowſon, and *granted the 2 next preſentations to W. F. and his heir*, the church voided, *W. preſented and died*, the church voided again, and *his ſon and heir preſented*, *whereas it is only a chattle*; and it was agreed that this is a uſurpation which puts the party * to his writ of right of advowſon by the common law, but now this is expreſsly aided by the ſtatute of *W.* 2. that uſurpations permitted by termors ſhall not grieve him in the reverſion, by which at the next avoidance the prior preſented, and iſſue was taken by the other, that the prior did not

* It was reſolved, that if *tenant in tail* of a manor with an advowſon appurtenant *grants the next avoidance*, *and dies*, and

not grant modo & forma, &c. and would not ſtay the matter in law. Br. Quare Impedit, pl. 14. cites 34 H. 6. 27.

the iſſue enters into the manor, then the grant is void, as it ſeemed by 3 Rep. 81. And although ſuch *grantee preſents* by colour of ſuch grant, yet that is a uſurpation which ſhall bind. Noy, 143. Anon.

11. By the *poſſeſſion of the king* by preſentation, *or* by the poſſeſſion *of any other perſon by preſentation*, every other is out of poſſeſſion. Br. Quare Impedit, pl. 18. cites 35 H. 6. 59.

No preſentation ſhall gain poſſeſſion, *but that which is* a perfect preſentation, *and where the incumbent continues by 6 months*; for 10 preſentments within 6 months ſhall not gain poſſeſſion. Br. Quare Impedit, pl. 149. cites 12 H. 8. 12.——S. P. If all the clerks die within the 6 months. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

12. He who *preſents himſelf by a ſtrange name*, where he is patron and takes, he ſhall be put out for ſpoliation; for he may *pray the ordinary to admit him*, but not preſent himſelf. Br. Quare Impedit, pl. 18. cites 35 H. 6. 59.

If J. N. *pray the ordinary to admit him, which he does*, this does not gain poſſeſſion: for there is *no preſentation*; for he cannot plead plenarty of his own preſentment.——Br. Preſentation, pl. 23. cites 14 H. 8. 2.——Br. Quare Impedit, pl. 86. cites 14 H. 8. 2. 29.

13. If a church becomes void, to which *I have cauſe to preſent*, and a *ſtranger makes preſentation*, and his clerk is inſtituted and inducted, againſt whom a *ſtranger brings quare impedet, and recovers*, this recovery ſhall not grieve me who am rightful patron, and a ſtranger to this recovery, &c. Agreed per tot. Cur. Keilw. 49. pl. 4. 18 H. 7.

14. If *a ſtranger preſents the very patron*, this will not put him out of poſſeſſion. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

15. If the *ordinary makes collation within 6 months*, this does not gain poſſeſſion to the ſucceſſor: *for he has colour* as ordinary; *contra, where he* preſents *without colour*. Note the diverſity. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

Collation with admiſſion ſhall not ouſt the patron of his poſſeſſion; *but preſentation with admiſſion* gains poſſeſſion. Per Coniſby and Fineux Ch. J. accordingly. Ibid.

16. If a man *preſents himſelf*, and is inducted, and dies, this does not toll the action of the very patron; but he may have quare impedit, and this does not gain poſſeſſion. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

So it is of the collation. Ibid.

17. A *college* was *founded by the name of Aulæ Scholarium* Reginæ de Oxon. The *provoſt* of the ſaid college *preſented* to a church being void *by name of* the *provoſt* of the college of the queen in Oxon, *and omitted the word (ſcholarium)*; and it was *held* clearly by the court, that this preſentation thus made, by a contrary name of their foundation, ſhall make *no uſurpation*, nor gain any patronage to themſelves; for there was no ſuch name of incorporation as they preſented by, and ſo conſequently no uſurpation thereby by them gained. Bulſt. 91. Mich. 8 Jac. Dr. Ayray v. Sir Richard Lovelace.

18. It was held by Brampſton and Crooke J. that a naked *preſentment without* any *induction*, does not gain any right, and the very patron by this is not put out of poſſeſſion, but that it is

the inſtitution and admiſſion by the ordinary, which is a judicial act, that makes the uſurpation, and there is not any intereſt gained before; for if there be a preſentation without inſtitution, nothing is done, therefore if the uſurpation is gained by the inſtitution, which is ſubſequent to the preſentation, the uſurper in his declaration cannot ſay that he was ſeiſed in fee and preſented, [400] which is precedent to the act which makes the uſurpation, viz. the inſtitution, and till inſtitution no eſtate is drawn out of the uſurpation; that if after preſentation and before inſtitution the very patron grants his advowſon to a ſtranger, the grant is good, though afterwards there be inſtitution of the clerk of the uſurper. And they ſaid that in truth there cannot be an uſurpation to gain the fee till the inſtitution, and *by relation*, which is a fiction in law, it ſhall not be ſo taken; for relation and fiction is to preſerve, and to prevent miſchief, and not to do a tort, as the caſe in queſtion is. But Barkley and Jones held, that the preſentation is the ſole act of the party which gains the advowſon, and the inſtitution is only a ſucceeding ceremony; and when the ceremony is performed, it ſhall have relation to the precedent act; and cited 6 E. 3. 41. b. that preſentation in time of war, and inſtitution in time of peace, ſhall be an uſurpation in time of war. Et ſic pendet. Jo. 427, 428. Hill. 15 Car. B. R. in caſe of Sir Henry Harper v. the Bailiffs and Burgeſſes of Derby.

(F. c) Uſurpation. *For whom* the Uſurpation ſhall be ſaid to be.

Watſ. Comp. Inc. 8vo. 207. cap. 13. cites ſame caſes.

[1. IF the *king preſents in right of his ward, who has not any right* to the advowſon, this veſts the inheritance in the ward by uſurpation, becauſe he has expreſsly preſented in his right. 42 E. 3. 4. b. 43 E. 3. 14. b. Contra 22 E. 4. 9. b.]

[2. *So* it is of a common guardian. Contra 17 E. 3. 60. 7 H. 4. 26. b.]

Watſ. Comp. Inc. 8vo. 207. cap. 13. cites S. C.

[3. If I *preſent as procurator to J. S. to a church of which J. N. is ſeiſed;* this ſhall be an uſurpation for J. S. if I am procurator of J. S. 17 E. 3. 60.]

[4. *So* it ſhall be if I preſent as his procurator, *though I be not his procurator.* 17 E. 3. 60.]

Watſ. Comp. Inc. 8vo. 207. cites S. C.—S. P. Admitted

[5. So if I myſelf *am ſeiſed* of an advowſon, *and I preſent as procurator to a ſtranger*, this ſhall be an uſurpation upon myſelf for the ſtranger. 17 E. 3. 60.]

per Cur. Ow. 142. in C. B. 42 Eliz. in the caſe of RUDD v. TOPSEY. And upon the reaſon thereof the principal caſe there was ruled, viz. In a quare impedit, the jury found that Edward Capell was ſeiſed of an advowſon in fee, and did let it to the defendant for years, and during the leaſe he preſented the defendant; and the doubt was, whether this was a ſurrender or an extinguiſhment. And it was held by all the juſtices, that this could not be a ſurrender, but is clearly an extinguiſhment.

S. P. Co. Litt. 52. a. This is a putting myſelf out of poſſeſſion, becauſe the patentee comes in by the inſtitution and induction of the ordinary.

[6. So ſhall it be, if *I preſent as atterney to a ſtranger* of an advowſon whereof I myſelf am ſeiſed, this ſhall be an uſurpation for the ſtranger. 17 E. 3. 60. b.]

(G. c) Uſurpation. *What Perſon* [may] uſurp. The *King*.

[1. THE king may uſurp. 42 E. 3. 4. b. 43 E. 3. 15. D. 18 El. 351. 22. and cites Trin. 35 H. 8. The king may gain an advowſon by preſentment, and plenarty by ſix months without any title. Alſo *againſt an infant purchaſer*.] S. P. By all the juſtices, except Windham J. For true it is that the king cannot do wrong to any; but that which makes the tort, and cauſes the uſurpation, is the inſtitution and induction, which is not properly tort, becauſe they are judicial acts. Sid. 163. Brown v. Spence.

In quare impedit by the *king*, who *counted that he himſelf was ſeiſed* of the advowſon, *and preſented* his clerk, &c. *who was inſtituted*, &c. and after died, and he preſented again, and the defendant diſturbed him, the *defendant ſaid, that before the king preſented, or any thing had, J. S. was ſeiſed*, &c. *and preſented, and his clerk inſtituted and inducted, and conveyed* the advowſon *to himſelf by grant of J. F. and after the church voided, and W. S. informed the king that he had intereſt*, by which the king preſented, and his clerk was received and inſtituted, &c. *and after the church voided again, and the defendant preſented, by reaſon that he was within age at the time of the preſentation of the king, abſque hoc, that the king had other title but by the information.* And it was held that the king was in poſſeſſion by reaſon of his preſentation; and therefore ſee that the king may be an uſurper. Br. Quare Impedit, pl. 18. cites 35 H. 6. 59.——Br. Prerog. pl. 6. cites S. C.

*[401]

For whom.

[2. If the king *preſents in right of his ward, who has not any right* to the advowſon, this veſts the inheritance in the ward; for he has expreſsly preſented in his right, and is an uſurpation. Ergo 42 E. 3. 4. b. 43 E. 3. 14. b. Contra 22 E. 4. 9. b.] See (F. c) pl. 1, 2.

[3. *So* ſhall it be in caſe of a *common guardian*. Contra 7 H. 4. 26. b. 17 E. 3. 60.]

(H. c) *Who* may uſurp *in reſpect of the Eſtate*.

Fol. 371.

[1. IF a man ſeiſed of an advowſon in fee, *grants the three next avoidances* of the church to J. S. and after the church voids, and the *grantor himſelf preſents, and his clerk inſtituted and inducted*, though the grantor himſelf has the fee, ſo that he cannot gain a new fee by an uſurpation, yet this ſhall be an uſurpation as to the grantee, by which the two other next avoidances to him granted are turned to a right; and ſo becauſe he cannot have a writ of right, he is without remedy for them. M. 16 Ja. B. between Sir WILLIAM ELLWAYES AND TAILOR. Per Curiam. Intratur. Contra. Co. Litt. 249. there cites H. 18 El. B. per Curiam, for the *privity* between them [makes it] no uſurpation, and becauſe he cannot uſurp upon himſelf.] Hob. 315. S. C.—— The grant of the three avoidances is all one entire intereſt, and he cannot have writ of right by reaſon of the feebleneſs of his eſtate, and this uſurpation is not remedied by the ſtatute of W. 2. 5. And ſo his right being remedileſs, it is gone, and he in reverſion is ſeiſed in fee diſcharged by this grant, and having uſurped within the 6 months, the intereſt does not continue divided in him; and if he dies, his executor ſhall not have it but his heir, for it is drowned in the reverſion; as if tenant for life he diſſeiſed by him in reverſion, and dies ſeiſed, this is a deſcent of the eſtate in fee, and ſo the reverſioner is ſeiſed in fee of the advowſon. Adjudged accordingly. But Hutton contra; for he held that they were 3 ſeveral intereſts, as if 3 ſeveral grants had been made. Jo. 6. pl. 4. S. C.

[2. But

See Co. Litt. 240. a. and at the end of pl. 1. next above.

[2. But P. 12 Car. B. between Legg and Sir Anthony Ager in ejectionæ firmæ, adjudged per Curiam, that if *leſſor* of an advowſon *uſurps upon his leſſee for years*, that this ſhall not ouſt the leſſee of the next turn, becauſe leſſor cannot make any uſurpation upon himſelf for the privity between them; and therefore this preſentation upon the leſſee only bars the leſſee for this turn only, and his eſtate not turned to a right; and in this caſe they denied the ſaid caſe of Sir William Ellwayes and Tailour to be law.]

[402] (H. c. 2) *Who* ſhall be *ſaid* to be the *Uſurper*.

1. IF a head of a corporation, by a *wrong name of incorporation*, preſents a clerk, who is admitted, inſtituted, and inducted; the party who is preſented ſhall not by the preſentment be the uſurper, becauſe the preſentment as to him (being by a void name of incorporation) is void in itſelf, and he by this gains nothing at all (the preſentation of him being by a contrary name differing from the name of the foundation;) but this *collation* here by the biſhop ſhall make him to be the uſurper. Per tot. Cur. 1 Bulſt. 91. Mich. 8 Jac. Dr. Ayray v. Sir Richard Lovelas.

See (B. c)

(I. c) Uſurpation. Upon whom. Upon the King. [*Or others.*]

For the advowſon was always appendant, and the inheritance paſſes to the grantee, and is not made diſappendant, as in caſe of a common perſon; for the king cannot be put out of poſſeſſion; but the patentee ſhall not have quare impedit of the firſt diſturbance; for that preſentment, being a choſe en action, doth not paſs unleſs mentioned in his grant. And if the *patentee* brings quare impedit on the 2d avoidance, he *ſhall make his title by* the preſentment of the king not making mention of the uſurpation. 3 Le. 17. pl. 41. Mich. 14 Eliz. Anon.——3 Le. 61. pl. 89. Mich. 18 Eliz. C. B. the S. C. in the ſame words.——Dal. 75. pl. 1. Anno 14 Eliz. S. C.—* Hob. 242.

[1. IF the king be *ſeiſed of a manor to which* an advowſon is appendant, the church becomes void, and a ſtranger uſurps; this is not any uſurpation as to the inheritance; for the king may grant the manor with the advowſon appendant, and the patentee ſhall preſent to the avoidance. * Hobart's Reports, 189.]

[2. *But* a man may uſurp *upon the queen;* for the plenarty, &c. is good plea againſt her. 18 E. 3. 2. Adjudged. But there quære.]

[3. *This* uſurpation *is only to the preſentment.*]

A man may uſurp upon the king, if his clerk be received, as well as upon a common perſon; quod nota; and this puts the king out of poſſeſſion. Br. Quare Impedit, pl. 39. cites Fitzh. Quare Impedit, 15. and 18 E. 3. 15.——*But* Brooke ſays it is ſaid elſewhere, that lapſe ſhall not hold place againſt the king; for nullum tempus occurrit regi; and from hence it ſeems that the king may have quare impedit after the 6 months, if *the church* be void; but if it be *full by preſentation, and no patron nor incumbent alive who may be ſaid diſturber, againſt whom the king may recover, the king is put to his writ of right* of advowſon; contra it ſeems where they are alive; for plenarty is no plea againſt the king. Per Cand. But Belk. contra.

In quare impedit it is admitted, that *two preſentations* ſhall put the king out of poſſeſſion, and *put him to his writ of right* of advowſon. Br. Preſentation, pl. 9. cites 47 E. 3. 4.——And ſays, ſee 24 E. 3.

[4. A man may uſurp upon the king, and *put him to his writ of right*. 18 E. 3. 16.]

E. 3. 37. that the king ſhall have quare impedit or writ of right of advowſon, and ſome other actions. And Brooke ſays, from hence it ſeems that the king may be out of poſſeſſion. Ibid.—Br. Prerogative, pl. 9. cites S. C. —— Br. Quare Impedit, pl. 39. cites S. C. and 21 E. 3. accordingly.——S. P. Br. Prerogative, pl. 110. cites 41 E. 3. 10.——Vaughan Ch. J. ſaid, that the reaſon why *two uſurpations put the king out of poſſeſſion* is, that after the death of the firſt incumbent there is none againſt whom he may bring his action. 2 Jo. 10. in caſe of the King v. Jervice, cites Stamf. Prer. 39. 54. 62.——But ſee pl. 5.

[5. A man *cannot* uſurp upon the king *for the inheritance and put him to his writ of right though he preſents twice.* P. 13 Ja. B. † Contra adjudged between the KING plaintiff, AND THE BISHOP OF WINCHESTER AND MATTHEWS defendants. D. 18 El. 351. 22. D. 28 H. 8. 24. 153. Co. 6. GREENE, 30. cites P. 25 El. B. Intratur. M. 21. 2. El. Rot. 2218. between † PESCOD AND YARDLEY. Adjudged, that double or treble uſurpation by ſeveral perſons does not gain the * inheritance of the advowſon out of the king; for it is permanent, and is not diveſted thereby.] *[403]

† S. C. adjudged in C. B. againſt the opinion of Anderſon Ch. J. there, that the king is put to his writ of right. But error being brought in E. R. this judgment was reverſed, by the opinion of Popham Ch. J. Yelverton, Williams, and Tanfield, Fenner being e contra; and they alleged two reaſons; 1ſt, The right of patronage, and the advowſon itſelf being an inheritance in the crown of record, the law ſo protects it, that by no tort done by a ſubject it can be diveſted; for in caſe of the king there ought to be the ſame means to diveſt it out of the king, (viz. a record) as there is to entitle him, and here is no matter of record againſt the king; for the preſentation by a ſubject is only matter in fact, which act, though it is mixed with the judicial act of the biſhop, yet it ſhall not prejudice the king, inaſmuch as it is grounded only upon the tort of the ſubject. 2dly, No man can ſhew when and at what time the uſurpation upon the king commences; for there is no doubt, but after the 6 months paſſed from the incumbency he may well preſent; for plenarty is no plea againſt the king, & nullum tempus occurrit regi, and after ſuch uſurpation upon the king, there is no doubt per Cur. but that the patronage is yet in the king to grant. And they all held, that during the life of the firſt preſentee, there is no doubt but that the king may preſent, and then the death of the incumbent cannot make that an uſurpation which was not ſo in his life; for his death is a determination of the firſt tort, which will rather aid than hurt the king. And per Tanfield, according to this reſolution it was reſolved alſo 23 & 24 Eliz. C. B. in one BARDLEY's caſe, though in that caſe there was not any induction, which was the reaſon that the opinion of the judges was not delivered in point of judgment, but all were of opinion as they in this court now are; and no book in the law is contra, but only a glancing opinion in 43 E. 3. 19 E. 3. and 18 E. 3. Yelv. 90, 91. Trin. 4 Jac. B. R. the King v. Matthew.—Noy, 18. S. C.

† Mo. 338. S. C. accordingly, by name of Yardley v. Preſtwood————And. 81. pl. 147. S. C. accordingly.——Cro. J. 123. S. C. accordingly, by name of the King v. Champion.

Quare impedit by the king, the *defendant pleaded, that the church was full the day of the writ purchaſed*, &c. and ‡ his counſel demanded judgment of the writ; et non allocatur againſt the king. And there it is agreed in a manner, that plenarty is no plea againſt the king claiming in his own right, or in another's right, by which the *defendant alleged two preſentments in his anceſtor one after another, to prove uſurpation to put the king out of poſſeſſion.* And per Belknap clearly, this ſhall not ſerve againſt the king, by which Candiſh dared not demur, but traverſed the preſentment of the king. Br. Plenarty, pl. 1. cites 43 E. 3. 14.——Uſurpation upon the king does not gain poſſeſſion. Br. Quare Impedit, pl. 28. cites S. C. But Brooke ſays, quære inde————‡ Orig. is (counſel de luy in judgment, &c.)

In a ſpecial verdict in treſpaſs, it was adjudged, that an *uſurpation on the king's title* by preſentation will put him out of poſſeſſion, and he *is put to his quare impedit*, and cannot preſent, till the incumbent is removed by judgment. § *But* double or treble uſurpations by ſeveral perſons ſhall *not gain the inheritance* of the advowſon *out of the king*; for that is permanent, and cannot be deveſted. Whereas, as to preſentation, the king may be put out of poſſeſſion, becauſe that is tranſitory. Adjudged 6 Rep. 30. a. Trin. 44 Eliz. B. R. Green's caſe.——S. P. determined on a writ of error, Cro. J. 123. the KING v. CHAMPION, with this further reaſon, that the king is put to his action of quare impedit, becauſe reaſon requires that the church ſhould be ſerved——Cro. J. 385. the King v. the Biſhop of Norwich. S. P. adjudged. —— § Cro. El. 519. in Huſſey's caſe. S. P.

[6. The *patentee* of the king of an advowſon *preſents twice* to the church, *and his clerk is inſtituted and inducted where the patent was void, in law, and* ‖ *it did not paſs by the patent*, yet the patentee has ſo gained the poſſeſſion of the advowſon by this uſurpation againſt all *ſtrangers*, that at the next avoidance, if he be diſturbed, *he*

‖ Fol. 372.

he may maintain againſt a ſtranger, who makes no title thereto, an aſſiſe of darrein preſentmeat. D. 18 El. 351. 22. Adjudged.]

If a feme purchaſe an advowſon, and take a huſband, and the church voids, and the ſtranger does preſent, and the huſband ſuffers an uſurpation, &c. By this uſurpation the wife ſhall be out of poſſeſſion after the 6 months paſt, and ſhe ſhall be put to her writ of right of advowſon if ſhe have preſented before; and if ſhe have not preſented, ſhe is without remedy; but otherwiſe it is, if the feme hath an advowſon by deſcent, or by courſe of inheritance. F. N. B. 34. (S.)

[7. An uſurpation may be *upon a feme covert.* 50 E. 3. 13. b. at common law.]

But the king may bring his quare impedit at any time during the lives of the patron and incumbent, or of the incumbent only, though it be after the 6 months. Br. Quare Impedit, pl. 39. cites 47 E. 3. 4. ——If there be an *uſurpation upon the king by a complete plenarty*, the king cannot preſent to the church before he has removed the incumbent by quare impedit, leſt contentions might grow in the church between the ſeveral claimers of the benefice, to the diſturbance or hindrance of divine ſervice, and this was by the common law. But in that caſe the king *is only put out of poſſeſſion as to the bringing of an action*, but the inheritance of the advowſon is not deveſted out of him. 2 Inſt. 358.

[8. If a common perſon uſurps upon the king, and his clerk is admitted, inſtituted, and *inducted, the king is put to his quare impedit*, and cannot preſent till the incumbent is removed. Co. 6. GREENE, 30.]

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S. C. Jo. 426. by the name of HARPER v. THE BAILIFFS AND BURGESSES OF DERBY, who preſented Wierſdale, and there ſame point was agreed; becauſe the king for want of an office found had not gained any particular eſtate, and ſo this is ſuch uſurpation as will diveſt the whole intereſt in the advowſon, and put the heir out of poſſeſſion. *But if an office be found* in ſuch caſe, and thereby the king entitled to the advowſon during the non-age of the heir, and a ſtranger preſents to an avoidance happening after the death of the anceſtor and the office found, this ſhall not diveſt the reverſion out of the heir; for though the ſtranger has by his preſenting gained the poſſeſſion of the advowſon pro hac vice, yet this does not diveſt the eſtate of the king during the non-age of the heir; and if the eſtate of the king was not diveſted out of him, the inheritance ſhall not be; for ſo long as the particular leſſee or grantee for years, or the lord by reaſon of ward is in poſſeſſion, the reverſion ſhall not be diveſted or turned to a naked right.

[9. If the *ward of the king has an advowſon in groſs*, whereof he is ſeiſed in fee, *but this is not found in the office*, and after the church voids, though the king may preſent thereto without any office thereof found; yet if a ſtranger preſents, and his clerk is in by 6 months, and after the heir ſues livery, this is an uſurpation *upon the heir*; for the king without ſuch office had not any poſſeſſion therein to protect the inheritance of the heir. Hill. 14 Car. B. R. between HARPER AND WIERSDALE in writ of error upon a judgment in Bank in quare impedit adjudged per Curiam. Intratur.]

10. If an *infant purchaſes an advowſon*, and *uſurpation is had upon him*, he ſhall not avoid it by nonage; for *the ſtatute ſays, per negligentiam cuſtodum*, which is of an infant who is in *by deſcent*; for an *infant and feme covert* were bound by uſurpation *at common law* after 6 months. Br. Coverture, pl. 70. cites 35 H. 6. 62.

4 Le. 209. pl. 339. Mich. 18 Eliz. B. R. S. C. Anon.

11. The *king* was *ſeiſed of a manor to which an advowſon was appendant*, and the church being void, a *ſtranger preſented* A. who was in by 6 months *unknown to the* council of the *king, who afterwards granted the manor with the advowſon to W. R.* Then *A. died.* It was held per Cur. that the grantee ſhall preſent, becauſe the advowſon was always appendant, and the inheritance thereof paſſed with it to the grantee; for it was not made diſappendant by this uſurp-

uſurpation unto the king, though in the caſe of a common perſon it had been ſo, until he had continued it and made it appendant again by a writ of right of advowſon. And it was agreed, that W. R. the king's patentee ſhall have the next avoidance, (though he could not have the preſent avoidance for want of being mentioned in his grant,) and in qua. imp. to be brought by him, he ſhall make his title by the laſt preſentation of the king, without making mention of the preſentment of the ſtranger. Hob. 140. pl. 192. Mich. 13 & 14 Eliz. Anon.

12. It was held by all the juſtices, that no uſurpation can be upon *parſon imparſonee*. Pl. C. 501. Mich. 18 & 19 Eliz. Grendon v. Biſhop of Lincoln.

(K. c) Uſurpation. Upon whom. *In reſpect of Eſtate.*

[1. IF *two jointenants* are ſeiſed of an advowſon, and the *one preſents alone*, yet this does not put the other out of poſſeſſion. P. 7 Ja. B. between KITE AND THE BISHOP OF BRISTOL. Becauſe the ordinary might have refuſed the clerk, and by reaſon of their joint title. 27 H. 8. 11. b.]

S. P. If the advowſon be *appendant*, but it ſerves for the others for title in quare impedit after his death. Br. Preſentation, al. &c. pl. 1. cites 27 H. 8. 1. But he ſays, quære if it had been an advowſon *in groſs*.——If one preſents alone, and his clerk is inducted, the other is out of poſſeſſion. Br. Quare Impedit, pl. 52. cites 11 H. 4. 54. per Hanke. And Brooke ſays, the king's attorney in 35 H. 8. agreed with Hanke clearly.

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[2. *So one tenant in common* of an advowſon preſents alone, this does not put the other out of poſſeſſion. P. 7 Ja. B. between Kite and the Biſhop of Briſtol.]

Br. Preſentation, pl. 1. makes a quære of this point.

[3. *One coparcener* cannot uſurp upon the other by preſenting alone without the other. 17 E. 3. 37. b. P. 7 Ja. B. D. 9 El. 259. 20. Dubitatur 15 E. 3. Aſſiſe Darrein Preſentment, 11. 9 E. 3. 39.]

Where *one parcener preſents in the turn of her coparcener*, this does not put her to her writ of right of advowſon as uſurpation made by a ſtranger ſhall do, by reaſon of the privity, ſo that ſhe loſes nothing but this turn, and ſhall have her turn again when it comes to her turn again. Br. Quare Impedit, pl. 139. cites 22 E. 4. 8.——S. P. Br. Quare Impedit, pl. 157. cites 2 H. 7. 14.——*So of grantees* of coparceners. Br. Quare Impedit, pl. 139.

Ten preſentations by one coparcener ſhall not ouſt the other of his turn, though the 6 months paſs; for there is *privity*, and the claim by one and the ſame title; per Brud. Ch. J. in C. B. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

[4. If two *coparceners make partition to preſent by turn*, the one may uſurp in the turn of the other. 30 E. 3. 15.]

Fin. Law. 8vo. 198.—Watſ. Comp. Inc. 8vo. 214. cap. 13. cites S. C.

[5. *But* ſuch uſurpation *does not bind* her upon whom the uſurpation is *at her next turn*, but that ſhe may preſent.]

[6. If 2 *coparceners make partition in chancery*, *or* make *compoſition by fine to preſent by turn*, and after the one preſents in the turn of the other, yet this doth not put her out of poſſeſſion, but that ſhe may preſent to the next turn, and this *by the aid*

Watſ. Comp. Inc. 8vo. 214. cap. 13. cites S. C.

of the ſtatute of Weſtminſter 2. *cap.* 5. *or by the common law.* 33 E. 3. Quare Impedit, 196.]

[7. The *dean* may uſurp *upon the chapter by preſenting alone*, without the chapter, *to an advowſon, whereof the chapter is ſeiſed by themſelves* (as it ſeems), though both are ſpiritual perſons. 17 E. 3. 64. b.]

Watſ Comp. Inc. 8vo. 218. cap. 13. cites S. C.

[8. If 2 *churches are united and conſolidated* in one *by the aſſent of both patrons*, and it is agreed they ſhall preſent thereto alternis vicibus for ever, and after the *one preſents in the turn of the other*, this is an uſurpation; for they are not like to coparceners who are privy in blood. D. 9 El. 259. 20.]

Fol. 373.

Watſ. Comp. Inc. 8vo. 218. cap. 13. cites S. C. D. 259. b. pl. 2. cites 43 E. 3. 35. F. N. B. 35. (O) cites S. C.—— Ow. 142. Rudd v. Topſey, cites 17 E. 3. 3. and 24 H. 6.

[9. So if *A. ſeiſed in fee of a manor, to which* an advowſon is appendant, *makes compoſition with B. by fine to preſent by turn;* by this compoſition the advowſon is appendant every 2d turn, and if the one uſurp upon the turn of the other, this ſhall put him out of preſentment; becauſe they are *not privies by blood* as coparceners are, *nor in eſtate*, as jointenants, or tenants in common are. D. 9 El. 259. 20.]

[10. If *I am ſeiſed* of an advowſon, *and preſent thereto as procurator of J. S.* this ſhall be an uſurpation upon myſelf. 17 E. 3. 60. adjudged.]

—See (F. b.) pl. 5.

Watſ. Comp. Inc. 8vo. 217. cap. 13. cites S. C. —So where the grantor himſelf uſurps upon the firſt voidance.

[11. If a man *grants* 2 *next avoidances to J. S.* and after a *ſtranger uſurps upon the firſt* avoidance, this ſhall be an uſurpation upon the 2d avoidance, ſo that it is turned to a right; and becauſe the grantee cannot have a writ of right, he is without remedy. M. 16 Ja. B. between Sir William Ellis and Taylor. Per Curiam.]

See (H. c) pl. 1. and the notes there.——But ibid. pl. 2. is contra.

See pl. 1.

[12. If 2 *jointenants of a manor to which* an advowſon is appendant are, and the church voids, and the *one preſents alone*, this is not any uſurpation to his companion, but it is good title at the next avoidance in a quare impedit to allege this preſentment by the one to ſerve for both. 27 H. 8. 11. b.]

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By the common law, if an advowſon deſcended to divers coparceners, if they cannot agree to preſent, the eldeſt ſhall have the 1ſt turn, and ſo every one according to ſeniority, and this privilege extends not only to their heirs, but to their aſſignees, whether they have their eſtate by conveyance, or by act in law, as tenant by the curteſy, and therefore although the coparceners do make compoſition to preſent by turn, this being no more than the law appoints, (expreſſio eorum qua tacite inſunt nihil operatur) they remain coparceners of the advowſon, and the inheritance of the advowſon is not divided; and notwithſtanding this compoſition, they may join in a quare impedit if any ſtranger uſurp in the turn of any of them; and the ſole preſentation out of her turn did not put her ſiſter out of poſſeſſion in reſpect of the privity of eſtate, no more than if one coparcener takes the whole profits. 2 Inſt. 365.

13. 13 *E.* 1. *cap.* 5. *ſ.* 5. enacts, That *when an* advowſon deſcends unto parceners, *though* one preſents twice, *and uſurps upon his co-heir, yet he that was negligent, ſhall not be clearly barred, but another time ſhall have his turn to preſent when it falls.*

This law doth *extend to uſurpation by one coparcener upon another* as well *before partition* as after. 2 Inſt. 365.

14. A man ſeiſed of a *manor with advowſon appendant* had *iſſue four daughters*, and died, and *they made partition of the manor, and that each ſhould preſent by turn in degrees, as their age was*, by which the *eldeſt commenced*, &c. *and her clerk was in*, and after *the eldeſt died, her heir within age, and found by office for the king*, and he ſeiſed the ward, and after the church voided again, and the *king preſented in turn of the ſecond daughter:* and per Cateſby, the king preſented in right of the ſecond daughter, and therefore his preſentment in the turn of the ſecond daughter does not put her to writ of right of advowſon; but to this Brian and Choke were ſtrongly contra, and that it was uſurpation; for there is *no privity* of the partition in the king, and *this preſentation is in jure regis proprio, as lord*, and never ſhall make title to the heir in quare impedit. Br. Quare Impedit, pl. 139. cites 22 E. 4. 8.

15. Where there is a *corporation of maſter and confrerers*, and the *maſter preſents in his own name*, this will not put the ſucceſſor out of poſſeſſion; for he cannot do a tort to himſelf; per Fitzjames Ch. Juſtice; and all the Juſtices in B. R. were with the firſt judgment. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

16. If 2 *jointenants preſent one of themſelves*, this does not gain poſſeſſion; for *it is not a preſentation, but a prayer to be admitted.* Per Fitzjames. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

17. Where a *biſhop ſuffers* an uſurpation of a church in right of his biſhopric, it ſhall not bind his ſucceſſor, but himſelf only during his time; and it was reſolved by all, that uſurpations *ſhall bind the biſhops* who ſuffer them, *but not their ſucceſſors;* becauſe it is within the ſtatute 1 Eliz. which reſtrains alienations and grants by biſhops, &c. And judgment accordingly. Cro. J. 673. Mich. 21 Jac. B. R. Dalton v. Biſhop of Ely.

But if a biſhop be *purchaſer* of an advowſon, and ſuffers an uſurpation, that ſhall not bind his ſucceſſor. Per Hobart Ch. J. Ibid.

18. When one uſurps upon a *leſſee for years*, this gains the fee, and puts the true patron out of poſſeſſion; and though by the ſtatute of W. 2. cap. 5. he in *reverſion after the leaſe may have* a *quare impedit*, when the church is void, *or* may *preſent*, and *if he does preſent, and his clerk is* admitted and *inducted*, then *he is remitted*, yet till it be recovered, or his clerk be in, the uſurper hath the fee, and the writ of right lies againſt him, and that deſcends to his heirs. Hutton. 66. Rudd v. Biſhop of Lincoln. Br. Error, pl. 83. cites S. C.

(L. c) Uſurpation. Upon whom. In what Caſes Uſurpation * *upon one ſhall be upon others*, at the Common Law.

[407] *See (H. c).

[1. IF *leſſee for years*, or *guardian*, *brings quare impedit*, though the *defendant has writ to the biſhop* againſt the termor or guardian, and his preſentee accepted, yet the *tenant of the frank-tenement* is not put out of poſſeſſion thereby. 50 E. 4. 14. b. Curia.]

S. P. Watſ. Comp. Inc. 8vo. 214. cap. 13. cites Keilw. 1. 2 Inſt. 365. 2 H. 7. 4, 5. 22 E 4. 9.

[2. If 3 *coparceners make partition to preſent by turn*, and the *eldeſt uſurps in the turn of the middleməſt*, this ſhall not be any uſurpation upon the turn of the youngeſt. * 30 E. 3. 5.]

——* This ſeems miſprinted for 30 E. 3. (15.) and is the caſe of Sir Richard Talbot v. the Biſhop of Hereford.

The Court inclined that it would *put all out of poſſeſſion*, and would not permit a ſpecial verdict upon the motion of Serjeant Maynard, but a caſe was made of it for the conſideration of the judges. 2 Vent. 39. Paſch. 35 Car. 2. C. B. Anon.——Watſ. Comp. Inc. 8vo. 214. cap. 13. cites ſame caſes. And Dr. Watſon ſays the caſe of Vent. ſeems to be upon this reaſon, that partition made of an advowſon does not ſever the right and inheritance thereof, but is only of the poſſeſſion, and cites 2 Co. 87. CORBET's caſe; therefore the inheritance remaining entire, an uſurpation a ſeverance in the turn of one coparcener, gains the whole inheritance by wrong until avoided, and conſequently muſt put all the coparceners out of poſſeſſion.

[3. [*So*] if 3 coparceners are, and the *eldeſt preſents in her turn without partition, and* after a *ſtranger uſurps in the turn of the ſecond*, yet this is not any uſurpation as to the 3d or 1ſt coparcener, but only to the 2d. 12 H. 7. Kell. 1. per Curiam.]

See (M. c) pl. 8.

[4. *So* had it been, though *partition* had been made *to preſent by turn*. 12 H. 7. Kell. 1.]

5. If *tenant for life*, the *remainder over in fee, ſuffers uſurpation*, and the tenant for life dies, he in remainder has no remedy for this uſurpation. Br. Quare Impedit, pl. 162. cites 16 E. 3.

And though upon a diſagreement between them, the eldeſt may preſent, yet it is but a privilege which the eldeſt daughter may waive. Trin. 20 Car. 1. C. B. Rot. 1849. Hoy v. Blevy.

6. An advowſon deſcended to 3 *coparceners infants, and before preſentment by any of them, a ſtranger uſurps*, it ſeemed to the court that uſurpation ſhould be *upon all*; for one right deſcended to them, and they may join in the preſentment. 21 E. 3. 31.

(M. c) Uſurpations. *Defeating* of Uſurpations.

† Br. Quare Impedit, pl. 45. cites S. C.—— ‡ Br. Preſentation, pl. 31. cites S. C.——*For* the advowſon never was diſappendant; and by the re-entry of the diſſeiſee all meſne eſtates are defeated, and the diſſeiſee remitted. Per Fulth, which was neither denied by the Juſtices, nor affirmed. Br. Preſentation, pl. 32. cites 14 H. 6. 24.——It was ſaid for law, that by his regreſs he has recontinued the manor, and the advowſon was always appendant, and ſo remained after the regreſs; but *contra of advowſon in greſs*. Br. Quare Impedit, pl. 107. cites 14 H. 6. 15.

[1. IF the *diſſeiſor of a manor to which* an advowſon is appendant, *preſents* to the advowſon, and his clerk is *inducted, and* after *diſſeiſee re-enters*, at the next avoidance he may preſent; for this defeats the meſne poſſeſſion and uſurpation. † 3 H. 4. 8. ‡ 14 H. 6. 16.]

Preſentation is in nature of a *re-entry* * and uſurpation by one that hath a *former right*, but which was uſurped upon, ſhall work a *remitter*. Cart. 44. Cornwallis v. Hood.

[2. *But if he re-enters within the 6 months*, his preſentee ſhall be received, and the other ouſted. (It ſeems it is intended upon recovery in quare impedit.) 14 H. 6. 24. Quære.]

* [408]

Fol. 374.

[3. But *otherwiſe* it is [of] *advowſon in groſs*. ‖ 3 H. 4. 8. 14 H. 6. 16.]

‖ Br. Quare Impedit, pl. 45. cites S. C.

[4. If a *feme ſuffers an uſurpation* upon her advowſon, *and after ſhe takes baron, who preſents* to the next avoidance *in right of the feme*, (and clerk *inducted*,) this veſts the poſſeſſion in the feme. 14 H. 6. 24. Quære.] F. N. B. 34. (S) in the notes there in marg.

[5. If the *patron* of an advowſon *creates a vicarage* out of it lawfully, and after a *ſtranger uſurps* upon him *in the parſonage, and after that in the vicarage*, and then the *patron recovers the advowſon in writ of right*, yet this ſhall not defeat the uſurpation in the vicarage, becauſe the vicarage is not appendant to the advowſon, as it is implied by the caſe; for this is put to prove it. 17 E. 3. 51. b. Curia. (It is to be admitted here, that the patron of the parſonage is patron of the vicarage.)] Watſ. Comp. Inc. 8vo. 240. cap. 13.

[6. If an advowſon *deſcends upon* 2 *coparceners*, and after an *uſurpation is made upon the one who dies without iſſue*, by which her right deſcends to the other coparceners, this ſhall defeat the uſurpation; becauſe ſhe cannot have action of parcel of the advowſon being ſeiſed of the remnant. 17 E. 3. 22.] Watſ. Comp. Inc. 8vo. 239, 240. cap. 13. cites S. C. but adds quære.

[7. If 3 *coparceners* are of an advowſon, and the *eldeſt preſents in her turn without partition*, and after a *ſtranger uſurps upon the turn of the* 2*d*, and afterwards the 3*d preſents in her turn*, this remits the 2d again, ſo that ſhe ſhall preſent again when it comes to her turn; for their right is joint, and ſo the uſurpation being avoided by one, it is ſo for all. 12 H. 7. Kell. 1. Per Curiam.] See (L. c) pl. 3. —— Watſ. Comp. Inc. 8vo. 239. cap. 13. cites S. C.

[8. The *law* would be *the ſame though there was a partition*, becauſe the partition doth not ſever the inheritance; for they ſhall join in writ of right, and the partition is only as to the poſſeſſion. Contra 12 H. 7. Kell. 1.] If an advowſon deſcends to 4 coparceners, and they make partition to preſent by turns, and the 3d preſents when the 2d ought, for that time the preſentment is gone, but when it comes to his turn again he ſhall preſent. 4 Le. 2. 22. pl. 356. cites 22 E. 4. Per Brian.

9. *A manor with advowſon appendant deſcends to an infant*, who *ſuffers uſurpation*, and after *makes feoffment of the manor cum pertinentiis*; the feoffee has no remedy for the uſurpation. Br. Quare Impedit, pl. 162. cites 16 E. 3.

10. If a recovery in quare impedit be within ſix months againſt the incumbent, he is removed by the judgment; ſo that if the *recoverer ſuffers the incumbent by agreement to continue incumbent during his life*, yet his patronage is reveſted by the judgment. Per Coke, Doderidge, and Haughton. Roll. R. 213. Trin. 13 Jac. B. R. Harris v. Auſtin. Judgment in quare impedit brought *after the* 6 *months*, ſhall reveſt the right in the patron.

Per Coke Ch. J. but he ſays he will not call it a remitter. Roll. R. 214. in caſe of Harris v. Auſtin.

11. Pemberton took this *difference, where the king has a good title*, no recovery againſt his clerk ſhall affect the king's title; for he ſhall not be prejudiced by a recovery, to which he is no party. If the king have a *defeaſible title, as by* uſurpation, there if the rightful patron recover againſt the king's incumbent, the king's title ſhall be bound, though he be not a party; for his title having no other foundation than a preſentation, when that is once avoided

the king's title falls together with it. But though the king's title be only by uſurpation, yet a recovery againſt his clerk by a ſtranger, that has nothing to do with it, ſhall not prejudice the king; covin may be betwixt them, and the king be tried. And North Ch. J. [409] ſaid, he was clearly of opinion, that the king's title by uſurpation ſhould be *avoided* by a recovery againſt his clerk, though the recoveror were a mere *ſtranger*. Mod. 255, 256. Trin. 29 Car. 2. C. B. the King v. Thornborough and Studley.

* (M. c. 2) [Defeated by] *Remitter.*

See 7 Ann. 18. at (C.c. 2) —— See (M. c.) pl. 1, 2. 7, 8.

[1.] [9. IF a † man *uſurp, upon me, and at the next avoidance I uſurp upon him*, I am remitted to my ancient right, and the uſurpation upon me defeated. 17 E. 3. 37. b.]

* There is no letter to this in Roll, and the pleas go on 9, 10, &c. but to prevent confuſion I have added a letter, and altered the number of the pleas, yet ſo as the old numbers appear at the ſame time.

† So if the king uſurps upon me, and I uſurp upon him again, and preſent, and my clerk is in by 6 months, I am now remitted; and ſo it was adjudged in Dyer's time, upon Fitzherbert's caſe; becauſe his clerk was legally in by 6 months, and ſo a remitter, which ſhall bind the king. Per Coke Ch. J. 3 Bulſt. 38. Trin. 13 Jac. in the caſe of Harris v. Auſtin.

‡ Watſ. Comp. Inc. 8vo. 213. cap. 13. cites S. C.—But the doctor ſuppoſes the preſentment of the eldeſt to be contrary to the aſſignment.

[2.] [10. If an *advowſon* be *aſſigned to* 2 daughters *coparceners in Chancery*, and the *eldeſt after preſents to the* ‡ *next avoidance*, this ſhall be in her ancient right, and not by uſurpation, becauſe the firſt preſentment of right belongs to her; and this *ſhall avoid the aſſignment in Chancery*. 17 E. 3. 30. 38. Adjudged.]

[3.] [11. If a man *uſurps* upon me, *and his clerk is in by 6 months, and after I bring a quare impedit againſt patron and incumbent*, and they *do not plead plenarty by 6 months*, but I recover upon *non ſum informatus* pleaded, I am by this remitted. M. 12 Ja. between AUSTIN and HARRIS. Per Curiam. Trin. 13 Ja. B. R. Same caſe.]

If *A. purchaſes* an advowſon, *and before any preſentation* had by him, *another uſurps* upon A. and preſents, and A. brings a quare impedit after the 6 months, and a plea of *non ſum informatus* is entered for the incumbent, the advowſon is hereby revеſted; for here was but a remedileſs right, and if you will not take advantage of it, A. ſhall hereby have his right again. A. had a right, and having a judgment to recover that to which he had a right, his right ſhall thereby be recovered. Per Coke Ch. J. 3 Bulſt. 46. Trin. 13 Jac. B. R. in the caſe of Harris v. Auſtin.

[4.] [12. *So* the *law* would be though I was a *purchaſer* of the advowſon, and never preſented before the uſurpation. M. 12 Ja. B. Dubitatur. My [Reports.] Tr. 13 Ja. B. R. Same caſe.]

The king's title being by uſurpation, the patron by this recovery is remitted to his ancient right, and judgment accordingly. Brownl. 165. Paſch. 12 Jac. S. C. by name of Auſtin v. the Biſhop of London & al.——3 Bulſt. 36. S. C. by name of Harris v. Auſten.——Roll. R. 210. S. C.

[5.] [13. If I [am] ſeiſed of an advowſon, and after the church voids the *king preſents by uſurpation*, and 6 *months paſs*, and after I *bring a quare impedit againſt the incumbent* of the king, *who does not take advantage of the plenarty*, but upon *non ſum informatus* pleaded I recover, I ſhall thereby be remitted. M. 12 Ja. B. between AUSTIN and HARRIS. Tr. 13 Ja. B. R. Same caſe.]

[6.] [14.

[6.] [14. *But* otherwiſe it would be, if I am a *purchaſer* of the advowſon, and the king uſurps before any preſentment by me, and 6 months paſs before the quare impedit brought againſt the incumbent, and after I recover in a quare impedit brought after the 6 months paſſed againſt the incumbent upon non ſum informatus pleaded, without taking advantage of the plenarty, I ſhall not be remitted; becauſe by the uſurpation and 6 months paſſed, I have but a remedileſs right, without any action to recover it, and the king is not party to the action. M. 12 Ja. B. between AUSTIN and HARRIS. Tr. 13 B. R. Same caſe.] Fol. 375. 3 Bulſt. 36. S. C. by name of Harris v. Auſtin.— Roll. R. 210. S. C.

[7.] [15. If *A. ſeiſed* in fee *of 6 acres to which* an advowſon is appendant, dies ſeiſed, and this *deſcends to B.* and *after A is attainted of treaſon by act of parliament*, by which the *king ſeiſes the 6 acres*, and he ſo ſeiſed, the church voids, and *J. S. uſurps upon the king*; and after the *act of parliament is repealed, and B. reſtored*, by which he enters into the 6 acres, and after the church voids; the ſaid uſurpation continues not defeated by the repeal of the act of parliament, in that B. nor his feoffee of the 6 acres cannot maintain a quare impedit againſt J. S. who uſurped before, if he diſturbs them. D. 28 H. 8. 24. 153. Adjudged, as it ſeems, upon this reaſon.] [410]

[8.] [16. If *A. uſurps upon B. a purchaſer* of an advowſon in fee, and the clerk of A. is *in by* 6 *months*, and *after the church voids, and B. preſents C. and he* thereupon is inſtituted and *inducted; but A. brings quare impedit againſt B. and C.* This is no remitter to B. the writ being brought within the 6 months; for during this time that the clerk is to be removed by the writ, this is not any remitter. H. 14 Car. B. R. between HARPER and WIERSDALE. Adjudged per Curiam, in writ of error upon a judgment in a quare impedit in Bank Intratur.]

9. If *tenant in tail* be diſturbed, and where he ought to have a quare impedit he *brings a writ de droit* d'advowſon, *and* in this *recovers*, he ſhall be in by force of the tail, and not in fee-ſimple, notwithſtanding the gift of the action be ſo; for where a judgment and my right do meet together, I ſhall be in my right. Per Coke Ch. J. 3 Bulſt. 46, 47. in the caſe of Harris v. Auſtin. cites 4 E. 3 f. 19. by Wilby. Roll. R. 214. S. C. cited per Coke Ch. J. in S. C.— If tenant in tail of a manor, unto which an advowſon is appendant, diſcontinue the manor in fee with the advowſon, and after the diſcontinuor granteth the advowſon unto another in fee, and afterwards doth re-infeoff the tenant in tail of the manor, who dieth ſeiſed of the manor; his heir ſhall preſent unto the advowſon when it ſhall happen void; and if he be diſturbed, he ſhall have a quare impedit, becauſe he is remitted unto the manor, and hath not remedy to come at the advowſon. F. N. B. 35. (B) cites 29 H. 6. Quare Impedit, 79.

10. Where the *king recited*, that *whereas he had recovered an advowſon by default* in a quare impedit *againſt a ſtranger*, *which* advowſon *was lawfully appropriated to the abbot long time before this recovery*, and after the king, by his letters patents reciting the recovery, *grants* the advowſon *to the abbot and his ſucceſſors*, it was adjudged that the abbot ſhould not be in by the king, but by his ancient right in his remitter according to their appropriation, and not by the laſt grant; becauſe the letters patents recited, that S. C. cited by Coke Ch. J. as mentioned by Huſſey; but Coke ſays, he has the book, but cannot find the caſe there. 3 Bu

46. in the caſe of Harris and Auſtin, they had other right before the recovery. Per Huſſey Ch. J. 21 E. 4. 49. a. cites it as adjudged 32 E. 3.

Roll. R. 214. S. C. cited per Coke Ch. J. in S. C.

11. If the *king uſurps* upon J. S. and afterwards by his letters patents *grant this unto him again*, this judicial patent, *reciting his ancient right*, ſhall reveſt this in him, and he ſhall be in again in his ancient right. As where he uſurped by preſentation to the advowſon of a houſe of religion, and afterwards, reciting the ancient right of the abbot, grants this advowſon again to him and to his ſucceſſors for ever; the abbot, by this grant, is in again in his ancient right. Per Coke Ch. J. 3 Bulſt. 46. in the caſe of Harris v. Auſtin, cites it as adjudged 2 H. 7. f. 17.

Br. Preſentation, pl. 57. cites S. C. But Brooke makes a quære.

12. If *huſband and wife preſent* to an advowſon *in the right of the wife*, which is *appendant* unto a manor of the wife's, and afterwards the *huſband aliens one acre, parcel* of the manor, with the advowſon in fee to a ſtranger, *and dies*, and the *ſtranger preſents and aliens the acre* to another in fee, *ſaving the advowſon* to himſelf, and then the church voids, the wife ſhall preſent; and if

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ſhe be diſturbed, ſhe ſhall have an aſſiſe of darrein preſentment, becauſe the advowſon was ſevered from the acre; but if the advowſon were appendant to the acre, then the wife ought to recover the acre before ſhe preſent to the advowſon. F. N. B. 32. (K)

* For in that caſe the leaſe amounts to a reſtitution; but if the king ſeiſes a priory alien, and leaſes the priory to farm during the war, without mentioning the advowſon, the king ſhall have it. F. N. B. 34. (P) in the notes there, (f) cites 29 E. 3. 18. (or 98.)

13. If a man traverſe an *office found of a manor*, unto which an *advowſon is appendant*, and *upon* the *traverſe* * the *king leaſes the manor* unto him who tendered the traverſe, without mentioning the advowſon, and afterwards the church voids, he who tendered the traverſe ſhall have the preſentment, if the traverſe be found for him. F. N. B. 34. (P)

S. C. cited Le. 331. Trin. 30 El. B. R. in the caſe of Wade v. Preſthall.

14. Where an *infant has* an *advowſon by deſcent*, and the church voids, and *he, who hath title paramount, uſurps* and preſents unto the ſame church, and the 6 months do paſs; *he is remitted* by this uſurpation, and the infant out of poſſeſſion, and without remedy by that uſurpation. F. N. B. 35. (M)

15. *Two ſeveral purchaſers* are *of the reverſion in fee* of an advowſon *after a grant of the next avoidance*. An avoidance happens, and *by confederacy one of the purchaſers preſents in the turn of the grantee of the next avoidance*; but upon a bill by the other purchaſer, it was decreed, that no benefit ſhould be had by this uſurpation, ſo as to defeat the plaintiff's title, nor ſhould it be given in evidence againſt him at a trial at law, which was then ordered. N. Ch. R. 4. Paſch. 3 Car. Markhall v. Hide.

(N. c) * *Quare Impedit. Of what* Thing *it lies.*

* A quare impedit *is in the nature of a treſpaſs*, and is all one with a *darrein preſentment.*

[1. A Quare impedit lies of a *donative*, and the writ ſhall be *quod permittat ipſum preſentare ad eccleſiam*, &c. and declare the ſpecial matter in his declaration. Co. Litt. 344.]

The writ of right of advowſon complains of the deforcement of the whole advowſon; the quare impedit and *darrein preſentment* complain only of a chattel, viz. of the preſent avoidance. Jenk. 13. pl. 23.—— On a writ of error upon a judgment in a quare impedit brought out of Ireland, exception was taken amongſt others, that the writ of error was quia cum, &c. per breve noſtrum de quare impedit; whereas the words of the writ are, *quod permittat ipſum præſentare, &c.* and there *is no ſuch writ as quare impedit*; but it was anſwered, that Bracton, 246, 247. diſtinguiſhes between the writs of quod permittat and quare impedit; that quod permittat was either an old antiquated writ, or taken away by ſome old ſtatute now loſt, and cited the ſtatute 13 E. 1. cap. 5. and Maynard's E. 2. fol. 300. Mich. 10 E. 2. to prove that there never was ſuch a writ as quod permittat; that in all judicial records it is called a quare impedit, and ſo in writs of inquiry, and ſo in writs to the biſhop for admitting clerks, and cited ſeveral other books. And per Cur. as to the calling the writ quare impedit inſtead of quod permittat, the fact is, that there was formerly a writ of quare impedit, now out of uſe; and the writ quod permittat is now erroneouſly called by the name of quare impedit; this error has prevailed in judicial writs and acts of parliament, but never yet in writs of error; however, it being become now a legal name, the writ of error ought not to be diſallowed for uſing of it. 10 Mod. 308, &c. Paſch. 1 Geo. B. R. the King v. the Biſhop of Meath.

2. 13 *E.* 1. *cap.* 5. ſect. 4. enacts, That † *from henceforth* ‡ *writs ſhall be granted for* ‖ chapels, prebends, § vicarages, hoſpitals, abbies, priories, *and other houſes which be of the advowſons of other men that have not been uſed to be granted before.*

† It appeareth here, and by 6 E. 3. that before this act writs did

not lie de capellis prebendis, &c. and yet it is adjudged in 14 H. 3. which was long before this ſtatute, that a quare impedit did lie of a chapel; and it was reſolved in parliament, Hill. 19 H. 3. quod nulla aſſiſa ultimæ præſentationis capiatur de eccleſiis prebendatus, nec de prebendis; but now this act hath made it clear, and the writ ſhall be ad capellam. & 2 Inſt. 363, 364.

‡ That is, writs of advowſon, quare impedit, and aſſiſe of darrein preſentment, which in this act had been named before. 2 Inſt. 364.

‖ A quare impedit lay of a chapel at common law. F. N. B. 33. (C) in the notes there (e) cites 24 H. 3. Quare Impedit, 183.——And ſo it did of a prebend. F. N. B. 33. (c) in the notes there (e) cites 13 R. 2. Brief, 643.

¶ As to the word (chapel) when the queſtion was, whether it were eccleſia, aut capella pertinens ad matricem eccleſiam, the iſſue was, whether it had *baptiſterium & ſepulturam*; for if it had the adminiſtration of ſacraments and ſepulture, it was in law adjudged a church. Trin. 20 E. 1. in Banco. Rot. 177. in quare impedit, Ric' de SMITH's caſe. Mich. 21 E. 1. in Banco. Rot. 1. Hertf. PRIOR DE ELIE's caſe. Hill. 8 E. 1. in Banco, ROGER DE BIGOD, AND COUNT DE NOIFFE's caſe. Hill. 8 E. 2. coram rege Cornub. pro capella Sancti Berione. A capella venit capellania; Rot. Cart. 26. Nov. An. 28 H. 3. in Cart' Fact' Will. Oxon. epiſcopo & capellan' ut patet. Mich. 32 E. 1. Coram rege Gloc', capellania Sancti Oſwaldi prioratus, Sancti Oſwaldi de Gloc' quæ eſt de libera capellania noſtra. 2 Inſt. 363.

If a *patron of a chapel preſent* unto it *by the name of a church*, and the clerk be inſtituted and inducted thereunto, &c. it hath loſt the name of a chapel. 2 Inſt. 364.

§ Quare impedit was brought *by a prebendary* of an avoidance *of a vicarage*, which was *appendant to his prebend*, quod nota. Br. Quare Impedit, pl. 95. cites 24 E. 3. 26.—— Br. Preſentation, pl. 26. cites 24 E. 3. 26.—— S. P. Br. Quare Impedit, pl. 156. cites F. N. B. fol. 32, 33.

¶ [412]

3. Quare impedit lies of an *archdeaconry*. Br. Quare Impedit, pl. 100. cites 24 E. 3. 42.

It was objected, that quare impedit does not lie of an archdeaconryſhip; for it is not local, nor any indenture made thereof, but it is only a matter of function, but it was not allowed; for an archdeacon hath locum in choro; and by the ſtatute a quare impedit lies of a chapel, and by equity thereof, of a prebend. Le. 205. Trin. 31 Eliz. C. B. Smallwood v. the Biſhop of Lichfield.——Ow. 99. S. C. by name of Sale v. Biſhop of Lichfield.——The king ſhall have a quare impedit of the *ſub-deaconry of York*, which is voided when the temporalties of the archbiſhopric were in the king's hands. F. N. B. 34. (G)

4. A

4. A quare impedit lies of a * *chantery* of Saint T. in O. Br. Quare Impedit, pl. 5. cites 9 H. 6. 16.

* S. P. where there was a compoſition, that if the patron did not preſent within one month, that then the ordinary ſhould preſent. Br. Quare Impedit, pl. 131. cites 13 E. 4. 3. —So of a chantery, which is donative by letters patents. F. N. B. 33. (C) —A quare impedit of a chantery ought to ſhew in what church or chapel the ſame is. F. N. B. 33. (C) in the notes there (e) cites 12 H. 4. 19. See Lib. Entr. 499.

5. A man may have writ of right of advowſon de advocatione *medietatis eccleſiæ*, but not quare impedit; for this is quod ipſum preſentare ad eccleſiam, ſo that this is all for the preſentation only. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.

S. P. F. N. B. 33. (A) —None ſhall have quare impedit preſentare ad medietatem eccleſiæ, but when there are 2 *ſeveral patrons, and* 2 ſeveral *incumbents* of the church within one and the ſame vill, ſo that the one patron has a diſtinct and ſeparate advowſon of one half of the church, and his incumbent has a diſtinct and ſeparate half of the tithes, and other eccleſiaſtical profits within the ſame vill; ſo of the other patrons, mutatis mutandis, and in this caſe the advowſon and the church are ſevered in right and in poſſeſſion; but when there is only one incumbent, though the advowſon is divided and ſevered in ſeveral hands, yet there never ſhall be a quare impedit preſentare ad medietatem ſeu *tertiam partem eccleſiæ*, &c. and the reaſon of this diverſity is manifeſt; for every quare impedit is in the poſſeſſion, and reſpects the church which belongs to the incumbent. Reſolved. 10 Rep. 135. b. Trin. 10 Jac. C. B. Smith's caſe.

F. N. B. 39. (G) ſays, it ſeems (within the writ [there] above-mentioned, that) a man ſhall have a quare impedit quod permittat ipſum præſentare ad tertiam partem eccleſiæ; and that it ſeemeth to ſtand with reaſon; for a conſolidation may be made of 3 advowſons, and every patron to preſent by turn, and then every one hath a right to a third part.

6. Quare impedit lies of *a priory*, or of an *abbey*, F. N. B. 33. (F)

7. A man ſhall have a quare impedit of an *hermitage*; and a writ to put him into corporal poſſeſſion. F. N. B. 34. (E)

Quære where this caſe is; for I do not obſerve, that it is warranted by either of the books cited, nothing being there ſaid of a church in ancient demeſne.

8. It will lie for a diſturbance to preſent to a *church in Wales*; it will lie alſo for a diſturbance to preſent to a *church in ancient demeſne*, though it concerns the very poſſeſſions in ancient demeſne; for the common law, being as ancient as thoſe privileges which men have in their lands held in ancient demeſne, will not ſuffer that there ſhould be a failure of juſtice, under pretence of any manner of privilege whatever. 3 Nelſ. a. 35. pl. 3. cites Hob. 48. Cox v. Barnſby. 5 Rep. Alden's caſe. S. P.

[413] (O. c) *Who ſhall have* Quare Impedit.

See Br. Quare Impedit, pl. 160. S. P. admitted.

[1. THE *grantee of a next avoidance* ſhall have a quare impedit againſt the patron who granted it. 39 H. 6. Quare Impedit, 95. Per Curiam, and ſaid to be oftentimes adjudged.]

And Br. N. C. 4 E. 6. pl. 410. by name of Ogle v. Harriſon. —A *grants* that whenſoever the church becomes void, *that B.* and his heirs ſhall *nominate* a clerk to the grantor and his heirs, *and that he and his heirs will preſent him over* to the ordinary, and the beſt opinion was, that every of them ſhall have quare impedit, if B. preſents to the ordinary, A. ſhall have quare impedit, & e contra; and though the one has a writ to the biſhop, this ſhall not ouſt the other of the poſſeſſion. Mo. 49. pl. 147. Paſch. 5 Eliz. Anon.

If the *next avoidance be granted to* 2, and one, before the church avoids, *releaſes* to the other, the releſſee may have quare impedit in his name alone. Adjudged and affirmed in error. Mo. 467. pl. 664. Trin. 39 Eliz. Lewis v. Bennet.

[2. *Be-*

[2. *Before* the ſtatute of 27 *H.* 8. of uſes, if *ceſty que uſe of a manor to which* an advowſon was appendant, preſents to the church when it becomes void, and this *by ſufferance of the feoffee*, yet if he be diſturbed, he cannot maintain a quare impedit; for he has not any eſtate at will. 17 H. 7. Kell. 42. b.]

Quare impedit by the *king*, and *made title, becauſe* J. N. who was *patron was outlawed*, and the church voided, and the king preſented, &c. The *defendant ſaid that before the outlawry, the patron infeoffed* 3 *to his uſe in fee*, and the church voided after the outlawry, and he preſented at the will of the feoffees, and therefore writ awarded to the biſhop for the king; and ſo it ſeems, that upon voidance ceſty que uſe has a chattel, and therefore it ſhall be forfeited by outlawry, quære if he had preſented nomine feoffati. Br. Preſentation, pl. 16. cites 3 H. 5. 3.

3. Quare impedit lies for the *biſhop*, who is diſturbed, to have preſentment to the prebend; ſo for the *king, the temporalties being in his hands*. Br. Quare Impedit, pl. 94. cites 24 E. 3. 26.

Br. Preſentation, pl. 25. cites S. C. And adds, that in ſome places the dean ſhall preſent to ſome prebends.

4. Quare impedit by the king of the *vicarage* of B. and found againſt him, and the defendant prayed writ to the biſhop; and Thorp J. took time to adviſe; for he *doubted whether a layman could be patron of a vicarage*, but a parſon or parſon imparſonee. Br. Quare Impedit, pl. 105. 39 E. 3. 33.

5. *Diſſeiſee of a manor*, to which an advowſon is appendant and voids, may have this writ. F. N. B. 33 (Q)

6. *The iſſue in tail* ſhall not have formedon of an advowſon in groſs, aliened by his anceſtor, but quare impedit at the next avoidance in his turn. Br. Quare Impedit, pl. 60. cites 14 H. 4. 33.

7. Where *a prior was parſon imparſonee*, and *J. N. preſented his clerk to the ſame church*, who was admitted, *inſtituted, and inducted*, by this the prior is not out of poſſeſſion; for *he cannot have writ of right, nor quare impedit;* for he is in poſſeſſion, and ſo he *ſhall have no action, but treſpaſs, or ſpoliation in the ſpiritual court*, becauſe the church is adjudged always full of him. Per Priſot. Br. Preſentation, pl. 36. cites 39 H. 6. 20.

But as to a ſtranger who has juſt title to preſent, it ſhall be adjudged void; for *parſon imparſonee cannot plead plenarty*, but it is always full as to him who no right has, and the admiſſion, inſtitution, and induction ſuppoſed is not to the purpoſe, if he who preſents has not title; but the prior continues parſon, and the opinion of the court was, that the church is always full of the prior, and that the other who was admitted, inſtituted, and inducted, was not parſon. Ibid. —— Br. Quare Impedit, pl. 114. cites S. C. —— Ibid. pl. 111. cites 36 H. 6. 11. S. C.

8. 7 *H.* 8. 4. enacts, That *recoverors of manors, &c. and advowſons, their heirs and aſſigns, ſhall have quare impedit for an advowſon, if upon avoidance any diſturbance be made by a ſtranger, as the recoverees might have had, albeit they were never ſeiſed thereof by preſentation.*

9. If the *patron ſells the fee* of the advowſon *after the avoidance*, [414] neither he nor his *vendee* can have a quare impedit, becauſe the avoidance makes it a choſe en action; ſo that it does not paſs to the grantee, and the grantor has deſtroyed his action by his conveyance, and ſo none can have it. Cro. E. 811. Hill. 43 Eliz. C. B. Leak v. Biſhop of Coventry and Babington.

10. Quare

And. 244. pl. 257. S.C. by name of Sale v. the Biſhop of

10. Quare impedit lies *for executors*. 4 Le. 15. pl. 53. Mich. 32 & 33 Eliz. Smallwood v. the Biſhop of Coventry and Litchfield.

Coventry and Marſh.—Cro. E. 207. S. C.——4 Le. 205. S. C.——Ow. 99. S. C. by name of Sale v. the Biſhop of Litchfield.

It was ſaid that if huſband has an advowſon in right of the wife, and the church becomes void, and the huſband dies, the executors ſhall have the preſentation; and that there are many books in that point; and Anderſon ſaid he knew that well, but that he doubted of the law in that caſe. Goldſb. 37. pl. 10. in Specot's caſe.——See (P. c) pl. 1.

11. *A. preſents B.* and before inſtitution *revokes* that, *and preſents C.* Quare impedit lies for C. Agreed by all. Latch. 248. Hill. 22 Jac. in caſe of Evans v. Aſcough.

12. *He that has* the *nomination* is only patron, and ſhall have a quare impedit or a writ of right, as his caſe requires. Dod. of Adv. 66. Lect. 12.

(O. c. 2) One or ſeveral, and where *two* ſhall *join*.

But now the common opinion is, that the king ſhall have the whole preſentment alone, and alone ſhall have the action; but methinks that it ſtands with reaſon, that the king and the other join; as in a popular action the party ſhall ſue for the king and for himſelf; and the words of the writ are, qui tam pro domino rege, quam pro ſeipſo ſequitur, &c. and that in an action of debt, &c. and by the ſame reaſon the king may ſue for himſelf and for the party. And the common experience is, that a man ſhall hold lands in common with the king, and alſo chattels; and by the ſame reaſon they may have the preſentment or advowſon in common. F. N. B. 32. (G.)

1. BY the regiſter the *king* ſhall *join with another* perſon in a quare impedit. F. N. B. 32. (G.)

2. If a man has an advowſon, and the *church voids, and two ſtrangers* do *ſeverally preſent their clerks* to the biſhop to that advowſon; the patron ſhall have *diverſe quare impedits* againſt them, if he will, and ſhall have ſeveral judgments, and ſhall recover ſeveral damages for their ſeveral preſentments and wrongs done. F. N. B. 35. (N.)

Note, They may waive the partition of the advowſon and the allotment thereon, and preſent by a new partition. F. N. B. 36. (D.) in the notes there (a) cites 21 E. 3. 31. 13 E. 3. Qua. Imp. 58. 33 E. 3. Qua. Imp. 196. by Skipw.

3. If *coparceners make compoſition* to preſent by turns, and *a ſtranger uſurps* and preſenteth *in the turn of one* of them, yet if they will, they may join in a quare impedit againſt the ſtranger, notwithſtanding the compoſition. F. N. B. 36. (D.)

(P. c) What Perſons *may* have it upon the Diſturbance.

Quare impedit was brought by *J. N.* and counted of *agreement to preſent by turn between* 3 *ſiſters* of the advowſon appendant, and that he married the one, and this is the turn of his feme, &c. and the defendant demanded judgment of the writ, becauſe it is in jure uxoris,

[1. IF the *baron* be diſturbed to preſent to an advowſon which he has in right of his wife, *and dies, the feme* ſhall have a quare impedit of this diſturbance. 3 E. 3. Quare Impedit, 57. 3 H. 5. Quare Impedit, 71. admitted.]

writ, who is in full life not named; and yet the writ awarded good, becauſe *nothing is to be recovered but the preſentment and not the advowſon*; and if writ to the biſhop be awarded againſt the baron, yet by this the feme is not out of poſſeſſion; for ſhe is not party to the judgment, and alſo ſhe is aided by the ſtatute of Weſtminſter 2. Br. Baron and Feme, pl. 28. cites 50 E. 3. 13.

If *baron* be ſeiſed *of an advowſon in jure uxoris, as in dower*, and the *church voids*, and the *feme dies before diſturbance*, and after the baron is diſturbed, he ſhall have this preſentation. Per Thirn. quod non negatur. Br. Preſentation, pl. 15. cites 54 H. 4. 12.

[2. *Guardian in ſocage of a manor, to which* an advowſon is appendant, if he be diſturbed, ſhall have a quare impedit *in his own name*, though he cannot make account thereof. Time of E. 1. fol. 132. adjudged.]

Fol. 376.

If there be guardian in ſocage of a manor, unto which an advowſon is appendant, and the church voids, the heir ſhall preſent, and not the guardian, becauſe he cannot account for the ſame. F. N. B. 33. (T)——It ſeems the preſentment ought to be in the name of the heir, and yet a guardian in a quare impedit againſt him may make title againſt the ſtranger in right of the heir, and alſo have a writ to the biſhop thereupon, but he cannot maintain quare impedit. F. N. B. 33. (T) in the notes there (a) cites 29 E. 3. 5. 14. 22. 27 E. 3. 89. a. 8 E. 2. Preſentment, 10.

3. One *coparcener*, upon agreement to preſent by turn, ſhall have quare impedit againſt the other who diſturbs him in his turn; quod nota. Br. Quare Impedit, pl. 139. cites 22 E. 4. 8.

So where jointenants make partition by deed to preſent by turn, and one of them, or the grantee of one, is diſturbed in his turn, he may bring quare impedit. See 1 Salk. 43. Mich. 11 W. 3. B. R. Biſhop of Saliſbury v. Phillips.——And 12 Mod. 321. S. C.

4. Three *jointenants* were ſeiſed *of certain land to which an advowſon was appendant*, and *the one preſented alone*, and his clerk admitted and in, and after *he who preſented him died*, and after *incumbent died*, and the other *two who ſurvived* preſented and were diſturbed, and *brought quare impedit*, and ſhewed this preſentment for their title, and admitted. Brooke ſays, and ſo ſee that the preſentation of the one jointenant does not put his companion out of poſſeſſion, and adds a *quære* if it had been an *advowſon in groſs*, and quære if they had been tenants in common. Br. Quare Impedit, pl. 3. cites 27 H. 8. 13.——But by P. 37 H. 8. Horwood the king's attorney was clear in opinion, that ſuch preſentment of the one puts the others out of poſſeſſion; and Bromley and Hales Serjeants contra.

But by 7 Annæ, cap. 18. f. uſurpation ſhall not diſplace the eſtate of the patron.

[P. c. 2] *Againſt whom.* By what Perſons.

[1.] [3. THE *chapter* may have it *againſt the dean of their ſeveral poſſeſſions*. 40 E. 3. 28. b.]

Watſ. Comp. Inc. 8vo. 441. cap. 22. cites S. C.

[2.] [4. A *prior* may have it *againſt the abbot*. 40 E. 3. 28. b.]

The *founder of a priory* ſhall have a quare impedit *againſt the ſubprior and* the *convent*, if they diſturb him, to preſent to an advowſon which belongeth to the houſe, if it voids during the vacation, where the founder ought to have the temporalties during the vacation. F. N. B. 34. (O) cites P. 9 E. 3.—The patron of an abbey preſentative brought a quare impedit againſt the ſuperior (ſubprior) and convent. F. N. B. 34. (O) in the notes there (e) cites 11 E. 3. Quare Impedit, 157. 18 E. 3. 15.—S. P. F. N. B. 38. (G) cites Trin. 31 E. 1.

3. Where

3. Where *guardian preſents in right of the heir, whether the heir has right or no right*, he who will have thereof quare impedit, ſhall have it againſt the guardian, and not againſt the heir. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37.

S. P. For there thoſe patrons cannot be impleaded.

4. Where the *king or the pope preſents*, quare impedit ſhall be *againſt the incumbent alone*. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37.

Br. Quare Impedit, pl. 149. cites 12 H. 8. 12.——Quare impedit by the *king againſt the incumbent alone*, who pleaded, which *was found againſt the king*, and it was pleaded in arreſt, becauſe the *patron was not named in the writ*; but * becauſe the writ was admitted, it was awarded that the plaintiff eat inde ſine die. Br. Quare Impedit, pl. 44. cites 3 H. 4. 25.

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5. The *maſter and confreers of D. preſented the maſter*, and the *maſter and confreers of E. brought quare impedit againſt the maſter by a ſtrange* name; and it lay well, and they recovered per judicium; for it was a void preſentment. Br. Quare Impedit, pl. 149. cites 12 H. 4. 12.

6. When a man *diſturbs and dies*, quare impedit lies againſt his *heir and the incumbent*, becauſe he ſhall make title and ſave his poſſeſſion: *but* by ſome, in quare impedit when the patron dies as above, and *the plaintiff proceeds againſt the incumbent*, this ſhall not bind the heir of the patron, becauſe he is not party; and there is no reaſon to give quare impedit againſt the heir, for he does not make any diſturbance; and alſo the plaintiff ſhall recover damages againſt him, which is not reaſonable where he does not make any diſturbance. Br. Quare Impedit, pl. 6. cites 9 H. 6. 30.

S. P. for by Forteſcue, plenarty by 6 months is no plea unleſs he ſays of his own preſentment, and parſon imparſonee is not in by the preſentment of any. Br. Quare Impedit, pl. 111. cites S. C.

7. Quare impedit lies well againſt *parſon imparſonee;* for the church is void, having regard to ſtrangers. Br. Plenarty, pl. 6. cites 38 H. 6. 20. Per Priſot and Forteſcue.

8. One *jointenant or tenant in common* ſhall not have a quare impedit for the advowſon which they have in common or in jointure, if one of them preſent ſolely againſt his companion. F. N. B. 34. (U.)

9. If A. wrongfully by uſurpation preſent B. and B. is received, and afterwards A. having gained the patronage *grants the patronage to R. S.* Walmſley J. thought the *quare impedit* ſhall be brought againſt R. S. which Anderſon Ch. J. doubted. 2 Le. 58. Mich. 32 Eliz. C. B. in caſe of Hall v. Biſhop of Bath.

See (N. c)

[P. c. 3] Of what Thing.

[1.] [5. IF there be a preſentment to the *appropriation* by a ſtranger, and the clerk inducted, yet the patron of the appropriation cannot have quare impedit, becauſe he cannot be put out of poſſeſſion. 44 E. 3. 33. b.]

[2.] [6. A quare impedit lies of a *free chapel* which a man has *by the patent of the king*, if the ſheriff will not put him in poſſeſſion. 14 H. 4. 11. b.]

[3.] [7. A quare impedit lies of an *hoſpital*. 18 E. 3. 1.] Watſ. Comp. Inc. 8vo. 430, cap. 22. cites S. C. and Regiſt. Orig. 31. a.

[4.] [8. If it be *brought againſt the incumbent and B. as patron, it is no plea for the incumbent that C. preſented him*, upon whoſe preſentment he was inducted; for he has named a diſturber, and complained of a diſturbance by him. 22 E. 4. 44. b. (R. quære this.)] Br. Quare Impedit, pl. 140. cites S. C. per Brian, that having named a diſturber and an incumbent the writ is good; for the plaintiff is not diſturbed by C. but by B. and there is no reaſon to have action againſt him who does no wrong to the plaintiff, and therefore was held good. And Brooke ſays, ſo ſee that the writ is *good againſt diſturber and incumbent, though the diſturber is not verus patronus.*

[5.] [9. A quare impedit lies of a *deanery by the king, though it be elective by others*. 17 E. 3. 40. adjudged.] Watſ. Comp. Inc. 8vo. 430. cap. 22. cites S. C.

(Q. c) Of what Things, and *for what Cauſes* it may be brought. And what will * be ſufficient Seiſin to maintain it. In what Caſes it is † neceſſary to have Seiſin.

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* See (R. c)

† See (S. c)

[1. IF a man *creates a church at this day*, and is diſturbed to preſent, he cannot maintain quare impedit, becauſe he cannot allege a preſentment. Dubitatur. 20 E. 4. 14. b. Contra 21 E. 4. 3.] Watſ. Comp. Inc. 8vo. 442. cap. 22. cites S. C.— A man ſhall not have quare impedit if he cannot allege a preſentment in himſelf or in his anceſtors, or in another perſon, from whom he claimed the advowſon, and that in his count, unleſs in ſpecial caſes; as if a man at this day ‡ *erect a church parochial* by a licence of the king or other chantry, which ſhall be preſentable, &c. If he be diſturbed to preſent to the ſame, he ſhall have a quare impedit, without alleging of preſentment in any perſon, and ſhall count upon the ſpecial matter. F. N. B. 33. (H.)——Watſ. Comp. Inc. 8vo. 442. cap. 22. cites S. C. and ſo, the doctor ſays, he ſuppoſes the law is now taken to be.——‡ S. P. if he be diſturbed to preſent at the firſt time, he ſhall have quare impedit without alleging preſentment. 2 And. 50. in pl. 37. in caſe of Sir Thomas Cecil v. Hall.

[2. If *advowſon* be *granted by parliament*, he ſhall have quare impedit præſentare *upon the matter*. 21 E. 4. 3. b. 16 H. 7. 8.] Br. Quare Impedit, pl. 138. cites 21 E. 4. 1. 3. per Choke.——Watſ. Comp. Inc. 8vo. 442. cap. 22. cites S. C. — S. P. that he ſhall have quare impedit without alleging preſentment before. 2 And. 50. in pl. 37. cites S. C.

In quare impedit to preſent to the church of St. Andrew Wardrobe, plaintiff declared, that by the act 22 *Car.* 2. *for re-building London*, it was *enacted, that the pariſhes of St. Andrew Wardrobe and St. Anne Blackfriars ſhould be united*, and St. Andrew Wardrobe to be the church to be rebuilt, and the pariſh church, and the *patrons to preſent by turns*, and the *firſt preſentation to be by the patron of the church the endowment of which was of the greateſt value, which was that of St. Andrew*; that 1 July 25 Car. 2. the incumbent of St. Andrew Wardrobe died, and that the king as patron preſented J. S. which was the firſt avoidance after the act; that J. S. died, whereby it belonged to the plaintiffs (patrons of Blackfriars) to preſent as in their turn, and that the defendant hindered them; the biſhop claimed nothing but as ordinary; and Blake the defendant demurred to the declaration, for that it did *not appear that the plaintiffs, or any by whom they claimed, had preſented to, or ever were in poſſeſſion of the* ‖ *church of Blackfriars*; and that ſuch a preſentation muſt always be alleged in a qua. imp. As to this it was ſaid, that this being an union by act of parliament, which appoints that the patrons ſhall

ſhall preſent by turns, and that the greater value ſhould preſent firſt, this was not neceſſary in this caſe; to which the court ſaid, that the act did not intend to reſtore a title to one who had loſt it by uſurpation, but to leave the title as it was before; and perhaps here might have been uſurpation before this act made; and if ſo, then the uſurper, and not the plaintiffs, is patron within the act till they had regained their right by a writ of right of advowſon; and thereupon it was adjourned to be further argued. But judgment was afterwards given for the plaintiff upon this point, and affirmed in error in B. R. but reverſed in the Houſe of Lords on a writ of error. 3 Lev. 435. Hill. 7 W. 3. C. B. Reynoldſon & al. v. Biſhop of London and Blake.——‖ [The word is (vicarage); but in this caſe of union by act of parliament, and the rectory being appropriate, the court ſaid, they would intend it a church now within the meaning of the act, and therefore I thought it better here to uſe the word (church).]

Br. Quare Impedit, pl. 138. cites 21 E. 4. 1. 3. and this as well to an advowſon in groſs as to an advowſon appendant, and by all the juſtices the king is patron by the office till it be traverſed in Chancery.——Watſ. Comp. Inc. 8vo. 442. cap. 22. cites ſame caſes.

[3. If the *king* be *entitled* to the advowſon *by office*, he ſhall have quare impedit *without preſentation*. 21 E. 4. 16 H. 7. 3.]

Watſ. Comp. Inc. 8vo. 443. cap. 22. cites S. C.—See (R. c) pl. 3.

[4. A *recovery in quare impedit againſt B. and damages for two years* becauſe the church was full of C. is a good title in a quare impedit after the death of B. without alleging preſentment. 42 E. 3. 8. b.]

Watſ. Comp. Inc. 8vo. 443. cap. 22. cites S. C.

[5. *But* in this caſe, if he had once *preſented, and the church full after the recovery* of his preſentment, this recovery is not ſufficient title. 42 E. 3. 8. b.]

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6. If an *abbot* has been *parſon imparſonee* time out of mind, and afterwards the abbey is * *diſſolved*, he of whom the advowſon is holden ſhall preſent, and if diſturbed ſhall have a quare impedit, without alleging of any preſentment in the count, but ſhall ſhew the ſpecial matter. F. N. B. 33. (K.)

* Both tranſlations are (diſturbed), but the French is (diſſolved).

7. If a *man be diſſeiſed* of a manor unto which an advowſon is appendant, and the *advowſon becomes void*, the *diſſeiſee* may preſent and have a quare impedit, *though he has not entered* into the manor. F. N. B. 33. (Q.)

See (Q. c)

(R. c) *What* will be *ſufficient Seiſin* to maintain this Writ.

[1. THIS writ is all in the poſſeſſion, and the *preſentment is the poſſeſſion*. 21 E. 4. 2.]

[2. If my clerk be *inſtituted and not inducted*, when it voids again I may maintain this writ. 38 H. 6. 15. b. by Mark.]

† Fol. 377. Watſ Comp. Inc. 8vo. 443. cap. 22. cites S. C.——S. P. For he ſhall recover only the preſentation in this writ; *but a recovery in writ of right of advowſon*, is a good title without preſentment, becauſe there he ſhall recover the advowſon. Br. Quare Impedit, pl. 142. cites S. C.——‡ F. N. B. 36. (D.)——See (Q. c) pl. 4.

[3. A *recovery* in quare impedit, *without alleging preſentment*, is not † ſufficient, becauſe it lies againſt the deforceor, who claims nothing in the patronage. ‡ 39 H. 6. 25. b.]

Br. Quare Impedit, pl. 80. S. P. cites 21 H. 6. 44. Per Curiam.

[4. A *preſentment by lapſe to the ordinary* is ſufficient ſeiſin. 9 H. 6. 24. b.]

[5. A

[5. A *presentment before time of limitation* is not sufficient; because it is not triable. 20 E. 4. 15. 42 E. 3. 4. b. Admitted. 17 E. 3. 11. 14. b.]

[6. If an *abbot had an impropriation time whereof memory*, &c. and after the *abbey is dissolved*, this *perpetual incumbency* is not sufficient seisin for the patron; for it is not presentative. Dubitatur. 20 E. 4. 15.] Watf. Comp. Inc. 8vo. 442. cap. 22. cites S. C. But if the king be seised of an advowson which has been ever held appropriated, he shall have quare impedit without alleging any presentation. Watf. Comp. Inc. 8vo. 442. cap. 22. cites 17 E. 3. 10. b. 20 E. 4. 15.

[7. If a man *presents to a prebend*, and after *the name is changed*, yet the said presentment is sufficient seisin to maintain a quare impedit upon the new name. 50 E. 3. 26.] Quare impedit by the *king*, and *counted how the bishop of St. David's was patron of a benefice in the church of A. called the prebend of G. and that such a bishop presented to it by name of prebend, and after the bishop by assent of his chapter, and the chapter of A. made it a treasury by name of dignity, and annexed it to the bishopric; and after the king rehearsing the ordinance, ratified, granted, and confirmed* the same thing accordingly, and that it should be named treasury accordingly, and that J. B. *incumbent there died*, by which it voided, and remained void till the *temporalties came into the hands of the king by the death of T. G. bishop there*, and yet is void, and so it belonged to him to present. And so see that a voidance which belongs to a bishop, who dies before he presents thereto, shall afterwards belong to the king, quod nota; and the defendant *demurred, because it was never put in ure by the name of treasury by any bishop, therefore the king ought to have made title by name of prebend and not of treasury*; for during the life of J. B. incumbent of the prebend, the bishop is only a patron as of prebend and not as treasury, till a bishop has put it in ure by such name; & non allocatur; but writ to the bishop awarded for the king. Br. Quare Impedit, pl. 42. cites 50 E. 3. 26.——Br. Presentation, pl. 10. cites S. C. Br. Alienations, pl. 3. cites S. C.——Watf. Comp. Inc. 8vo. 442. cap. 22. cites S. C.

[8. If *presentment be to an advowson*, and after *it is appropriated, and a vicarage made in the same church*, the presentment aforesaid is sufficient to have quare impedit for the vicarage, without other presentment for the vicarage. 50 E. 3. 27.] [419] Br. Quare Impedit, pl. 42. cites S. C.

[9. If *presentment* has been *to two churches*, and after *they are united*, he who is made patron by the union may have quare impedit for this, without other presentment. 50 E. 3. 27.] Br. Quare Impedit, pl. 42. cites S. C.

[10. The *same law* where a church *parochial is made collegial*. 50 E. 3. 27.] Br. Quare Impedit, pl. 42. cites S. C.——Pl. 10. in Roll is placed after the sub-division of (In whom), but it seems more properly placed before it, as here it is done.

In whom.

[11. The presentment of the *grantee of the next avoidance* is sufficient title *for the patron in fee* to have this writ. * 9 H. 7. 23. Co. 5. Countess of North. 97. b. adjudged.] * Br. Quare Impedit, pl. 122. cites S. C.—— Watf. Comp. Inc. 8vo. 444. cap. 22. cites S. C.—— S. P. for he made it in right of the grantor, and therefore it shall serve for him to make title in quare impedit. 5 Rep. 97. b. Mich. 39 & 40 Eliz. C. B. the Countess of Northumberland's case.——Mo. 456. S. C.——And. 48. S. C.——Cro. E. 515. S. C.——See pl. 15. infra.

[12. It ought to be alleged *in the plaintiff, or in him whose estate he has*. 21 E. 4. 2. b.]

For whom.

Br. Quare Impedit, pl. 122. cites S. C. —— Watſ. Comp. Inc. 8vo. 445. cap. 22. cites S. C.

[13. A *grantee of the next avoidance preſents*, and after the *heir of the grantor grants the next avoidance*, the ſaid preſentment is ſufficient *for the grantee*. 9 H. 7. 23.]

Watſ. Comp. Inc. 8vo. 445. cap. 22. cites S. C.

[14. *So* if grantee of the next avoidance preſents, and after *grantor grants the advowſon to A. who grants it to B.* the ſaid preſentment is ſufficient for B. in this writ, without alleging preſentment in the grantor or A. Dy. 1. 2. Ma. 106. 18.]

See pl. 11. ſupra. —— See (U. c) pl. 3, 4. infra.

[15. The preſentment *of grantee of next avoidance* is ſufficient *for grantor and his heirs*. Co. 5. 97. Adjudged.]

—In quare impedit the plaintiff *counted that his anceſtor was ſeiſed* of the advowſon and his clerk in, *and after he granted* the advowſon *to J. S. for life*, the church voided, *J. S. preſented* and his clerk in, and *J. S. died*, and after *the church voided*, by which the *plaintiff as heir of the anceſtor preſented*, and the defendant diſturbed him, and it was held that *he ſhall allege the one preſentation and the other*; for the preſentation of the tenant for life does not make title to the plaintiff, nor the preſentation of a guardian or termor, *and the defendant anſwered to the firſt preſentation, and had iſſue upon it, and not upon both*. And per Littleton he ought to anſwer to both, but the iſſue ſhall be upon the firſt only, and the plaintiff ſhall not reply to him to the ſecond preſentment. Br. Quare Impedit, pl. 129. cites 7 E. 4. 20.

The books are not directly that preſentment alleged in the grantee is not good; but that where a preſentment is alleged in the grantor and grantee, there the preſentment in the grantor is only traverſable; for that is the principal, and the alleging of the preſentment in both is not double. Cro. E. 518. Mich. 38 & 39 Eliz. C. B. Fitton v. Hall.

Br. Quare Impedit, pl. 139. cites 22 E. 4. 8. Per Choke. Watſ. Comp. Inc. 8vo. 445. cap. 22. cites S. C. —— S. P. and with this agree divers opinions in 7 E. 4. 20. 22 E. 4. 9. b. 16 H. 7. 18. a. 9 H. 7. 23. Brook tit. Quare Impedit, 122. 13 Eliz. D. 300. And true it is, that it is generally underſtood in our books, that where tenant for years or for life brings quare impedit, he ought to allege ſeiſin in him who has the fee, and this is regularly true; and yet preſentations by themſelves ſuffice, as appears 8 H. 5. 10. and this reſolution does not impugn the ſaid rule; for preſentation of the grantee of the next avoidance being made in the title and right of the grantor, ſhall ſerve as well for him as his own preſentment, and is tantamount. 5 Rep. 98. the Counteſs of Northumberland's caſe.

[16. If *tenant for years* preſents during his term, this is ſufficient for him in *reverſion*. 22 E. 4. 9. b.]

[17. *So* if *leſſee for life* preſents. 22 E. 4. 9. b.]

[18. *So* if *tenant at will* preſents. 22 E. 4. 9. b.]

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Watſ. Comp. Inc. 8vo. 445. cap. 22. cites S. C. —— But per Brian clearly, the plaintiff in quare impedit *ſhall allege a preſentment in his anceſtor over and above the preſentment of the guardian*, and otherwiſe ill, and therefore ſhall not have quare impedit, but it is put to the writ of right. Br. Quare Impedit, pl. 139. cites 22 E. 4. 8.

[19. *So* if a *guardian* preſents during the wardſhip. 22 E. 4. 9. b. though the king be the guardian. And ſo 42 E. 3. 4. b. where a *manor deſcends, and no preſentment has been before*.]

Watſ. Comp. Inc. 8vo. 446. cap. 22. cites S. C. —— The king brought quare impedit, and *counted of a preſentation of J. S. who was ſeiſed in fee, &c. and of 2 others in himſelf by the ward of the heir of the ſaid J. S.* and that the church is now void, and it belongs to him to preſent, and the defendant diſturbed him. Caund. ſaid, *the clerk alleged by the king to be inſtituted, &c. by the ſaid*

[20. *So* if the *king* preſents *in right of his ward, though the ward has no right*, this uſurpation for the ward is ſufficient preſentment for the king, if it becomes void during nonage, and for the heir after. 42 E. 3. 4. Contra 21 E. 4. 9. b. as to the heir.]

ſaid J. S. was not received nor inſtituted by the preſentation of J. S. and it ſeems to be a good plea; for the 2 preſentments of the king during cuſtody did not make title to him nor to the heir, without alleging ſeiſin by the preſentment in the anceſtor of the heir, or in the feoffor of the anceſtor of the heir, et adjornatur. Br. Quare Impedit, pl. 143. cites 43 E. 3. 4.

[21. A preſentment *by the biſhop as patron* is ſufficient * *for the king* to maintain a quare impedit to the church, when the temporalties come into the hands of the king for *vacancy of the biſhopric*. 50 E. 3. 26.] Br. Quare Impedit, pl. 42. cites * Fol. 378.

S. C. —— Watſ. Comp. Inc. 8vo. 446. cap. 22. cites S. C. —— If the biſhop dies, and the advowſon happens void before his death, the king ſhall preſent unto the ſame by reaſon of the temporalties, and not the biſhop's executors. F. N. B. 33. (R) cites 8 E. 2. Preſentment, 10. 39 E. 3. 21.

[22. A preſentment *by the father* is ſufficient *for the wife of the ſon tenant in dower* thereof. 14 H. 4. 12. admitted; *and alſo for the 2d baron in right of the feme*. 14 H. 4. 12.] Watſ. Comp. Inc. 8vo. 444. cap. 22. cites S. C.

23. If the *eldeſt ſon by* the *firſt venter* preſents, and dieth without heir, and afterwards the church become void, the *younger by the 2d* venter ſhall not preſent, nor have this advowſon; but Devon ſaith, if a man hath *two daughters by divers venters*, and they enter and make partition to preſent by turn, and one dieth without heir, the other ſiſter ſhall be her heir; quod fuit conceſſum; but after the partition, if one ſiſter hath preſented, and afterwards died without heir, it ſeemeth her ſiſter of the half-blood ſhall not be heir unto her. F. N. B. 36. (E.)

(S. c) *In what Caſes there needs* a Seiſin. See (Q. 2)

[1. IF the *king be entitled* to an advowſon *by office* he ſhall have quare impedit without preſentment. 21 E. 4. 16 H. 7. 3. Contra 17 E. 3. 10. b. 11. 14. for there a preſentment is alleged and traverſed, and the traverſe allowed per Curiam, where the king makes title by the ſeiſing by office of the *poſſeſſion of prior alien, and the preſentment alleged in the procurator of the prior.*] Watſ. Comp. Inc. 8vo. 442. cap. 22. cites S. C. See (Q. c) pl. 3.

[2. *But* 17 E. 3. 14. b. it is ſaid that if the *eſcheator ſeiſes* an advowſon *upon particular command* to ſeiſe it, the king may have quare impedit without alleging any preſentment; for the *ſeiſure makes title* without more.] Watſ. Comp. Inc. 8vo. 442. cap. 22. cites S. C.

[3. If a man *recovers in writ of right* of advowſon, *and has execution*, he may have quare impedit without alleging any ſeiſin; for the recovery ſufficiently enough affirms his right. 14 E. 2. Quare Impedit, 171. Adjudged.] Watſ. Comp. Inc. 8vo. 442. cap. 22. cites S. C. — S. P. 2 And. 50, 51. in

* pl. 37. in the caſe of Sir Tho. Cecill v. Hall. —— A man ſhall have quare impedit upon a *recovery by default in writ of right of advowſon* without alleging any preſentment; by all the Juſtices. Br. Quare Impedit, pl. 138. cites 21 E. 4. 1. 3. —— And where *colluſion* is *found againſt an abbot in recovery of advowſon*, the king ſhall have quare impedit without alleging preſentment; per Choke J. Br. Quare Impedit, pl. 138. cites 21 E. 4. 1. 3. —— See (Q. c) pl. 4. & (R. c) pl. 3.

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[4. 17 E. 3. 10. It is ſaid that he may allege ſeiſin in *recovery* by preſentment; but it is not *traverſable*.] Watſ. Comp. Inc. 8vo. 443. cap. 22. cites ſame

[5. If the *king ſeiſes* an advowſon, which has *been held always*

caſes, and 20 E. 3. 15. *in proper uſe*, he ſhall have quare impedit without alleging any preſentment. 17 E. 3. 10. b.]

[6. If the *king* has cauſe to *preſent by the temporalties of the biſhop*, he ſhall not have quare impedit without alleging ſeiſin by preſentment. 17 E. 3. 40.]

[7. *He who has no right* ſhall not have quare impedit without preſentment. 17 E. 3. 40.]

So of an *advowſon appropriate*, and after the *abbey is diſſolved*, the *donor* of the advowſon *ſhall have quare impedit.* Ibid.

8. If a church be void at this day, and the *patron preſents*, and is diſturbed, he ſhall have quare impedit, though he *had never poſſeſſion before.* Br. Quare Impedit, pl. 138. cites 21 E. 4. 1. 3. Per Cateſby.

F.N.B. 34. (F) in the new notes there (d) ſays, See a good caſe that accords herewith. 18 E. 3. 21. And ſee 9 E. 3. 20.

9. If the *king recovers* by quare impedit, and afterwards *ratifies the eſtate of the incumbent*; yet at the next avoidance the king ſhall preſent, becauſe his recovery and judgment for him was not executed. F. N. B. 34. (F) cites T. 9 E. 3.

See (Q. c) (R. c)

(T. c) What ſhall be ſufficient Seiſin.

[1.] THIS *writ is all in the poſſeſſion*, and the *preſentment* is the poſſeſſion. 21 E. 4. 2.]

See (R. c)

(U. c) Quare Impedit. Seiſin. *By whom the Preſentment being* ſhall be ſufficient.

[1. THE preſentment ought to be alleged *in the plaintiff, or in him whoſe eſtate he has.* 21 E. 4. 2. b.]

King *Ed.* 6. was *ſeiſed of the advowſon* of the church of Chedſay, which was parcel of the poſſeſſions of the late counteſs of Sarum, (attainted of treaſon by parliament anno 31 H. 8.) *as of fee*, and by his letters patents he *granted the next avoidance*, nomination, right of patronage, and free diſpoſition of the ſaid church to A. and B. conjunctim & diviſim, *ita ut bene liceret eiſdem ad eccleſiam prædictam* cum primo & proxime vacare contigerit *præſentare N. M.* &c. At the next avoidance *they preſented the ſaid N. M. who was* admitted and *inſtituted*, and afterwards *the king granted the advowſon in fee to the duke of Somerſet, and he granted it over before his attainder*, to Sir John Thynn, and the *church became void*; and whether Sir John Thynn might make to himſelf a good title in a quare impedit by the preſentment aforeſaid, or not, without alleging a preſentment in the king, or any other, by whom he claimed quare bene. D. 105. b. pl. 18. Mich. 1 Ph. & M. Sir John Thynn v. Earl of Pembroke.—— The reporter cites 9 H. 7. in quare impedit, and ſays, he thinks that, by the better opinion, he may, but that it is a queſtion there, if the grantee of the advowſon in fee ought to ſhew the firſt deed of grant of the next avoidance, or not?—— Ibid. Marg. pl. 18. ſays it is void, and that it was ſo adjudged Trin. 31 H. 8. Rot. 100. in the caſe of Sir Godfrey Fulgeam v. Sir William Hollis.—— See (R. c) pl. 11. 15.

[2. A preſentment *in him who grants* the advowſon *to B. a purchaſer*, is ſufficient in a quare impedit brought by B. Co. Magna Charta, 356. b.]

[3. A preſentment alleged *in the grantee of the next avoidance* is ſufficient in this writ. Co. 5. COUNTESS OF NORTHUMBERLAND, 97. b. Adjudged.]

[4. A preſentment alleged *in a leſſee for life or years* is ſufficient * title in this writ. Co. 5. 97. b. Co. 6. BRED. 57. b. 9 H. 7. 23.] * Fol. 379.

Br. Quare Impedit, pl. 138. cites 22 E. 4. 8. Per Choke. ——— See (R. c) pl. 16, 17, 18.

[5. So a preſentment alleged in a *tenant at will* is a ſufficient title in this writ.]

Br. Quare Impedit, pl. 138 cites 22 E. 4. 8. Per Choke. ——— See (R. c) pl. 18.

[6. So a preſentment alleged in a tenant *in dower or* tenant *by the courteſy* is ſufficient title in this writ. Co. 5. 97. b.]

[7. So a preſentment alleged in tenant *by ſtatute merchant, ſtaple, or elegit,* is ſufficient title in this writ. Co. 5. 97. b.]

[8. The preſentment *of the procurator of an abbot in right of the abbey* is ſufficient ſeiſin for the abbot. 17 E. 3. 14. Admitted 60. 76.] Watſ. Comp. Inc. 8vo. 446. cap 22, cites S. C.

[9. So this preſentment by the procurator ſhall be ſufficient *for the king, he having the poſſeſſions for cauſe of war, the abbot being an alien.* 17 E. 3. 10. 14. Admitted 60. Adjudged 76.] Watſ. Comp. Inc. 8vo. 446. cap. 22. cites S. C.

[10. So a preſentment alleged *by the guardian* in chivalry or ſocage is ſufficient title in this writ. Co. 5. 97. b.] Br. Quare Impedit, pl. 88. cites 14 E. 3. 37. ——— See (R. c) pl. 20.

[11. Upon an alienation of an advowſon in *mortmain*, if *the lord*, of whom it is held, at the next avoidance brings quare impedit, it is ſufficient for him to allege a preſentment *in his tenant, who aliened it in mortmain.* 21 E. 3. 27. b.] For there is no other entry into an advowſon, but to preſent, and he has no other remedy; for he cannot have writ of right of advowſon, becauſe he cannot allege ſeiſin in himſelf or his anceſtor. Br. Quare Impedit, pl. 70. cites S. C.

[12. If a *leſſee for life or years* preſents, and his *clerk inſtituted*, it is ſufficient title for him in quare impedit at the next avoidance without alleging any preſentment by the leſſor. Co. 5. SPECOT, 57. b. Adjudged. Co. 5. COUNT NORTH. 98. 11 H. 7. 29.]

[13. If the *king* be *ſeiſed of a manor in fee, to which* an advowſon is appendant, and the church voids, and a *ſtranger uſurps*, and after *the king grants the manor and advowſon in fee to J. S.* as he may, becauſe the ſaid uſurpation is not any uſurpation to the king as to the inheritance; and after the church voids, *J. S.* ſhall have his quare impedit, being diſturbed, and make his title by the laſt preſentment of the king, without making mention of the preſentment of the ſtranger. Hobart's Reports, 189.]

14. If *two jointenants* be of an advowſon, and the *one preſents* to the church, and his clerk is admitted and inſtituted, this in reſpect of the privity ſhall not put the other out of poſſeſſion, but if that jointenant who preſents *dies*, it ſhall ſerve for a title in a quare impedit brought by a ſurvivor. Co. Litt. 186. b.

(X. c) *At what Time* the *Preſentment being* ſhall be ſufficient.

Watſ. Comp. Inc. 8vo. 443. cap. 22. cites S. C.

[1. A Preſentment *before time of memory* is not ſufficient, becauſe it is not triable. 17 E. 3. 11. 14. b. 20 E. 4. 15. 42 E. 3. 4. b. Admitted.]

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Watſ. Comp. Inc. 8vo. 443. cap. 22. cites S. C.

[2. *But* in ſuch caſe he *may allege* the preſentment *to be within time of memory*, and then it is good; for the time is *not traverſable*. 17 E. 3. 14. b.]

(Y. c) Quare Impedit. *At what Time* it *lies*.

[1.] A Quare impedit lies againſt the patron *after* 6 *months plenarty* of his incumbent. 18 E. 3. 2. 13. b.]

Br. Quare Impedit, pl. 148. cites S. C. —— *But if the anceſtor ſuffers a man to appropriate, and dies after the 6 months paſt*, and after the heir ſuffers other 6 months, he may preſent, and may have quare impedit or darrein preſentment. Ibid. — Br. Quare Impedit, pl. 148. cites S. C. for upon appropriation the church remains void to him who has title. ——— Where a man makes diſturbance, and the *diſturber appropriates the advowſon*, there the party may have quare impedit againſt the twentieth abbot who is in after the appropriation, and forty years after, for all theſe are only as one and the ſame incumbent, and is no plenarty which puts a man from his action. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.

2. If *a man gives land and advowſon appendant in tail*, and the *tenant in tail ſuffers uſurpation, which continues by 6 months and dies*, the iſſue in tail ſhall not have quare impedit, nor aſſiſe of darrein preſentment till the next avoidance. Br. Quare Impedit, pl. 141. cites 46 Aſſ. 4. per Finch.

3. The *king* may have quare impedit *at any time during the lives of the patron and incumbent, or of the incumbent only*, notwithſtanding its being after the 6 months; for nullum tempus occurrit regi; quod nota. Br. Quare Impedit, pl. 39. cites 47 E. 3. 4.

Br. Droit de Recto, pl. 5. cites S. C. — So it was admitted there *of a common perſon* if he comes within the year *after the alienation in mortmain*, uſurpation within the year ſhall not grieve him. And ſo it ſeems

4. Quare impedit by the *king*, who *counted, that T. held the manor of D. of him in capite with this advowſon appendant, and preſented, and after the church voided, and after he aliened in mortmain, and the biſhop of R. preſented, and his clerk admitted, inſtituted, and inducted, and the biſhop died, and the king within the year brought quare impedit againſt the incumbent alone*, and well per judicium; for he may plead againſt the king by the ſtatute, and alſo the biſhop, who now is, was no diſturber, ſo that the action does not lie againſt him, and it lies well within the year though the other has gained poſſeſſion by preſentation, and this becauſe the *king in this caſe cannot have writ of right*, becauſe he has *has no right, but only a title, by reaſon of alienation in mortmain*, ſo that if he comes within the year it ſuffices. Br. Quare Impedit, pl. 40. cites 47 E. 3. 11.

that the king by *uſurpation not avoided by any action* may be out of poſſeſſion as well as a common perſon, and ſo is the beſt opinion there; and therefore it ſeems that the one uſurpation within the year cannot be an interruption, and a deſcent cannot toll the entry of the lord who enters for mortmain; for he has no right of entry, but only a title of entry, which may be taken at any time within the year. Br. Quare Impedit, pl. 40. cites 47 E. 3. 11.

Quare impedit of an advowſon in groſs, the plaintiff *counted, that J. N. was thereof ſeiſed and preſented, &c. and held the advowſon of him; and after alienedto the dean and chapter of H. by which he preſented by the ſtatute of mortmain*, and it is yet within the year, and the *defendant ſaid, that the church was full by 6 months before the writ purchaſed of his own preſentment*; judgment of the writ; and becauſe it is half a year after the alienation, therefore the writ lies well, per Cur. Br. Quare Impedit, pl. 70. cites 21 E. 3. 27. ——Br. Mortmain, pl. 13. cites S. C.

5. Quare impedit by R. H. *againſt* 5, and *three of them brought quare impedit againſt the plaintiff of younger date*, by which *R. H. prayed, that all may be determined upon his writ of elder date*, and that the other may be diſcontinued or nonſuited, and then it was not much denied; but afterwards, fol. 56. it was agreed, that if they cannot agree to diſcontinue the laſt writ, that then each ſhall anſwer the other in both writs; quod nota. Br. Quare Impedit, pl. 153. cites 11 H. 6. 23 & 56.

Quare impedit by J. A. and W. P. againſt B. B. and others, the plaintiffs counted, and the defendants anſwered, and ſo to demurrer;

and after the ſame defendants *ſaid, that they had another quare impedit againſt the plaintiffs, and prayed that they may anſwer thereto*; and per Brown, *they ſhall proceed upon the quare impedit of the firſt date, and this ſhall make an end of all*; for otherwiſe there may be inconvenience; for it may * be, that the one may be found for the plaintiffs, and the other with the defendants, where it is all of one and the ſame preſentation to one and the ſame church; and Newton accordingly, and no inconvenience to any party where they plead upon the writ of elder date. Br. Quare Impedit, pl. 79. cites 19 H. 6. 68. ——*For* where *A. brings quare impedit againſt B. and his incumbent*, and B. e contra againſt A. and they plead upon the firſt writ, and the other ſet aſide, there *if the title be found for A. he ſhall have writ to the biſhop to inſtitute his clerk, and to ouſt the other* if this recovery be *within the 6 months*, and no miſchief to the clerk of the defendant; becauſe he was named in the writ, and may have anſwer; *and if the clerk of A. was in at the time of the recovery he needs no writ to the biſhop, but ſhall recover damages for the diſturbance*; and *if B. recovers againſt A.* there *the clerk of A. ſhall be ouſted if* he was in *by his own ſuit, pending the writ*; but if he was in at the time of the writ purchaſed, he ſhall be ouſted; for it was the folly of the defendant that he had not pleaded that the church was full of the preſentation of A. the day of the writ. Ibid. ——*But* becauſe the *plaintiff did not aver that the ſecond writ was of the ſame preſentation of which he brought his writ*, therefore *each was awarded to anſwer to the other's action.* Ibid.

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6. In a quare impedit for the king, though the *defendant has a writ to the biſhop againſt the king*, the king may have *a new quare impedit* againſt him of the ſaid avoidance, and *make other title.* F. N. B. 35. (P.)

7. If the *diſturber preſent two or three times within* the 6 *months*, yet a quare impedit lies againſt the diſturber upon the firſt preſentment, if he purchaſe the writ within the 6 months. F. N. B. 35. (Q.)

Note, In ſuch caſe the profits are to the prior, and yet the freehold is in the abbot. F. N. B. 36. (Q) in the new notes there (a) cites 20 E. 3. Non-ability, 9. 14 H. 4. 10. Adjudged.

8. The righful patron may have a quare impedit *after the* 6 *months* againſt the incumbent of an uſurper that is *in by ſimony*, and in ſuch caſe plenarty for 6 months is no plea. Per Cur. Noy, 25. in caſe of Winchcomb v. Pulleſton.

For the inſtitution and induction thereupon are merely void, and ſo the church was never full of the perſon of ſuch clerk. Watſ. Comp. Inc. 8vo. 159. cites Hob. 167.

9. 1 *Mar.* 1 *Parl.* 2 *Seſſ. cap.* 5. enacts, That *the ſtatute of* 32 *H.* 8. *cap.* 2. (of limitations) *ſhall not extend to a writ of right of advowſon, quare impedit, aſſiſe of darrein preſentment, jure patronatus, &c.*

(Y. c. 2) Quare Impedit. *Where* it ſhall be *brought.*

S.P. F.N. B. 33. (C) in the notes there (c)

1. QUARE impedit by *the king againſt the biſhop* of Sarum of *the prebendary* of Horton, and *counted of a voidance by reaſon of the temporalties of the biſhop being in the hands of the king*, and that the prebend voiding, the king preſented, and he diſturbed, and counted *that ſuch a biſhop preſented ſuch a prebendary who died*, and ſo it is void, &c. and it was *brought in Wiltſhire where the cathedral church was, and not in the county of S. where the body of the prebend, viz. the manor of Horton, was*, which made the entire prebend, and yet the writ awarded good; quod nota. Br. Quare Impedit, pl. 68. cites 21 E. 3. 50.—— But Fitzh. Brief, 325. anno 15 E. 3. is contra, but it is better here as it ſeems; for quare impedit lies where the church is.

† Quare impedit was brought *in the county of Hereford of an adowſon in Wales*, and lay well. Br. Quare Impedit, pl. 16. cites 35 H. 6. 30. —— S. P. that it ſhall be brought in the county adjoining; per Forteſcue. Br. Quare Impedit, pl. 103. cites 36 H. 6. 33. And Brook ſays, the reaſon is ſaid elſewhere to be in as much as the lords there *have no authority to write to the biſhop.* —— S. P. Co. Litt. 134. b. neither ſhall conuſance be granted in a quare impedit, becauſe the inferior court cannot write to the biſhop.

2. Quare impedit does not lie in *Guernſey*, nor in † *Wales*, *nor* in other *royal franchiſes*, *but* it was admitted, that quare impedit lies *in Durham*. Br. Quare Impedit, pl. 152. cites 11 H. 6. 3.

Quare impedit of the *archdeaconry of St. D. in Wales* was brought *in the county of Hereford as in the county next adjoining* to the benefice; quod nota; and the *king made title by reaſon of the poſſeſſions of* * *the biſhop of St. D. being in his hands*, and ſo ſee that the biſhop was patron of the archdeaconry. Br. Quare Impedit, pl. 100. cites 24 E. 3. 42.

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3. The king may ſue this and every other writ in what court he pleaſe. F. N. B. 32. (E).

(Z. c) Quare Impedit. *How* it ſhall be. In what Caſes it ſhall be *Præſentare.*

Watſ. Comp. Inc. 8vo. 505. cap. 30. cites S.C.— Fol. 380.

[1. IF the *ſheriff will not put the patentee* of the king *of a free chapel in poſſeſſion*, the patentee ſhall have quare impedit quod permittat ipſum præſentare. 14 H. 4. 11. b.]

[2. If a man *diſturbs* another *to collate* to a benefice, yet the writ ſhall be good if it be præſentare. 17 E. 3. 64. adjudged.]

S. P. *And in his declaration he ſhall ſhew the ſpecial matter.* Br. Quare Impedit, pl. 156. cites F. N. B. fol. 52 & 33.

Br. Quare Impedit, pl. 144. cites 14 H. 4. 11. S. C. —— S.P. F. N. B. 33. (B) ſays, that the writ ſhall be quod permittat ipſum nominare clericum, &c. where it ſhould be præ-

3. In quare impedit the plaintiff made title, becauſe *fine was levied between J. N. and the abbot of B. of the advowſon*, and the ſame *abbot granted* by the ſame fine, *that J. N. and his heirs at every avoidance ſhall name to him his clerk, and he ſhall preſent him over to the biſhop*, and *alleged ſeiſin* accordingly, and that the church is void, and he named a clerk to the † abbot, and he would not preſent him to the biſhop, and brought quare impedit, which was

præſentare clericum; and therefore the writ was abated. Br. Quare Impedit, pl. 56. cites ‡ 4 H. 4. 10, 11. mittat ipſum præſentare, &c. and in

his ‖ count he ſhall ſet forth the ſpecial matter, and it ſhall be good. F. N. B. 33. (B). —— See accordingly 1 H. 6. 1, 2. 4 E. 3. 69. 21 H. 6. 17. a. and he ſhall have a writ to the biſhop to admit the preſentee whom he has named to another, whether the writ be brought againſt him who had the preſentation or againſt a ſtranger; yet ſee 24 E. 3. Quare Imp. 27. and 2 R. 3. Quare Imp. 102. that it lies not for him who has only the nomination. F. N. B. 33. (F) in the new notes there (c).

‖ F. N. B. 33. (B) in the new notes there (d), ſays, ſee accordingly 22 E. 4. 22. a. 14 E. 4. 2. b. and 14 H. 4. 11. the writ quod permittat nominare was abated by award in the like caſe. —— † Orig. is (eveſque). —— ‡ It ſhould be 14.

4. If a *biſhop be diſturbed to preſent* where he ought to make collation, the writ ſhall be quod permittat ipſum præſentare, &c. and he ſhall count upon the collation. F. N. B. 33. (D). F. N. B. 33. (D) in the new notes there (a), cites 16 E. 3. Brief, 660. Raſt. Entr. 501. 17 E. 3. 64.

5. The king ſhall have a quare impedit of the *ſub-deaconry of York*, which voided when *the temporalties of* the *archbiſhopric* were *in the king's hands*, and the writ ſhall be quod permittat eum præſentare; and yet the king ſhall give this ſub-deaconry by his letters patents. F. N. B. 34. (G).

(A. d) Quare Impedit. How it ſhall be. *In what Caſes* the Writ ſhall be *Ad Eccleſiam.*

[1. IF a quare impedit be brought *of a chapel*, the writ ſhall not be quod permittat præſentare ad eccleſiam, but *ad capellam*. 8 H. 6. 37. Curia.] And becauſe the writ was ad eccleſiam, the opinion of

the Court was, that the writ ſhould abate. Br. Quare Impedit, pl. 77. cites S. C. —— If the king be diſturbed to collate by his letters patent unto his free chapel, he ſhall have a quare impedit, and the writ ſhall be quod permittat præſentare, &c. ad præbendam in his free chapel, &c. F. N. B. 33. * (E). —— F. N. B. 33. (E) in the new notes there (b) cites 16 E. 3. Brief, 660. —— And 13 H. 4. Brief, 870. where eccleſia ſhall be intended a parochial church.

* [426]

2. If the clerk of a *donative* be diſturbed, the patron may have a quare impedit quod permittat ipſum præſentare ad eccleſiam, &c. and declare the *ſpecial matter in his declaration*. Co. Litt. 34. 4. cites H. 1 Jac. B. R. Rot. 601. between FAIRCHILD AND GAYER, in treſpaſs. Reſolved for the rectory parochial donative of St. Burien in Cornwall.] Br. Quare Impedit, pl. 156. cites F. N. B. 32 & 33.

3. Where 2 *or* 3 *patrons* are ſeiſed of an advowſon to *preſent by turns*, the qua. imp. ſhall be *præſentare ad eccleſiam*; for it is but one church. But where the church is divided, and there are 2 ſeveral patrons and 2 *ſeveral incumbents* of the ſame church, ſo that a diſtinct part of the church and tithes belong to each, in ſuch caſe the quare impedit ſhall be præſentare *ad medietatem, &c. eccleſiæ*. So in caſe of a *conſolidation* of 2 or 3 churches into one, and the patrons now preſent by turns, ſo as one incumbent poſſeſſes the whole, the preſentation ſhall be ad eccleſiam. 10 Rep. 136. Trin. 10 Jac. C. B. Smith's caſe. Per Coke Ch. J. in caſe of *two patrons and two incumbents*, (as here,) if either of the patrons be diſturbed, he may have writ either præſentare ad medietatem eccleſiæ, or præſentare *ad eccleſiam*; for quoad him it is a church. 10 Rep. 136. b. in Smith's caſe.

4. In

4. In quare impedit for the vicarage of B. in Devon, it was objected upon a demurrer, that there is a *variance* between the writ and the count, the *writ* being *quod permittat eum præſentare ad vicariam eccleſiæ de B.* and the concluſion of the *declaration is* quod ad ipſum E. (the plaintiff) *ad eccleſiam prædictam ſic vacantem, &c. pertinet præſentare*, &c. So that the writ is quod permittat, &c. præſentare ad vicariam, and the declaration is ad eccleſiam pertinet præſentare. But to this it was anſwered, and ſo reſolved per Cur. That *omnis vicaria eſt eccleſia*, and that it is ſo held expreſsly in ſeveral books, and therefore no variance in ſubſtance but in form only; beſides, this was not ſhewn for cauſe of demurrer, for the cauſe ſhewn was want of profert, and the precedents are as in this caſe; and ſo judgment for the plaintiff. Whereupon defendants brought a writ of error, and a bill in chancery, &c. Carth. 315, 316. Trin. 6 W. & M. Reynell v. Long.

5. The act of 22 *Car.* 2. *for rebuilding London, enacted, That the pariſhes of* St. Andrew Wardrobe and St. Anne Blackfriars *ſhould be united*, and that *the firſt preſentation ſhall be by the patron of the* (church) *whoſe endowment is of the greateſt value.* Now the truth was, that *St. Anne Blackfriars was a vicarage.* And upon a quare impedit brought it was among other things ruled by the Court, that though eccleſia and vicaria are different things, yet it appearing upon the whole record that the *rectory of Blackfriars is appropriate*, the vicarage of Blackfriars ſhall be a church within the intent of the act. 3 Lev. 435, 436. Hill. 7 W. 3. in C. B. Reynoldſon & al. v. Biſhop of London and Blake.

6. There *needs not the name of the ſaint*, as ad eccleſiam de Sancti *M.* de W. except there be more churches in the ſame vill. F. N. B. 32. (E) in the new notes there, cites 9 Eliz. Dyer, 259. 13 H. 4. 872.

7. If a man be diſturbed to preſent unto a parſonage, then the writ ſhall be * præcipe, &c. quod permittat ipſum preſentare, &c. *ad eccleſiam*, &c. for the word eccleſia is always intended a parſonage. And if it be a vicarage, then the writ is quod permittat ipſum præſentare *ad vicariam.* And if it be *a prebend*, then *ad prebendam*, and if a chapel *ad capellam*; and ſo he ought to † name the advowſon as it is, &c. F. N. B. 32. (H.) cites 8 H. 6. 22.

* And note, ſuch writ was at the common law. F. N. B. 32. (H) in the new notes there (a), cites 14 H. 3. Quare Impedit, 183. ad Capellam. 2 H. 3. Grants, 89. ad Vicariam. —— † In a quare impedit præſentare ad eccleſiam, it is a good plea to the writ that it is but a chapel, for † eccleſia ſhall be intended a pariſh church. F. N. B. 32. (H) in the new notes there (b) cites 5 E. 3. 60. 22 E. 3. 2. a. 12. a. 8 H. 6. 32. a. 37. a. 13 H. 4. Brief, 870. —— ‡ S. P. in F. N. B. 33. E. in the new notes there (b) cites 16 E. 3. Brief, 660. and 13 H. 4. Brief, 870.

[427] 8. There is another form of writ quod permittat ipſum præſentare *ad eccleſiam domus Sancti* Martini Briſtol. quæ vacat., &c. and ſo of an hoſpital and the like. F. N. B. 33. (G.) cites Lib. Entr. 506.

(B. d) Quare Impedit. *How* it ſhall be *brought.*

[1. A Writ may be brought *quod permittat ipſum præſentare ad cantariam*, without ſaying *perpetuam* cantariam. 17 E. 3. 12.]

[2. *So* he need not ſay ad perpetuam *vicariam.* 17 E. 3. 12.]

3. A quare impedit lieth of a priory, or of an abbey, and the writ ſhall be *quod permittat ipſum preſentare ad prioratum ſeu abbatiam*, &c. F. N. B. 33. (F.) cites the Book of Entries, 59. and 18 E. 3. Quare Impedit, 151. accordingly.

(B. d. 2) Quare Impedit in general. At *Common Law*, or *by Statute.*

1. QUARE impedit and darrein preſentment *complains of chattel only*, viz. the preſent avoidance. Jenk. 13. pl. 23.

2. Quare impedit *was by the common law*, but it was only *upon* a preſentment, viz. induction; but if the incumbent was to be inducted, then at the common law a writ of *right of advowſon* only lies. Per Popham. Brownl. 166. Trin. 4 Jac. the King v. Matthews.

3. In quare impedit *both plaintiff and defendant are actors* one againſt another, and therefore the defendant may have a *writ to the biſhop* as well as the plaintiff, which he cannot have without a title appearing to the Court. Vaugh. 58. Trin. 21 Car. 2. the King v. Jervis & al.

4. If the *church* is *full* of the defendant *by inſtitution*, then it is a quare impedit within the ſtatute; otherwiſe it is a quare impedit at common law. Skin. 25. Mich. 33 Car. 2. C. B. Holt v. Holland.

(B. d. 3) Quare Impedit. *In what Caſes* it *lies.*

1. IF the advowſon be *in groſs*, the *tenant in tail* may have quare impedit. Br. Quare Impedit, pl. 31. cites 43 E. 3. 24.

2. Where I *grant one part of an advowſon to S.* and *another to W.* and the *third to F. reſerving the fourth* avoidance to myſelf, in this caſe quare impedit does not lie; for the advowſon is one entire thing, and we cannot join in action; and therefore, if we cannot agree in preſentment, the biſhop ſhall have it by lapſe; but of coparceners, if they cannot agree, the eldeſt ſhall have the preſentment. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.

3. Note *when there is no patron, as where the prior is prieſt, and is admitted to his own benefice; or* where *my advowſon is aliened in mortmain, and appropriated* to a religious houſe, and the like; in thoſe caſes, I may have quare impedit, and the plenarty by 6 months is no plea. Br. Plenarty, pl. 10. cites 14 H. 8.

4. *Col-*

4. *Collation by 6 months* does not *toll quare impedit*, where the plenarty is by ſuch collation, for the ſtatute of Weſtminſter 2d requires preſentation in this caſe. Jenk. 281. pl. 7.

5. A man cannot have quare impedit and *darrein preſentment too*, but on the return of the quare impedit, the darrein preſentment brought after ſhall abate. But per Hobart, if he had brought *another quare impedit* it had been well; and ſo it was received in the Earl of BEDFORD's caſe. And per Hutton, W. 2. 5. proves that he ſhall not have both. Noy, 18. Mich. 15 Jac. C. B. the Village of St. Andrew's v. the Archbiſhop of York and the Counteſs of Shrewſbury.

6. If A. a *ſpiritual man has the preſentation, and B. a layman the nomination*, if *B. nominates to A. the* ſpiritual man, *C. a clerk to be preſented over, and A. doth ſo* accordingly, if *before C's admiſſion B. nominates another* to be likewiſe preſented, which *A. refuſeth* to do, becauſe *A.* hath preſented one already by his nomination; B. ſhall not maintain any quare impedit againſt the preſentor for ſuch refuſal; becauſe A. is patron, and being a ſpiritual man he cannot change his preſentation already made. Dod. of Adv. 65, 66. Lect. 12.

(B. d. 4) Quare Impedit. * *Proceſs* and *Proceedings.*

* The *proceſs* in this action are *ſummons, attachment, and diſtreſs peremptory*, by the *ſtatute of Marlbridge*

1. 52 *H.* 3. *cap.* 12. ENACTS, That *in aſſiſes of darrein preſentment, and in a plea of quare impedit, of churches vacant, † days ſhall be given, from* 15 *to* 15, *or from* 3 *weeks to* 3 *weeks, as the place ſhall happen to be near or far.*

13. *The ſheriff muſt ſummon the defendant by good ſummoners, and return their names upon the original*; the *writs* are *returnable from* 15 *days to* 15 *days*; The *ſummons* on the firſt writ may be made *at the church door, or to the perſon* of the defendant; and although a *nihil* be *returned* upon the firſt ſummons, *attachment, and diſtreſs*, yet if the *defendant make default* upon the diſtreſs, a *writ ſhall go to the biſhop* on the title made by the plaintiff. Brownl. 158.——See the caſe of Williams v. Blower & e contra.

This act extendeth not to a writ of quare non admiſit, nor to an incumbravit, but only to the aſſiſe of darrein preſentment and quare impedit, and the reaſon thereof is for fear of the lapſe. 2 Inſt. 124.

† By aſſent of parties a longer day may be given than is preſcribed by this act, but that aſſent muſt be entered of record. And it is to be obſerved, that by the common law great delays be diſallowed in four kinds of actions, viz. In all writs of dower, quare impedit, aſſiſe of darrein preſentment, and aſſiſe of novel diſſeiſin, and therefore no protection ſhall be allowed, or eſſoin de ſervitio regis ſhall be caſt in any of them. 2 Inſt. 124.

At the common law, in a quare impedit, the proceſs was ſummons, attachment, ‖ and diſtreſs infinite, which was miſchievous in reſpect of the lapſe; now it is provided, that if he appear not at the grand diſtreſs, judgment ſhall be given for the plaintiff, and a writ to the biſhop awarded. 2 Inſt. 124.—— ‖ S. P. Br. Quare Impedit, pl. 152. cites 11 H. 6. 5. And the plaintiff ſhould not have writ to the biſhop till the defendant came, but contra now by the ſtatute.—S. P. Brownl. 158.

And in a plea of quare impedit, if the diſturber come not at the firſt day that ‡ he is ſummoned, nor caſt no eſſoin, then he ſhall be attached at another day; at which day, if he come not, nor caſt no § eſſoin, he ſhall be diſtrained by the great diſtreſs above given.

‡ Put the caſe, that upon the ſummons the defendant is returned nihil, and at the attachment and diſtreſs nihil alſo; this caſe is out of the letter of the ſtatute, for the defendant was never ſummoned; but it it ſaid, that when there be two miſchiefs at the common law, and the leſſer is provided for by expreſs words, the greater ſhall be included within the ſame remedy. This caſe, when nihil is returned, is the greater miſchief, for he by his default ſhall loſe nothing, but in the caſe provided, the defen-

defendant by his default ſhall loſe iſſues; and the law intends, that he will rather appear than loſe iſſues. 2 Inſt. 124.

A quare impedit is brought againſt two; upon the diſtreſs one doth appear, and the other makes default; in 7 E. 3. it was reſolved, that the plaintiff ſhould not preſently have a writ to the biſhop againſt him that makes default, for that it might be, that the other that appears ſhall have againſt the plaintiff a writ to the biſhop; and it was there ſaid, that it was not reaſonable, that upon one original the plaintiff ſhould have one writ to the biſhop for him, and another againſt him; but this notwithſtanding, the plaintiff by this act ought to have againſt him that makes default, a writ to the biſhop; and it was not againſt reaſon, if the other defendant can bar the plaintiff, for him to have a writ to the * biſhop againſt the plaintiff by the common law; and ſo be the later books, and common experience, at this day. 2 Inſt. 124, 125.

§ Eſſonium or exonium, is derived of the French verb eſſonier or exonier, which ſignifieth to excuſe, ſo as an eſſoign in legal underſtanding is an excuſe of a default, by reaſon of ſome impediment, or diſturbance, and is as well for the plaintiff as the defendant, and is all one with that which the civilians call excuſatio. Of eſſoigns there have been (as we have read in our books) 5 kinds, viz. 1ſt, De ſervitio regis. 2dly, In terram ſanctam. 3dly, Ultra mare. 4thly, De malo lecti, in our old books called eſſonium de reſiantiſa. 5thly, Et de malo veniendi; and this laſt is the common eſſoine which is intended in this act. 2 Inſt. 125.

In a quare impedit or darrein preſentment, an eſſoin de ſervice le roy ad terram ſanctam, or ultra mare, lieth not for doubt of the lapſe, but a common eſſoin lieth; and of eſſoins the Mirror ſaid well, abuſion eſt que faux cauſes de eſſoines ſont receivable de cy que droit ne allowe fauxime in nul caſe, & abuſion eſt d'allower eſſoine in perſonal actions; for the ſame author treating de articles per viels roys ordain, faith, ordein fuerunt eſſoines in mixt actions; and reals & ne in perſonels. And I find not in Glanvill any eſſoins but in real and mixt actions; but before the making of this act, eſſoins were allowed in perſonal actions. 2 Inſt. 125.

* [429]

And if he come not, then † *by his default, a writ ſhall go to the biſhop of the ſame place, that the claim of the diſturber for that time ſhall not be prejudicial to the* ‖ *plaintiff; ſaving to the diſturber his right at another time when he will ſue therefore.*

† Upon theſe words of this act, plaintiff ſhall have a writ to the biſhop without making of any title. 2 Inſt. 125. ——— The ſtatute ſaith only, ſcribatur epiſcopo, and yet the plaintiff ſhall have both a writ to the biſhop, and beſides a writ to enquire of damages. If the biſhop be out of the realm, a writ to the biſhop may be awarded to his vicar-general, for he is in place of the biſhop. 2 Inſt. 125.

If the defendant appear at the grand diſtreſs, and take a day by prece partium, and after makes default, no writ ſhall be awarded to the biſhop; for this caſe, in reſpect of his appearance, is out of the ſtatute; but a new diſtreſs ſhall be awarded. 2 Inſt. 125.

‖ The king ſhall take the benefit of this ſtatute. 2 Inſt. 125.

The ‡ *ſame law, as to the making of attachments, ſhall from henceforth be obſerved in all writs where attachments lie, as in making diſtreſſes, ſo that the ſecond attachment ſhall be made by better pledges, and afterwards the laſt diſtreſs.*

‡ This is the laſt clauſe of this chapter, and is to be underſtood according to the letter, and needeth not any expoſition. 2 Inſt. 125.

2. In quare impedit the *plaintiff recovered againſt the biſhop, and had diſtringas epiſcopum directed to the ſheriff for diſturbing the church;* and the ſheriff returned 20 s. in iſſues, and the plaintiff prayed another diſtreſs, and had it. Br. Quare Incumbravit, pl. 2. cites 21 E. 3. 31.

3. If the *defendant makes default after appearance*, the plaintiff ſhall recover immediately, and his damages; but if they have *day by continuance*, there the plaintiff ſhall only have diſtringas upon the default. Br. Quare Impedit, pl. 151. cites 2 H. 4. and 6 R. 2.

4. Quare impedit; the ſheriff returned *nihil at the ſummons, and attachment at the diſtreſs;* and by 4 Juſtices, the plaintiff ſhall recover by equity of the ſtatute; but 2 Juſtices contra. Br. Quare Impedit, pl. 152. cites 11 H. 6. 3.

S. P. For in this writ the advowſon is not demanded, but the diſturbance is to be puniſhed for the damage done to the perſon. By Danby and other Juſtices. F. N. B. 32. (E) in the new notes there (b) cites S. C.

5. In quare impedit the ſheriff may *ſummon the defendant in the church*. Per Martin. But Danby and Cotton contra; but that he may, in writ of *right of advowſon*. Br. Quare Impedit, pl. 152. cites 11 H. 6. 3.

6. If *ſome of the plaintiffs appear* in quare impedit, *and ſome not*, ſummons ad ſequendum ſimul ſhall iſſue before the others ſhall proceed. Br. Quare Impedit, pl. 153. cites 11 H. 6. 23.

Br. Lieu, pl. 24. cites 21 E. 3. 5. S. P.

7. The *biſhop* of Coventry was *patron of two prebends*, and he *granted the next avoidance of either* of them, *as ſhould happen to be firſt vacant*, to J. S. which *grant was confirmed* by the dean and chapter; *the biſhop* that made the grant *died; one of the prebendaries died;* the *then biſhop collated it to M.* and the grantee brought a quare impedit, and the court were of opinion, that it muſt be [430] *brought in that county where the cathedral church is*, and *not where the body of the prebend lies*, according to 21 E. 3. D. 194. pl. 33. Mich. 2 & 3 Eliz. ——— v. Ralph Bayne Bp. of Lincoln and Merrick.

8. If the biſhop and defendant join in bringing a writ of error, the biſhop, unleſs *ſummoned and ſevered*, muſt join in the *aſſigning* them. Cro. J. 92. Mich. 3 Jac. Lancaſter v. Lowe.

9. *After judgment* in quare impedit for the King v. Saker, and writ to the biſhop, the *incumbent continued poſſeſſion, and waſted the vicarage houſe*, ſo a prohibition was prayed and granted per Curiam; for as Coke ſaid, it is the dowry of the church, and any one may have this writ againſt him; for it is the writ of the king, and the *prohibition* was *not to do waſt*. Roll. R. 335. Hill. 13 Jac. in the caſe of Knowles v. Harvey.

10. *Judgment* was in quare impedit, and the ſame term a *writ of error* was delivered to the ſame court *before a writ to the biſhop* was awarded to admit the clerk. Per tot. Cur. the writ of error ought to have been allowed without any other ſuperſedeas, becauſe a writ of error is a *ſuperſedeas* in itſelf. Godb. 439. Trin. 5 Car. B. R. Earl of Pembroke v. Boſtock.

A juror was denied to be withdrawn after evidence given in qua. imp. and departure from the bar, becauſe the king ſhall not be prejudiced; for the judgment is *ſalvo jure*; but otherwiſe it is uſed in the Exchequer upon an information or intruſion. Noy, 111. The King v. the Biſhop of Wincheſter and Dr. Hide.

11. In a quare impedit, if the ven. fac. be returned, the plaintiff cannot be *nonſuited* without calling the *jury;* but if the ven. fac. be not returned at the day, then he may be nonſuited on the roll without calling the jury; and ſo he may in the firſt caſe if deft. conſent. Noy, 107. Anon.

2 Mod. 264. S. C. accordingly, and the Court ſaid, that the ſheriff ought to have gone to

12. In a quare impedit againſt two, they *ſeverally appeared, and caſt an eſſoign by turns*, and idem dies was given to him who firſt appeared, &c. Then an *attachment iſſued* againſt them for not appearing at the day, and *proceſs continued to the grand diſtreſs;* which being *returned, and no appearance, judgment final was ordered to be entered*, according to the ſtatute of Marlbridge, cap. 12.

It

It was moved to diſcharge this rule, becauſe the defendants were not ſummoned, either upon the attachment or great diſtreſs, and the *ſureties, returned upon the proceſs, were John Doe and Richard Roe*; that if judgment final ſhould be entered, there is no remedy but by writ of deceit, and on ſuch a writ the ſummoners and veyors are to be examined in court, but feigned perſons cannot be examined, ſo that it is an abuſe of officers to return ſuch names; that ignorance of the ſheriff was the original cauſe of it, who being to make returns, and finding the names of John Doe and Richard Roe ſet down in the books of precedents as forms, followed thoſe precedents exactly, and made their returns accordingly, and took no further care to return true ſummoners. Per Cur. the deſign of the ſtatute of Marlbridge was to have proceſs duly executed, and that he cannot be without the tenants having notice of it; for if the defendant do not appear upon the ſummons, an atachment iſſues againſt him, commanding the ſheriff to ſeiſe his body, and to make him give ſureties for his appearance, if he will not appear, then the grand diſtreſs is awarded, to ſeiſe the thing in queſtion; and if ſtill he neglect to appear, then judgment final is to be given, by which the right is for ever concluded, and this being ſo fatal, the proceſs muſt never be ſuffered to be changed into a thing of courſe. It is true, the defendant here had notice of the ſuit, but he had not ſuch notice as the law allows him; and for his fourching in eſſoign the law allows it him. Accordingly judgment was ſet aſide. Mod. 248. pl. 7. Trin. 29 Car. 2. C. B. Searle v. Long.

the church, and ſeiſed the profits, and if there be nothing, to return a nihil; and that the Court being moved again, continued their former opinion; it was objected that leaving *due notice upon the ſummons* was as much as was required; for the other writs are only to give the defendant time to plead, and therefore not neceſſary that notice ſhould be given *upon every one of the writs*; for if once

ſerved it is enough. But the Court was of opinion, that the defendant having not appeared nor caſt an eſſoign, and judgment final being given, it was reaſon that all the proceſs ſhould be ſerved really, of which there had been no occaſion, if he had either appeared or eſſoined, and therefore the proceſs not being duly ſerved, * judgment was ſet aſide, and cited Raſt. Ent. 217. And they held that the *eſſoign of the other defendant was newiſe binding to the patron defendant*, becauſe they may ſever in pleading, and ſo that judgment was likewiſe ſet aſide.

*[431]

(B. d. 5) *Pleadings. Abatement of* the *Writ by Death of* one of the Parties, *and the Effects* thereof.

1. PRIOR *defendant* in quare impedit *died*, and the writ abated, he *not being named by his proper name*, quod nota; for now there is no defendant. Br. Corporations, pl. 79. cites 10 E. 3. 16. & Fitzh. Quare Impedit, 42.

S. P. And after the 6 months paſſed the *plaintiff brought another quare impedit againſt his ſucceſſor*, and awarded good. Br. Quare Impedit, pl. 158. cites 10 E. 3. & Fitzh. Quare Impedit, 32.

2. *Baron and feme brought quare impedit*, and the *feme died pending the writ*, and yet the writ remained good, and the baron had writ to the biſhop *as tenant by the curteſy*. Br. Quare Impedit, pl. 67. cites 38 E. 3. 35.

S. P. Br. Quare Impedit, pl. 57. cites 14 H. 4. 12. In quare impedit *by the baron and feme, if the writ abates by the death of the feme, and the baron brings another writ*, and *plenarty is pleaded in bar*, he may *aver, that the church was void, within 6 months before the firſt*

firſt writ purchaſed; for it is abated there by *the act of God*, and not by the folly of the party. Per Newton. Br. Journes, pl. 12. cites 7 H. 6. 16.

Baron and feme male title to preſent in right of the feme, and *after iſſue joined and before the venire facias the feme died*. The baron ſhewed that himſelf had taken out a venire facias in his own name; whereupon the defendant demurred, ſuppoſing that the writ was abated; but Winch. was of opinion, that the writ was not abated, becauſe this was a chattel veſted in the huſband during the wife's life. Win. 73. Paſch. 22. C. B. Blunt & Ux. Hutchinſon.——So where *ſeveral barons and their femes were plaintiffs, and one of the femes died* pending the writ before judgment, the Court awarded writ to the biſhop in the name of the baron and the others. Mo. 456. pl. 625. Trin. 38 Eliz. the Counteſs of Northumberland's caſe ——*But* if quare impedit be brought *againſt baron and feme and others*, and the *feme was dead the day of the writ purchaſed*, the writ ſhall abate; *contra, if* ſhe had died *pending the writ*. Br. Quare Impedit, pl. 153. cites 11 H. 6. 23.

Quare impedit againſt the patron and incumbent, the *patron pleaded*

3. If quare impedit be *brought againſt the patron and incumbent*, and the *patron dies pending the writ*, yet the writ ſhall not abate, and ſo recovery may be againſt the incumbent alone. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37.

ed in bar, and the *incumbent pleaded the ſame* matter alſo, and *ſo to iſſue*, and after one came and pleaded that the *patron is dead after the laſt continuance*, judgment of the writ, and the writ was awarded good, per judicium, after long argument by reaſon of the miſchief of the lapſe. Br. Quare Impedit, pl. 6. cites 9 H. 6. 30. —— *So* where 2 * *parceners*, or 2 *jointenants* bring quare impedit, and the one dies, the writ ſhall ſtand for the ſame miſchief, and ſo is 38 E. 3. 35. Br. Quare Impedit, pl. 6. cites 9 H. 6. 30.——S. P. Br. Quare Impedit, pl. 67. cites 38 E. 3. 35. ——* S. P. and ſo of *tenants in common*. Br. Quare Impedit, pl. 57. cites 14 H. 4. 12.

* The death of one plaintiff ſhall not abate the

4. If *one of the* * *plaintiffs, or* one *of the defendants* in quare impedit *dies*, quære if the writ ſhall not abate. Br. Quare Impedit, pl. 7. cites 9 H. 6. 56. per Rolfe.

writ, but he ſhall be ſevered. F. N. B. 35. (L).

If 2 *bring writ of right of advowſon, or if* it be brought *againſt two*, and the *one dies*, of the one part or the other, the writ ſhall abate; *contra in a quare impedit*; for there, after title made, the defendant is become actor, and he may recover damages againſt the plaintiff. Br. Quare Impedit, pl. 6. cites 9 H. 6. 30. per Babington.

In quare impedit *againſt* 3, the *one died pending the writ*, and yet the writ was awarded good againſt the other; quod nota. Br. Quare Impedit, pl. 63. cites 9 H. 5. 6.

Death of the one before writ purchaſed, ſhall abate the writ againſt all; *but* death of the one *pending the writ* ſhall not abate the writ [but] againſt himſelf only; note the diverſity. Br. Brief, pl. 3. cites 27 H. 8. 26.

† Quare impedit was brought againſt the biſhop, who collated M. as patron, and pending the writ, the biſhop died, yet judgment was given for the plaintiff to recover the preſentment, and damages to half a year's value, and an amoveas of M. and writ to the now biſhop or metropolitan as the plaintiff pleaſe. D. 194. pl. 33. Mich. 2 & 3 Eliz. Ralph Bayne biſhop of Coventry, &c. and Meyrick's caſe.—Ibid. Marg. ſays that quare impedit was brought againſt patron, parſon, and ordinary, and the patron died, and yet judgment was given againſt all, cites Trin. 35 Eliz. B. R. Sir Richard Pipe's caſe.——Cro. E. 324. S. C. by name of Pipe v. the Queen.——S. P. For there are 2 miſchiefs. 1. If the writ abates the *diſturbance* ſhall not be *puniſhed*, though the writ was well commenced; for there wants a diſturber; and 2dly, if the writ abates not, but the plaintiff ſhall proceed to judgment and execution, the very patron ſhall be *put out of poſſeſſion*, and as in the laſt caſe, he may recontinue poſſeſſion by writ of right, but is without remedy if the writ abates, which is the greater miſchief, it ſhall not abate. 7 Rep. 26. b. in Hall's caſe, and cites 7 H. 4. 26. b. 13 H. 8. 13. 9 H. 6. 6. 57.

Quare impedit by a prior againſt the biſhop of C. and others, *one pleaded that one of the defendants was dead the day of the writ purchaſed*, and demanded judgment of the writ, et non allocatur for all. Br. Quare Impedit, pl. 49. cites 7 H. 4. 34. 36.

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The *grantee of the next preſentation brought quare impedit, and died*

5. A. *grants* to B. *the next preſentation* to the church of D. the church voids, and B. brings quare impedit, and dies pending the writ, and after the 6 months paſs, the executor can have no remedy. Br. Quare Impedit, pl. 158. cites 4 E. 6.

after the 6 *months paſt, pending the writ*, and the *executors brought another quare impedit by journeys accounts*, and *took general writ, and counted generally* that the grant was made to the teſtator, and he brought quare impedit, and died, and that they brought this writ, et ea ratione pertinet ad ipſos preſentare, and the defendant hindered them, and then it purported, that this is of a diſturbance done to them-

themſelves after the 6 months paſſed, and then the writ does not lie; for *all ought to be compriſed in the writ and count ſpecially, and ſhall demand writ to the biſhop upon the preſentation, and writ of the teſtator*, and becauſe it did not, therefore ill, et nihil inde venit. Br. Quare Impedit, pl. 160. between Mark, Ogle, and Harriſon. But Brooke ſays, it *ſeems that where the plaintiff dies, none can have other writ by journeys accounts.* —— Br. N. C. 4 E. 6. pl. 410. S. C.

The *plaintiff* in a quare impedit *died pending the writ*; it was prayed to have another writ for the executors; for he ſaid he could not have it but by the allowance of the Court, and the Court granted it, but bid him look well to it, if it lay in this caſe or not, and in what form the writ ſhall be. Cro. E. 174. Hill. 32 Eliz. Walter Moile's caſe.

Quare impedit is revivable by *journeys accounts*. Per Hale Ch. J. Ventr. 230. Hill. 24 & 25 Car. 2. B. R. in the caſe of Dacres and Duncombe.

6. Quare impedit brought *by the king* abates by his *demiſe*. Het. 83. Paſch. 4 Car. B. R. the King v. Clough.

(B. d. 6) Abatement of the Writ for *other Matters*. In what Caſes, and the Effect thereof.

1. NOTE; A *writ* brought *by the king* or queen *is not, unde queritur, that the defendant injuſte*, &c. 18 E. 3. 1, 2. (as it is in the caſe of a common perſon;) alſo if the words *ut dicitur* be *omitted*, the writ is good; yet ſee 38 E. 3. 31. that *in the king's caſe* it ſhall be *ut dicitur*, but *in that of a common perſon*, in all writs it ſhall be *ut dicit*, and if it be ut dicitur, the writ ſhall abate. F. N. B. 32. (E.) in the new notes there (c) cites the above caſes, and 17 E. 3. 50. 74.

2. Quare impedit by the *king* againſt L. and *intitled himſelf to the moiety of the advowſon, becauſe L. the defendant was outlawed in treſpaſs, and conveyed in forma juris*, (as appears in the book,) and upon the avoidance he preſented, and *L. ſaid that the advowſon was ſevered into three portions*, and named the portions, *abſque hoc that the incumbent, who died, was preſented by the father of L. as the king ſuppoſed in his count*; and the *king demurred*, and had writ to the biſhop, becauſe the plea of the defendant, viz, that the church was *ſevered into three portions, goes in abatement of the writ*, and the *traverſe goes in bar*; but if he had reſted upon the plea, that the advowſon was ſevered into three parts, the king's writ had abated. Br. Quare Impedit, pl. 115. cites 22 Aſſ. 33.

3. A *writ* was brought *by the queen ratione minori ætate* J. filii & *hæredis S. in cuſtodia reginæ exiſten. de qua præd. S. terram ſua tenuit* in capite, where *by the count it appeared, that he held of one* [433] *G. who was the queen's ward*, and yet held good. F. N. B. 32. (F) in the new notes there (b) cites 24 E. 3. 54.

4. In quare impedit it was agreed, that it is a good plea to the writ by the patron or incumbent, to ſay *that the writ bears date in the life of the laſt incumbent*. Br. Brief, pl. 75. cites 46 E. 3. 19. So if it be *brought by the heir* to ſay, that it *bears date in the life of the anceſtor* in this action. Br. Ibid.—Br. Quare Impedit, pl. 37. cites S. C.

5. In quare impedit by a prior againſt the biſhop of C. and others, one *pleaded that the church was full the day of the writ purchaſed of the preſentment of the plaintiff*; judgment of the writ,

and becauſe he *claimed nothing in the patronage*, the plaintiff demurred; and therefore awarded that he ſhall not have the plea; quod nota. Br. Quare Impedit, pl. 49. cites 7 H. 4. 34. 36.

And per Skene, it is a good plea for the defendant *that the church was full of his own preſentment* 6 *months before the writ purchaſed.* Ibid.

6. In quare impedit the *defendant ſaid that the clerk of the plaintiff was inſtituted and inducted before the writ purchaſed*, and is now in; judgment of the writ; and the beſt opinion was, that it is a good plea; for he cannot recover the preſentation where himſelf has the preſentation, and it does not lie for damages only. Br. Quare Impedit, pl. 54. cites 12 H. 4. 11.

7. In quare impedit by C. againſt B. the plaintiff *counted that N. was ſeiſed of a manor and advowſon appendant who preſented*, &c. *and N. gave in tail*, and the *donee at the avoidance preſented, and his clerk in*, &c. and after the *tenant in tail died without iſſue*, and he in *remainder entered and preſented* T., &c. and his *clerk in, and* after *died, and he preſented again, and the defendant diſturbed him*; and the *defendant ſaid that a ſtranger was ſeiſed of the manor and advowſon appendant, and preſented F.*, &c. *and died, and the manor with the appurtenances deſcended to K. as daughter and heir, who took the defendant to baron, and the baron and feme in jure uxoris preſented*, and the *feme is yet alive*; judgment of the writ: and the beſt opinion was, that it is no plea to the writ; for the *plaintiff alleges the avoidance by the death of T. and the defendant by the death of F.* and alſo the *defendant does not allege that the preſentation made by the father of his feme was after the preſentation of which the plaintiff declares, nor does he traverſe it.* Br. Quare Impedit, pl. 108. cites 14 H. 6. 23.

In quare impedit *againſt ſeveral, one cannot plead to the writ by joint coparcenary* [*or*] *tenancy in common pro indiviſo in the plaintiff* of the advowſon, *unleſs he ſhews him to have other title in the advowſon, or to be incumbent.* So if the count be vicious; quære of the miſnoſmer of the plaintiff. Br. Quare Impedit, pl. 154. cites 31 H. 6. 15.

8. *Jointenancy of the part of the defendant* is no plea in quare impedit: *contrary*, it ſeems, *of the part of the plaintiff*. Br. Quare Impedit, pl. 108. cites 14 H. 6. 23.

Br. Quare Impedit, pl. 75. S. P. and cites S. C. where the writ was againſt patron and incumbent, and the patron made default, and the *incumbent* appeared, and *pleaded that the plaintiff was made a knight after the laſt continuance*, and was found for the incumbent, by which the writ abated, and the plaintiff prayed a writ to the biſhop for default of the patron, but could not have it, becauſe it is repugnant to have a writ to the biſhop when his writ abates. ——— Where the plaintiff in a quare impedit was *made a knight pending the writ*, Shelly thought that inaſmuch as this ſhall be accounted his own default, he ſhall not have a writ by journeys accounts. And agreed that the books are clear that the writ ſhall abate. † D. 55. a. b. pl. 7. Paſch. 34 & 35 H. 8. Anon. ——— [But it ſeems by the other part of the caſe (though not clearly expreſſed) that if this being made a knight was not the act of the plaintiff himſelf, but that he had been *compelled by the king to be made a knight* (as any man having lands of a certain value, was compellable to be at that time, and till the 12 Car. 2.) then he might have had this writ. See Ibid.—And after this caſe it was enacted by * 1 E. 6. cap. 7. that making a plaintiff, &c. knight, &c. ſhould not abate the ſuit.] ——— † S. C. cited 6 Rep. 10. b. in Spencer's caſe. ——— The plaintiff's being made a knight pending the writ is peremptory; for common experience tells us, that it is the act of the plaintiff, and no one is compelled or conſtrained thereto. 7 Rep. 27. b. in Sir Hugh Portman's caſe.

9. In quare impedit, if the writ abates *upon plea to the writ found againſt the plaintiff, or by confeſſion of the exception* to the writ, this is *peremptory* to the plaintiff, and he ſhall not have another quare impedit. Br. Peremptory, pl. 12. cites 7 H. 6. 15.

10. In quare impedit the plaintiff in his *count made title as to the advowſon appendant*. The *defendant ſhewed fine levied if the moiety*, ſo that the moiety is in groſs; judgment of the writ; and it was doubted if it goes to the writ or to the action. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.

11. In quare impedit the plaintiff *counted that one J. F. was ſeiſed in fee of the manor of B. ad quod advocatio prædicta pertinet, and preſented one R. and after gave the manor* to which, &c. *to one O. his anceſtor in tail, and alleged another preſentment in the tenant in tail, and conveyed the manor to himſelf as heir in tail*, and alleged ſeveral deſcents; Littleton demanded judgment of the *writ*; for it is ad quod advocatio *pertinet, where it ſhould be pertinuit*, & non allocatur; and the deſcents adjudged not double, by reaſon that the gift is the effect, and the deſcents are only conveyances. Br. Quare Impedit, pl. 11. cites 33 H. 6. 32.

In quare impedit the plaintiff *counted of a gift in tail to his anceſtor of a manor and advowſon as in groſs, and counted of two preſentments* & non excipitur; *and that the church voided by the death of R. and he preſented*; and *the other ſaid that the advowſon was appendant to the manor, which manor and advowſon were given to the anceſtor of the plaintiff in fee, and that the brother of the plaintiff gave one acre parcel of the manor, and the advowſon, to the brother of the defendant whoſe heir he is, and that R. the preſentee died 6 years ſince, and that the church voided by the death of W. preſentee of the brother of the defendant*; judgment of the *writ*, which *ſuppoſes an avoidance by the death of R.* and alſo that this *writ is not purchaſed within 6 months*; and it was challenged for the doubleneſs, & non allocatur; for the *plea is to the writ*, and *the appendancy and the deſcent to the defendant is for title*. And it was agreed there, that if the advowſon was *in groſs*, then the preſentments are but uſurpations, and ſhall not prejudice the heir in tail by reaſon of the ſtatute; but if it was *appendant*, then the alienation of the acre and advowſon is a diſcontinuance, and he cannot preſent till he has recovered the acre by formedon; but if it was in groſs he may have quare impedit; note the difference; for tenant in tail cannot have writ of right. And after the parties were compelled to take *iſſue, if the advowſon was in groſs or appendant at the time of the gift in tail*; quod nota. Br. Quare Impedit, pl. 31. cites 43 E. 3. 24. ——And in anno 44 E. 3. 15. in the ſame caſe the iſſue was taken if the acre, given with the advowſon in diſcontinuance, was parcel of the manor or not, and ſo the *appendancy and the groſs was the effect of the matter*, to maintain or deſtroy the action. Br. Quare Impedit, pl. 31. cites S. C.

12. It was agreed for law, that if quare impedit abates, the plaintiff ſhall not have another writ; for this *is peremptory*, quod nota; and *quære if* it be *for falſe Latin*, which is the *default of the clerk*. Br. Quare Impedit, pl. 15. cites 34 H. 6. 37.

If the writ abates for falſe Latin *or inſufficiency of form*, this is the default of the clerk, and ſhall not be peremptory to the plaintiff, nor ſhall the defendant have writ to the biſhop upon it, but the plaintiff may have a new writ of quare impedit; and with this agrees 3 H. 6. 3. a. 31 H. 6. 15. a. 7 Rep. 27. b. Paſch. 40 Eliz. in Sir Hugh Portman's caſe.

13. In quare impedit if the plaintiff is *nonſuited after appearance*, this is *peremptory*, though it be *before declaration*; quod nota. Br. Peremptory, 74. cites 19 E. 4. 9.

S. P. Reſolved; and ſo though the writ be brought within ſix months. 7 Rep. 27. b. Paſch. 40 Eliz. Sir Hugh Portman's caſe. ——So of a *diſcontinuance*. Ibid. ——The nature of a quare impedit is to be final upon nonſuit or diſcontinuance. Hob. 137, 138. pl. 187. Trin. 14 Jac. in caſe of the Earl of Bedford v. Biſhop of Exeter and Wilſon. ——The *nonſuit of one plaintiff* ſhall not abate the writ, but he ſhall be ſevered. F. N. B. 35. (L.)

14. *Quare impedit by the queen* againſt others, and *one is by her condemned*, and *execution taken againſt him*; this ſhall abate all the writ againſt the others, as in treſpaſs againſt ſeveral. Br. Executions, pl. 146. cites 20 E. 4. 1.

This caſe ſeems not clearly abridged; the caſe itſelf is, that ſhe recovered by default againſt one, and had judgment to have writ to the biſhop, &c. with a ceſſet executio till tried between the others and her; for otherwiſe this execution againſt one alone, will abate

the writ againſt the others; as in treſpaſs againſt two, if the iſſue be tried againſt one, and the plaintiff prays execution againſt him, the writ ſhall abate againſt the others, &c. Paſch. 20 E. 4. a. pl. 3.

† The king licenced N. to found a provoſt of a chauntery, which ſhall be called *provoſt of the chauntery of C.* and after the king impleaded him by name of the *provoſt of the houſe of C.* and for this miſnoſmer the quare impedit abated, notwithſtanding it was averred for the king that he was known by this name. Br. Miſnoſmer, pl. 24. cites 38 E. 3. 14.——S. P. Br. Brief, pl. 137. cites S. C. The reaſon ſeems to be, becauſe the king ſhall take conuſance of the name, which he himſelf appointed by his writ.

* 15. In quare impedit againſt ſeveral, it was agreed that to ſay that *no ſuch in rerum natura*, as the one of them is, ſhall abate all the writ; but † *miſnoſmer of the one* ſhall not abate but only againſt him who is miſnamed. Br. Brief, pl. 3. cites 27 H. 8. 26.

16. The *teſte* of every quare impedit *ſhall be the ſame day that the writ is obtained, by reaſon of the lapſe*, that it do not prevent the ſix months, ſo as to defraud the ordinary. Br. Quare Impedit, pl. 151. cites the Regiſter.

17. In quare impedit by the queen the count was upon a preſentation made by H. 8. in right of his dutchy of Lancaſter, and ſo conveyed the ſame to her by deſcent. Exception was taken to the writ, becauſe it does not ſet forth how the queen claims the advowſon; as where the king preſents by the temporalties in his hands, the writ ſhall ſay, ratione epiſcopatus Cant. nunc vacant. or in caſe of ward, ratione cuſtodiæ; and that therefore in this caſe it ought to be ſaid ratione ducatus. But Anderſon Ch. J. held the writ well enough, and it is good enough both ways, either generally or ſpecially; and cited the Book of Entries accordingly, where the writ is general, but the count is ratione ducatus ſui Lancaſtriæ. And afterwards a precedent was ſhewn of anno 32 H. 6. where the writ was general, and the count was ratione ducatus. Le. 226, 227. pl. 307. Paſch. 33 Eliz. C. B. the Queen v. Biſhop of York.

18. If a *man has an advowſon in right of his feme*, and the huſband brings quare impedit, the writ ſhall be general ad ſuam ſpectat donationem, without mentioning his wife; per Anderſon Ch. J. and cited the Book of Entries, 483, that the writ is general and the count ſpecial. Le. 227. pl. 307. in caſe of the Queen v. Biſhop of York.

I do not obſerve any ſuch point in the caſe cited, but Goldſb. 78. pl. 12. Hill. 30 Eliz. in BROKESBY'S CASE is the ſame point, and that at length by the opinion of all the juſtices it was amenable, and that a clerk of the Chancery came into C. B. and amended it.—— Cro. E. 119. pl. 4. Mich. 30 & 31 Eliz. S. C. by name of Rookeſby's caſe.

19. The plaintiff in a quare impedit declared thus, (viz.) *ſuam ſpectat donationem*, leaving out the word *(ad)*; adjudged, that the writ ſhall be amended. 3 Nelſ. a. 36. pl. 5. cites Reynoldſon v. Biſhop of London. 3 Lev. 435.

S. P. and yet the writ ſhall not abate, but he ſhall recover all in damages, and therefore to prevent this it is uſual to name the ordinary in the quare impedit; per Pigot. Br. Quare Impedit, pl. 147. cites 9 E. 4. 30.—*But* if the quare impedit *abates within the 6 months*, the plaintiff may bring another writ; but if the plaintiff be * *nonſuit* within the 6 months, he cannot have

20. If after 6 months a quare impedit *abate*, which was brought within the 6 months, the plaintiff is remedileſs to recover his preſentation. Cro. E. 119. Mich. 30 & 31 Eliz. B. R. Rookſeby's caſe.

have a new writ; becauſe the defendant on title made has a writ to the biſhop, and for that cauſe a new writ to the biſhop will not lie. Brownl. 161. Anon.——*S. P. 7 Rep. 27. b. Portman's caſe.

21 The *patron granted the next preſentation to A. and B.* the church became void, and *during the avoidance A. releaſed* his right *to B.* who being diſturbed, brought a quare impedit alone; the defendant demurred, becauſe it appears of the plaintiffs own ſhewing, that they ought to have joined in the action, and the releaſe, being made after the church was void, was of no effect; adjudged accordingly that the releaſe was void. Le. 167. pl. 232. Mich. 30 & 31 Eliz. C. B. Brokeſby v. Wickham and Biſhop of Lincoln.

Ow. 85. S. C. adjudged.—3 Le. 256. pl. 340. Hill. 32 Eliz. S. C. the Court held the releaſe void; becauſe here was not any intereſt to be releaſed, but a power only to preſent, and an authority annexed to the perſon.—After the voidance it is merely a chote en action, and ſo not to be releaſed. Cro. E. 173. Brookſbie's caſe.——And. 223. pl. 241. S. C. adjudged.——Goldſb. 112. pl. 19. S. C. Adjornatur.

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22. A quare impedit *was brought by ſeveral perſons jointly*, and *in the declaration they vary in their title*; the court agreed, that the writ ſhall abate; for the judgment muſt agree with the writ, unleſs there be *ſummons and ſeverance*; and upon divers titles a joint judgment cannot be given; for there can be but one rightful title. Mo. 184. pl. 327. Anon.

23. In a quare impedit; where the writ abates, the *defendant ſhall not have a return*; for perhaps his clerk is in; if not, he may recover by a quare impedit as plaintiff; and there can be no judgment where there is no writ. Where the writ abates there is no writ. Jenk. 124. in pl. 51.

24. In quare impedit, &c. the defendants pleaded in bar *another quare impedit brought by the ſame plaintiffs for the ſame church*, and *averred that they were the ſame plaintiffs*, the ſame avoidance, and the ſame diſturbance, upon which both actions were brought, and that the firſt action is ſtill depending, &c. The *plaintiff replied*, that after the bringing the firſt action he ſtill continued ſeiſed in tail of the advowſon; and being ſo ſeiſed, he preſented his clerk to the biſhop, &c. who refuſed him, which is the diſturbance upon which he now declared in this 2d action, *and traverſed that it was the ſame diſturbance*, upon which he declared in the former action. The defendants demurred; the whole Court agreed, that the writ ought to abate; for though there muſt be a diſturbance naturally to maintain the action, yet the principal effect of the ſuit is to recover the preſentation; and therefore for the ſame thing you ſhall not have two ſuits at once. Now there was a diſturbance laid in the firſt action, and the avoidance of the ſame, ſo that the *new diſturbance* betters not the plaintiff's caſe; beſides, it is the nature of a quare impedit to be final, either upon a diſcontinuance or nonſuit; but by this means one man may bring 20 quare impedits, which would be intolerably vexatious; and the *adding a new defendant mends not the caſe*; for *ſtill there are two depending againſt the ſame perſon*; but he may have

Brownl. 163. S. C.—S.C. cited Hutt. 4. in caſe of Andrews v. Hacker.—S. C. cited Brownl. 28. in caſe of Sir William St. Andrew v. the Archbiſhop of York and the Counteſs of Shrewſbury.——*Several *quare impedits* may be brought *againſt ſeveral defendants*, as one againſt the biſhop, and another againſt the patron and

the writ againſt the others; as in treſpaſs againſt two, if the iſſue be tried againſt one, and the plaintiff prays execution againſt him, the writ ſhall abate againſt the others, &c. Paſch. 20 E. 4. a. pl. 3.

† The king licenced N. to found a provoſt of a chauntery, which ſhall

* 15. In quare impedit againſt ſeveral, it was agreed that to ſay that *no ſuch in rerum natura*, as the one of them is, ſhall abate all the writ; but † *miſnoſmer of the one* ſhall not abate but only againſt him who is miſnamed. Br. Brief, pl. 3. cites 27 H. 8. 26.

be called *provoſt of the chauntery of C.* and after the king impleaded him by name of the *provoſt of the houſe of C.* and for this miſnoſmer the quare impedit abated, notwithſtanding it was averred for the king that he was known by this name. Br. Miſnoſmer, pl. 24. cites 38 E. 3. 14.——S. P. Br. Brief, pl. 137. cites S. C. The reaſon ſeems to be, becauſe the king ſhall take conuſance of the name, which he himſelf appointed by his writ.

16. The *teſte* of every quare impedit *ſhall be the ſame day that the writ is obtained, by reaſon of the lapſe*, that it do not prevent the ſix months, ſo as to defraud the ordinary. Br. Quare Impedit, pl. 151. cites the Regiſter.

17. In quare impedit by the queen the count was upon a preſentation made by H. 8. in right of his dutchy of Lancaſter, and ſo conveyed the ſame to her by deſcent. Exception was taken to the writ, becauſe it does not ſet forth how the queen claims the advowſon; as where the king preſents by the temporalties in his hands, the writ ſhall ſay, ratione epiſcopatus Cant. nunc vacant. or in caſe of ward, ratione cuſtodiæ; and that therefore in this caſe it ought to be ſaid ratione ducatus. But Anderſon Ch. J. held the writ well enough, and it is good enough both ways, either generally or ſpecially; and cited the Book of Entries accordingly, where the writ is general, but the count is ratione ducatus ſui Lancaſtriæ. And afterwards a precedent was ſhewn of anno 32 H. 6. where the writ was general, and the count was ratione ducatus. Le. 226, 227. pl. 307. Paſch. 33 Eliz. C. B. the Queen v. Biſhop of York.

18. If a *man has an advowſon in right of his feme*, and the huſband brings quare impedit, the writ ſhall be general ad ſuam ſpectat donationem, without mentioning his wife; per Anderſon Ch. J. and cited the Book of Entries, 483, that the writ is general and the count ſpecial. Le. 227. pl. 307. in caſe of the Queen v. Biſhop of York.

I do not obſerve any ſuch point in the caſe cited, but Goldſb. 78. pl. 12. Hill. 30 Eliz. in BROKESBY'S CASE is the ſame point, and that at length by the opinion of all the juſtices it was amenable, and that a clerk of the Chancery came into C. B. and amended it.—— Cro. E. 119. pl. 4. Mich. 30 & 31 Eliz. S. C. by name of Rookeſby's caſe.

19. The plaintiff in a quare impedit declared thus, (viz.) *ſuam ſpectat donationem*, leaving out the word *(ad)*; adjudged, that the writ ſhall be amended. 3 Nelſ. a. 36. pl. 5. cites Reynoldſon v. Biſhop of London. 3 Lev. 435.

S. P. and yet the writ ſhall not abate, but he ſhall recover all in damages, and therefore to prevent this it is uſual to name the ordinary in the quare impedit; per Pigot. Br. Quare Impedit, pl. 147. cites 9 E. 4. 30.—*But* if the quare impedit *abates within the 6 months*, the plaintiff may bring another writ; but if the plaintiff be * *nonſuit* within the 6 months, he cannot have

20. If after 6 months a quare impedit *abate*, which was brought within the 6 months, the plaintiff is remedileſs to recover his preſentation. Cro. E. 119. Mich. 30 & 31 Eliz. B. R. Rookſeby's caſe.

have a new writ; becauſe the defendant on title made has a writ to the biſhop, and for that cauſe a new writ to the biſhop will not lie. Brownl. 161. Anon.——* S. P. 7 Rep. 27. b. Portman's caſe.

21 The *patron granted the next preſentation to A. and B.* the church became void, and *during the avoidance A. releaſed* his right *to B.* who being diſturbed, brought a quare impedit alone; the defendant demurred, becauſe it appears of the plaintiffs own ſhewing, that they ought to have joined in the action, and the releaſe, being made after the church was void, was of no effect; adjudged accordingly that the releaſe was void. Le. 167. pl. 232. Mich. 30 & 31 Eliz. C. B. Brokeſby v. Wickham and Biſhop of Lincoln.

Ow. 85. S. C. adjudged.—3 Le. 256. pl. 340. Hill. 32 Eliz. S. C. the Court held the releaſe void; becauſe here was not any intereſt to be releaſed, but a power only to preſent, and an authority annexed to the perſon.—After the voidance it is merely a chote en action, and ſo not to be releaſed. Cro. E. 173. Brookſbie's caſe.——And. 223. pl. 241. S. C. adjudged.——Goldſb. 112. pl. 19. S. C. Adjornatur.

22. A quare impedit *was brought by ſeveral perſons jointly*, and *in the declaration they vary in their title*; the court agreed, that the writ ſhall abate; for the judgment muſt agree with the writ, unleſs there be *ſummons and ſeverance*; and upon divers titles a joint judgment cannot be given; for there can be but one rightful title. Mo. 184. pl. 327. Anon. [436]

23. In a quare impedit; where the writ abates, the *defendant ſhall not have a return*; for perhaps his clerk is in; if not, he may recover by a quare impedit as plaintiff; and there can be no judgment where there is no writ. Where the writ abates there is no writ. Jenk. 124. in pl. 51.

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Brownl. 163. S. C.—S.C. cited Hutt. 4. in caſe of Andrews v. Hacker.—S. C. cited Brownl. 28. in caſe of Sir William St. Andrew v. the Archbiſhop of York and the Counteſs of Shrewſbury.—— * *Several quare impedits* may be brought *againſt ſeveral defendants*, as one againſt the biſhop, and another againſt the patron and

incumbent; but if A. brings a quare impedit againſt B.—B. cannot have a quare impedit againſt A. Brownl. 16. Anon.

have as many as he will againſt * ſeveral perſons. Hob. 137. pl. 187. Trin. 14 Jac. the Earl of Bedford v. Wilſon.

This caſe of Coppledick is in Win. 31. where this plea being pleaded by the incumbent was demurred to, and another plea being pleaded by the patron, viz. that there was no ſuch church as Ulceby in the county of Lincoln, this laſt being tried it was found for the defendant; for that there was an union of the church of Fordington to the church of Ulceby, and that it was called Ulceby cum Fordington, and that inſtitutions, &c. were to Ulceby, and that Ulceby was the greater, and Fordington the leſſer church and united, and therein had loſt its name, and it was agreed, that being known by the one name or the other had been ſufficient to have found for the plaintiff. It was objected for the plaintiff in arreſt of judgment, that there was a miſ-trial; for to try the iſſue of nul tiel vill, the venire ſhould be from the body of the county, whereas here it was de vicineto de Ulceby; but all the Court agreed the trial good, and that it is admitted there is ſuch a town, and the writ implies it; and judgment for the defendant.——[But as to the plea of the incumbent, viz. that there is no ſuch Richard, &c. no farther notice is taken of it.]——S. C. by name of Cuppledick v. Terwhit. Hob. 240, 250. Trin 16 Jac. ſays, that the whole writ was abated againſt all the defendants upon the verdict found for the defendant, and that no opinion was given upon the other demurrer of no ſuch biſhop, &c.——† The caſe of BLUNT v. HUTCHINSON, Win. 73. is neither the S. C. nor the S. P.

25. Quare impedit *againſt Richard biſhop of Lincoln, the patron and incumbent*, who *pleaded*, that at the day when the writ was brought, there was *no ſuch Richard biſhop of Lincoln*, and this was held a good plea in abatement. 3 Nelſ. a. 38. pl. 19. cites Hutt. 33. Coppledike v. Tanſey; and Winch. 73. S. C. reported by the name of † Blunt v. Hutchinſon.

26. In quare impedit the defendant prayed oyer of the writ, and pleaded in abatement that there was a *variance* between the writ and count, the *writ* being *quæ ad noſtram ſpectat donationem*, and the *count* was, *quæ ad ſuam donationem ſpectat jure prerogativæ*. It was objected on demurrer, that the title by the writ is a title in fee, but this in the count is only a title pro hac vice; ſed non
[437] allocatur; for the precedents are ſo, and the writ is always general; and if the king has judgment by default, and a writ to the biſhop, this will not gain a general title to the crown, or become an uſurpation; per Holt Ch. J. for where the king has judgment by default in a quare impedit, he, as well as a ſubject, muſt by ſuggeſtion on the roll ſet forth his ſpecial title. A reſpondeas ouſter was awarded. 2 Salk. 559. Trin. 5 W. & M. the King v. Dr. Lancaſter and Biſhop of London.

27. In qua. imp. the *count varied from the writ*; for the writ was quod permittat præſentare *ad vicariam*, and the declaration is *ad eccleſiam* pertinet præſentare; but upon exception taken to it the court reſolved, that *omnes vicaria eſt eccleſia*, and that it is ſo held expreſsly in ſeveral books, and therefore *is no variance in ſubſtance* but in form only; and this *not being ſhewn for cauſe of demurrer*, judgment was given for the plaintiff, and thereupon the defendants brought a writ of error and a bill in chancery, &c. Carth. 315, &c. Trin 6 W. & M. B. R. Reynell v. Long.

(B. d. 7) In what Caſes the *Patron*, &c. muſt be *named*.

1. THE king may have *quare impedit againſt the incumbent alone;* contra of a common perſon. Br. Prerogative, pl. 110. cites 41 E. 3. 10. Br. Quare Impedit, pl. 6. cites 9 H. 6. 30.

by Babington.—And ſo where the pope preſented. Ibid.——S. P. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37.——Quare impedit by the *king againſt the incumbent alone*, who pleaded, which *was found againſt the king*, and it was moved in arreſt becauſe the *patron was not named in the writ*, but becauſe the writ was admitted it was awarded that the defendant eat inde fine die. Br. Quare Impedit, pl. 44. cites 3 H. 4. 2. 3.

Quare impedit by the *king againſt the incumbent alone*, and *counted that the abbeſs of W. was ſeiſed*, &c. *in right of the church, and preſented W.* who was admitted, *and after the church voided, and ſhe preſented B. who* was admitted, and *after was created biſhop of S. by which the church voided, and remained void till the temporalties came into the hands of king* E. 3. (which is intended the temporalties of the abbeſs as it ſeems to me,) and made the deſcent to the king, who now is, *by which he preſented, and the defendant diſturbed him*, (and ſo ſee that the * king ſhall have *preſentation which fell in the time of the former king*, and not his executors;) and the defendant pleaded to the writ becauſe he is only an incumbent, and the patron is not named, and the writ awarded good; for it may be, that the patron did not diſturb; and alſo in this caſe *the king ſhall not recover the advowſon, but only the preſentation, and by this recovery the patron ſhall not be out of poſſeſſion* as in other caſes, becauſe it appears that the title of the king is not to any inheritance. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37.——* Br. Preſentation, pl. 11. cites S. C.

The king brought a quare impedit againſt the biſhop, Smith incumbent, and Langford; the incumbent pleaded that no patron was named in the writ; and per Cur. that is a good plea in bar, though the *king* be plaintiff *be claiming to preſent by lapſe for ſimony*. Alſo the *patron* now *was only grantee of the prochein avoidance*, and has preſented Smith, yet he ought to be named; *but* if the clerk *had been in by collation by the ordinary for lapſe*, or proviſion of the pope in former times, or ex preſentatione regis againſt whom no writ lies, if a common perſon had been plaintiff in the quare impedit, in thoſe caſes it might be without any patron. Noy, 151. the King v. Biſhop of Litchfield, &c.—Cites 7 H. 4. 37; and 7 Rep. 26. 9 H. 6. &c.

2. Quare impedit againſt one who *ſaid that the biſhop preſented him by lapſe, and that he claimed nothing in the patronage*, judgment if tort; and the other prayed writ to the biſhop, becauſe he has diſclaimed in the patronage; but per Cur. you ſhall not have it, but your *writ ſhall abate*, becauſe he is no diſturber, nor the *biſhop not named in the writ;* & adjornatur. Br. Quare Impedit, pl. 24. cites 42 E. 3. 7.

3. Quare impedit by the *king*, who *made his title for alienation in mortmain* of the manor to which the advowſon, &c. and the biſhop of R. preſented his clerk, who was admitted, inſtituted, and inducted, and the biſhop died, and the *king within the year brought quare impedit againſt the incumbent alone*, and well; for he may plead againſt the king by the ſtatute, and alſo the biſhop who now is was no diſturber, ſo that the action does not lie againſt him. Sav. 109. pl. 184. in caſe of Hall v. the Biſhop of Bath and Wells, cites 47 E. 3. 11. S. C. cited 7 Rep. 26. b. in caſe of Hill v. the Biſhop of Bath and Wells. [438]

4. Quare impedit *againſt R. L. as incumbent, and D. C. as patron;* the *incumbent ſaid*, that *he was preſented* to the ſame church *by A. B.* and inſtituted *and inducted, which A. B. is not named* in the writ; judgment of the writ; per Brian, the writ is good; for he has named a diſturber, and the incumbent is not diſturbed by A. B. but by D. C. and there is no reaſon to have action againſt him who has done no tort to the plaintiff. And there-

fore held good; and ſo ſee that the writ is good againſt diſturber and incumbent, though the diſturber is not very patron. Sav. 109. pl. 184. in caſe of Hall v. the Biſhop of Bath and Wells, cites 22 E. 4. 44.

But where a *patronage is gained by the preſentation*, admiſſion, and inſtitution of a clerk, ſuch patron ought to be named with the incumbent in the quare impedit. Jenk. 200. pl. 18. cites it as reſolved.

5. Where there *is no patron*, there lies quare impedit without naming the patron. Br. Preſentation, pl. 23. cites 14 H. 8. 2. per Fitzjames J.

6. Where the *king preſents to my church* when I have right to preſent, my quare impedit lies only againſt the incumbent of the king, without other patron; but in every other caſe of *common perſon*, it muſt be brought againſt the patron and incumbent. Note, this was ſaid per Frowicke Ch. J. for clear law. But Marrow ſaid, he had ſeen quare impedit againſt the incumbent alone between common perſons. But Frowicke replied, that he never had in his life. Kelw. 53. pl. 9.

7 Rep. 26. b. Hall v. Bp. of Bath and Maunton. The caſe was, the dean of W. was ſeiſed of a vicarage of W appendant to the manor of W. in fee in right of his deanry, and preſented P. who was inducted, and leaſed the manor to the earl of L. for years, who aſſigned it to Sir G. S. and he granted it to C. R. The vicarage voided, R. preſented D. who was admitted, &c. C. R. aſſigned to H. the plaintiff. D. was deprived. H. brought quare impedit againſt the biſhop and the incumbent for diſturbing him to preſent. The incumbent pleaded, that he claimed nothing in the advowſon of the vicarage, but is vicar of the church of the preſentation of the ſaid G. S. who is alive, not named in the writ, and demanded judgment of the writ; and upon demurrer it was reſolved, that the writ ſhould abate, and that the patron ought to be named in the writ; 1ſt, Becauſe the patronage will in this caſe be recovered againſt him that has nothing in the patronage; and there is no reaſon, that he who is patron ſhall be outſted thereof, when he is a ſtranger, and not party to the writ; and eſpecially when, as in this caſe, he might be made party thereto. 2dly, At common law the incumbent could not plead any plea which concerned the right of patronage, and therefore it would be unreaſonable that he only ſhould be named in the writ, who at common law could not defend the patronage; and that he who has the patronage, and might defend the right thereof, ſhould be omitted in the writ. But this *diverſity* was agreed, that *when by the judgment in the quare impedit the inheritance, eſtate, or intereſt of the patron in the patronage is to be deveſted by the judgment* in the quare impedit brought by J. S. there J. N. who preſented, and his clerk received, ought to be named in the writ. *But when* the inheritance, eſtate, or intereſt, ſhall *not be deveſted by the judgment, then if other diſturber be named in the writ*, he need not name the rightful patron in the writ; and with this diverſity the books agree. And after the plaintiff Hall, perceiving the reſolution of the Court, diſcontinued his ſuit, and loſt his preſentation illa vice.—Sav. 108. S. C. And it ſeems there, that the writ was adjudged good. See 108. at the end.——S. C. cited Cro. J. 651. in the caſe of Savil v. Thornton.—See (P. c) pl. 1. in the notes.——7 Rep. 26. b. cites 7 H. 4. 25. 37. That becauſe the preſentation was only recovered, and not the advowſon, nor the patron put out of poſſeſſion, the writ was adjudged good without naming the patron. Ibid. 26. b.—So where the *patron died before writ brought*,

7. In quare impedit the incumbent *pleaded, quod ipſe nihil habet, nec habere clamat*, &c. *niſi de preſentatione Georgii Sidenham Militis not named* in the writ, and demanded judgment of the writ; upon which, the plaintiff did demur in law; and it was argued for the plaintiff, that the writ was well brought without naming the patron; for if a quare impedit be brought againſt the patron and incumbent, and the patron dieth, pendant the writ, the writ ſhall not abate. 9 H. 6. 30. *It might be, that the plaintiff did not know*, nor could tell, *who preſented the ſaid incumbent, but he findeth the incumbent a diſturber by his incumbency*; and if of neceſſity ſuch patron ought to be named, then if ſuch an uſurper ſhould die before the writ brought, he which hath cauſe of action ſhould be remedileſs. And by Anderſon and Periam, the writ is good enough for the reaſon aforeſaid. Le. 58. pl. 83. Mich. 32 Eliz. in C. B. Hall v. Biſhop of Bath.

brought, the writ is well brought againſt the incumbent alone. Ibid. cites 47 E. 3. 11. a. b.——becauſe by the *ſtatute* 25 *E.* 3. 7. he is enabled to plead. Ibid. 27. cites Pl. C. 178. b.

8. Quare impedit, in which the plaintiff made a title, for that the defendant was preſented *upon a ſimoniacal agreement*; the archbiſhop pleads, that he claimed nothing but as ordinary; and the defendant Sowton pleaded in abatement, that the *patron* is *not named* in the writ; and upon demurrer it was adjudged, that he need not, becauſe his title is not in queſtion, but is admitted, and the king claims in affirmance of his title and right but by the offence of the defendant; and the patron ſhall not be put out of poſſeſſion by recovery in this action, for he has had the fruit of his preſentation; but his clerk ſhall be removed for his ſimony, and therefore need not be made party; per Charlton J. but 3 juſtices contra, who doubted becauſe the patron is not only to have his clerk admitted, but likewiſe to continue. And reſpondeas ouſter was awarded. 3 Lev. 16. Paſch. 33 Car. 2. The King v. the Archbiſhop of York and Sowton. 2 Show. 167. pl. 160. S. C.

(B. d. 8) Pleadings. *Count.*

1. IN a quare impedit the plaintiff ought to *declare*, that the preſentment was made *in time of peace*. F. N. B. 33. (K) in the new notes there (e) cites 18 E. 2. Quare Impedit, 175. In a quare impedit the plaintiff declared, that *Sir George Horner was ſeiſed in fee* of the manor of Dowling, to which the advowſon was appendant; that he *preſented* J. S. who was admitted, inſtituted, &c. *and* that afterwards he *granted the next avoidance to the plaintiff*; that J. S. died, and it belongs to him to preſent; and upon demurrer to this declaration, it was objected, that it was ill, becauſe the plaintiff *did not allege*, that Sir *G. H.* preſented *tempore pacis*. And it was admitted, that ſo it ought to be, where the plaintiff makes his title by a preſentation, but here the title is by being ſeiſed of the manor, to which the advowſon is appendant; and ſo the difference is between advowſon in groſs and appendant. And per Cur. when one ſhews a precedent right, and then alleges a preſentation in purſuance of that right, as here the plaintiff does in Sir G. H. it needs not to ſay tempore pacis; otherwiſe, where no title is alleged, ſo that the preſentation only makes the title. Mod. 230. Hill. 28 & 29 Car. 2. Strode v. Biſhop of Bath and Wells, and Sir George Horner and Maſters. 2 Mod. 184. S. C. & P.

2. If a man *recovers* an advowſon againſt another *in a writ of right*, when the church voideth he ſhall preſent; and if he be diſturbed, he ſhall have a quare impedit, and *allege the preſentment in him againſt whom he recovered*, without alleging any other preſentment. F. N. B. 33. (I). *So* a man ſhall have a quare impedit, and *allege a preſentment by his proctor*, and it ſhall be good, without alleging a preſentment in himſelf. F. N. B. 33. (I) cites 17 E. 3.

3. In quare impedit the plaintiff *counted of a preſentation in the time of his predeceſſor, and another in the king who ſeiſed by reaſon of the war between him and France, and that he was reſtored*, and well; for the laſt preſentment did not make him title, and alſo he ought to make mention of the laſt preſentment. Br. Quare Impedit, pl. 19. cites 40 E. 3. 10. Br. Double, pl. 122. cites S. C.—*So of preſentment of the guardian*, this does not make title, and yet he ought to make count upon it. Br. Quare Impedit, pl. 19, cites 40 E. 3. 10.—By which the *defendant ſaid, that J. F. was ſeiſed of the manor of D. with this advowſon appendant, and preſented, que eſtate he has, abſque hoc that the advowſon is in groſs, priſt*; and the *other that is in groſs, priſt*. Ibid.

Ibid.—*But* by 20 E. 4. 13. and 21 E. 4. 10. *where both claim by one and the ſame perſon, the one as appendant*, and the *other in groſs*, there the *appendancy ſhall be traverſed*; but where they claim *by ſeveral perſons* the *preſentation ſhall be traverſed*, and therefore the law ſeems to be where it is in groſs, as in the preſent caſe. Br. Quare Impedit, pl. 19. cites 40 E. 3. 10.

[440] 4. Quare impedit by the king, quod permittat ipſum *preſentare ad prebendam vocat. Major pars altaris in eccleſia de Sarum*; and becauſe he *did not ſhew in what church* in Sarum, *nor of what ſaint, nor in what Sarum*, (for there are two Sarums) therefore ill. Br. Quare Impedit, pl. 20. cites 40 E. 3. 17.

5. Quare impedit by the king, who *counted during the time that the temporalties were in the hands of the king*; the defendant demanded judgment of the count, becauſe *it is not ſhewn for what cauſe* they were ſeiſed into the hands of the king; et non allocatur. Br. Quare Impedit, pl. 23. cites 42 E. 3. 7.

6. Quare impedit by the *king*, and *counted that B. was ſeiſed of the manor with advowſon appendant, and preſented*; and *from B.* the manor and advowſon *deſcended to E. and from E. to R.* who now is *in ward of the king*; and the church voided, and the king preſented, and the defendant diſturbed him; the *defendant ſaid, that there never was ſuch E. in rerum naturæ*, et non allocatur; for this is a miſpriſion in the meſne conveyance. *Contra, if he had miſtaken the name of B. or R. now in ward*; for thoſe are material, quod nota; and therefore the writ good. Br. Quare Impedit, pl. 26. cites 43 E. 3. 7.

As quare impedit by the king *by reaſon of ward*, he *counted of*

7. In quare impedit the *king counted upon two preſentments*, by which the *defendant pleaded it in abatement of the count*, et non allocatur; *contra*, in caſe *of a common perſon*. Br. Count, pl. 27. cites 43 E. 3. 14.

preſentment in the grandfather of the infant and of another preſentment in himſelf, by reaſon of the cuſtody, &c. and the *defendant ſaid, that the grandfather of the infant was ſeiſed, and preſented, and gave the advowſon, and a manor to which it was appendant, to M. and her baron in tail: and the baron died, and the church voided, and M. preſented*, and yet the king had writ to the biſhop for default of M. at another day; but it was held there, that the plea of M. is no plea, becauſe ſhe *did not deny the preſentment of the king upon her*. Br. Quare Impedit, pl. 29. cites 43 E. 3. 14.

Br. Omiſſion, pl. 2. cites S. C.

8. In quare impedit the plaintiff *counted that F. was ſeiſed of a manor with the advowſon appendant, and preſented, and made their deſcent from F. to R.* and *from R. to F.* and *from F. to F.* now plaintiff; and the *defendant alleged, that W. was ſeiſed and preſented, and it deſcended to T. who preſented*, and *from T. to W.* who preſented, and *from W. to the defendant*, and the *plaintiff voided the one preſentment by the nonage of F. and the other* 2 *by the nonage of another F.* and the *defendant alleged omiſſion in one who was elder brother to F. through whom the deſcent is made*. Judgment of the writ, and the writ awarded good, notwithſtanding an omiſſion *of one meſne in the conveyance* in this action. Contra, in writ of right; and it may be, that he in whom omiſſion is alleged was never ſeiſed, and therefore the writ awarded good. Brooke ſays, it is a wonder that all the preſentments alleged by the defendant were ſuffered; for it ſeems to be double at this day, and alſo it ſeems that he *ought to have traverſed the appendancy alleged by the plaintiff*. Br. Quare Impedit, pl. 32. cites 44 E. 3. 21.

9. Quare impedit by two *coparceners*, and *counted that their anceſtor was ſeiſed of the manor of D. to which the advowſon is appendant, and preſented F. his clerk, who was inſtituted and inducted, and made the deſcent to them;* the church voided, *they preſented B. who was inſtituted and inducted;* and the church voided, and ſo it belonged to them to preſent; and ſo ſee they alleged two preſentments, and yet it is not challenged for double; and the reaſon ſeems to be, that they ought to allege one in their anceſtor for title, and then ought to ſpeak of the other which they themſelves made, and *one of the plaintiffs was ſummoned and ſevered;* and the *defendant ſaid, that ſhe who was ſummoned and ſevered aliened her part to her*, judgment of the writ; and after ſhe ſaid, that ſhe aliened her part of the land and advowſon before the voidance, and before the writ brought; and the plaintiffs ſaid, that they were *ſeiſed of the advowſon in common the day of the writ purchaſed, abſque hoc that ſhe aliened before the avoidance.* Br. Quare Impedit, pl. 52. cites 11 H. 4. 54.

10. Quare impedit, and *counted of a tail of a manor to his grandfather, to which the advowſon was appendant, and that his father diſcontinued two parts of the manor and the whole advowſon, and that the right of two parts of the manor and the advowſon deſcended to him as heir in tail*, and ſhewed how; and an ill count; for the right of two parts of the manor and the advowſon in poſſeſſion cannot deſcend; by which he ſaid, that the right of two parts of *the manor and of the advowſon* deſcended to him, and then well. Br. Quare Impedit, pl. 78. cites 19 H. 6. 30. [441]

11. If the *declaration be admiſſus et inſtallatus, without more*, it ſhall abate. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

12. In quare impedit the plaintiff *counted that A. was ſeiſed of the advowſon as of fee, and he took A. to feme; and the church voided, and he in right of A. preſented and had iſſue and died; and the church voided again, and he preſented;* and by the opinion of the court, becauſe the *ſecond preſentment is not alleged in right of the wife*, therefore ill; by which he amended his count; quære librum. Br. Quare Impedit, pl. 8. cites 28 H. 6. 8.

13. Where the plaintiff *counts of ſeveral preſentments* to an advowſon in groſs, this *is not double;* for none of them is traverſable but the laſt; for this makes the poſſeſſion; and if the *laſt preſentment be omitted*, the defendant may plead it to the count. Br. Quare Impedit, pl. 11. cites 33 H. 6. 32.

14. In quare impedit the plaintiff made to himſelf *title, becauſe king H. 4. was ſeiſed in his demeſne as of fee and right of the advowſon in groſs, and granted*, &c. and did *not ſhew whether* he was ſeiſed *in right of the crown or by purchaſe, or by the dutchy*, &c. and yet good, per Cur. for there is no other form, and ſee that it is ſaid *in demeſne of advowſon.* Br. Pleadings, pl. 12. cites 34 H. 6. 34. Br. Count, pl. 18. cites S. C.

15. In quare impedit the plaintiff *ought to allege preſentation*, and it is not ſufficient to plead a recovery without it; becauſe it may be that the recovery was againſt a deforceor who claimed nothing in the patronage; but writ of right of advowſon does not

not lie but againſt the patron; per Priſot. Br. Judgment, pl. 51. cites 39 H. 6. 23.

So if he makes collation, and *does not preſent.* Ibid. pl. 28.

16. He who has a *donative*, or ought to make *collation*, and is diſturbed, ſhall have *general writ* of quare impedit *quod permittat ipſum preſentare*, and ſhall have *ſpecial count*; for there is no other form of writ. Br. General Brief, pl. 24. cites New. Nat. Brev. fol. 33. (C) and (D).

17. The queen brought a quare impedit *upon* the ſtatute 13 Eliz. cap. 12. which enacted, that no perſon ſhall be admitted to a benefice with cure, &c. except he *ſubſcribe the articles of religion*, and that all admiſſions and inductions otherwiſe ſhall be void; the church remained void for two years, and then the queen preſented, but in the count it was *not alleged, that the church* to which the defendant was preſented *was* a church *with cure*; and upon demurrer to the declaration it was held ill. And. 62. pl. 136. Trin. 24 Eliz. the Queen v. the Biſhop of Lincoln and Cock.

18. Quare impedit lies to preſent *to two parts of the church of, &c.* for in a church there may be ſeveral portions to which preſentations may be made; as A. may have the 1ſt, B. the 2d, and C. the 3d part, and divers patronages and advowſons thereof, and if diſturbed may have quare impedit, and declare of a ſeiſin of the 1ſt, or 2d, or 3d part, as the caſe requires. And therefore the plaintiff in the principal caſe having declared *that J. S. was ſeiſed of the advowſon of the ſaid two parts of the church aforeſaid, and preſented, &c.* All the judges held the writ good, and well maintained by the declaration; but if he had not declared of the ſeiſin of the advowſon of the two parts, but that the declaration had been *(that he was ſeiſed of the two parts and preſented)*, according as the writ mentioned it, the writ and declaration would be abated. 2 And. 23. pl. 16. Paſch. 37 Eliz. Stanhopp v. Biſhop of Lincoln.

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(B. d. 9) Quare Impedit. Pleas. Good *in general.*

Br. Alienation, pl. 7. cites S. C.

1. QUARE impedit by the king; the *tenant of the king had iſſue three daughters, and died*; and the *tenements came to the king by his prerogative*, and *partition was made in Chancery*, and this *advowſon allotted to the one who took baron and had iſſue and died, and the iſſue within age and in ward of the king*, and the *prebend voided, and the king preſented.* The *defendant ſaid, that after this the three daughters made partition to preſent by turn, and that the firſt had her turn, and* after the *ſecond, and* the *third took the defendant to baron, and had iſſue and died, and this voidance now belongs to him as tenant by the courteſy, and ſhewed the compoſition*; and becauſe by the firſt partition in Chancery the king was aſcertained of his tenant of record, and *this new partition, without licence of the king, is an alienation in law without licence*, therefore judgment pro rege; for it was agreed, that though partition be made between parceners, yet they

they are in by their common anceſtor, and may vouch as heir, and have every one advantage as heir, yet by the partition in Chancery the one was ſole tenant of the advowſon, and by the laſt partition to preſent by turn all are tenants thereof, and writ of right of advowſon ſhall be brought againſt all, and before again the one alone, and ſo the king has a ſtranger to his tenant; quod nota; and therefore the king recovered. Br. Quare Impedit, pl. 73. cites 21 E. 3. 30, 31.

2. Quare impedit by the *king*, and *made title by non-age of T. ſon of J. W.* and the church voided, becauſe M. H. the *incumbent* thereof *was created biſhop* of E. Mowbray ſaid, the church did not void, the advowſon being in the hands of the king. But Norton ſaid, to this he ſhall not be received, and *pleaded certain eſtoppel that the king had certified the time of the ſeiſure, and the age of the infant, and what day H. was ſworn biſhop of E.* and that a certain year the biſhop was treaſurer of the king, and commiſſion made to him by name of biſhop of E. to go in a meſſage of the king to Rome, and ſhewed record which proved the tenure and the age of the infant, and that he at requeſt of the great men had received the homage of the infant, and made him livery within age; and there it is agreed, that where the king *makes livery to the infant within age generally, fees and advowſons* do not paſs without ſpecial words; but contra of livery made at full age, and upon the livery made within age above were no ſpecial words of fees and advowſons, by which it was awarded, that the king have writ to the biſhop. Br. Quare Impedit, pl. 74. cites 21 E. 3. 39, 40. Br. Eſtoppel, pl. 75. cites S. C.

3. In quare impedit, the king made *title to preſent to a prebend, becauſe the temporalties of the biſhop were in his hands by reaſon of the death of R. late biſhop*, &c. The *defendant ſaid*, that *ne voida pas the temporalties being in the hands of the king by the death of R.* this is a *pregnancy*; for it ſuffices for the king if it be in his hands by any other cauſe. Br. Negativa, &c. pl. 26. cites 24 E. 3. 55. Br. Quare Impedit, pl. 97. cites S. C.

4. In quare impedit the defendant ſhall not have his *age*; nor *protection nor eſſoign de ſervicio regis does not lie*, nor ſuch dilatories, becauſe the lapſe ſhall not incur. Br. Quare Impedit, pl. 116. cites 43 Aſſ. 21. per Thorp J.

5. The *plaintiff entitled himſelf by preſentation by A. who granted to him*, and the *church voided*, and *he preſented*, and the *defendant diſturbed him*; and the *defendant ſaid, that after this preſentment A. was ſeiſed and preſented, &c. and granted the advowſon to the defendant, and the church voided, and he preſented*; and well, without ſhewing how A. came to it again after his firſt grant. Br. Confeſs and Avoid, pl. 10. cites 3 H. 4. 15. Br. Quare Impedit, pl. 46. cites S. C. [443]

6. In a quare impedit by the king it is a good plea to *ſhew that ſuch a one was ſeiſed and preſented, and the incumbent admitted and inſtituted and died, and the patron* * [*preſented*] *this incumbent, who was admitted and inſtituted*, in whoſe poſſeſſion the *king* by his letters patents which he ſhewed ratified and *confirmed his eſtate*; judgment if the king will impeach him, and a good plea. Br. Quare Impedit, pl. 61. cites 14 H. 4. 36. * Quære this? For the Year-book and Fitzh. tit. Qua. Imp. 123. ſeem not clear.

7. In

7. In quare impedit it was agreed, that a *chantery* may be founded without the aſſent or licence of the ordinary, and where the *king made title by the temporalties of the biſhop of L. to the chanteries of St. T. in O.* the *defendant ſaid, that he and his anceſtors time out of mind have been patrons of a chantery of St. T. in the ſame vill*, and alleged preſentment in his anceſtor, *abſque hoc that this A. by whom the king claims founded any chantery there*, and no plea, becauſe he *did not plead of the ſame chantery*; for it may be another chantery for any thing that is contained in the plaint of the defendant, and if the defendant had pleaded that no ſuch church in the ſame county, there the plaintiff ſhould have had writ to the biſhop; per Cur. quod nota. Br. Quare Impedit, pl. 5. cites 9 H. 6. 16.

8. In quare impedit the defendant prayed *aid of the king*, and had it *upon charter ſhewn, in lieu of voucher*, and yet it was agreed, that it is an action which does not die with the perſon; for the heir ſhall not have action of diſturbance in the time of his father; and it was agreed, that a man *cannot vouch a common perſon* in quare impedit, *but ſhall have warrantia chartæ*, and in lieu of this, voucher of the king; for action does not lie againſt the king. Br. Quare Impedit, pl. 7. cites 9 H. 6. 56.

9. In quare impedit the defendant *ſaid, that the incumbent was preſented, living the other incumbent*, and ſo is in by ſpoliation. Br. Quare Impedit, pl. 13. cites 33 H. 6. 26. in a note.

10. If I grant *the next preſentation to J. N. which he enjoys accordingly*, there, if *at another voidance the grantee diſturbs, and alleges the laſt preſentment in himſelf*, the *grantor may confeſs and avoid it*, by reaſon that it was but for one turn only. Br. Confeſs and Avoid, pl. 49. cites 13 E. 4. 2.

11. *If a man pleads*, or otherways ſays *that ſuch a church is void*, he *ought to ſhew how* it voided, viz. *by reſignation, death, or* otherwiſe by *deprivation*, &c. For if it voids by death, it ſhall be tried per pais; and if by deprivation, reſignation, creation, or otherwiſe, this voidance ſhall be tried by the ordinary. Br. Quare Impedit, pl. 85. cites 15 E. 4. 25. per Jenny.

12. Quare Impedit by the *Lord H. and M. his feme, againſt the biſhop, W. H.* and others, and *counted that certain perſons were ſeiſed of the advowſon in groſs to the uſe of the plaintiffs and the heirs of the feme, who granted the advowſon to R. who granted* the advowſon *to the plaintiff and the heirs of the feme*, and ſhewed preſentment, and that the church voided, &c. and *the biſhop*, the *patron*, the *incumbent, and all the others joined in plea, and ſaid that the ſaid feoffees were ſeiſed to the uſe of the ſaid W. H. and his heirs males, and that they preſented abſque hoc, that they were ſeiſed to the uſe of the lord H. and his feme.* And per Keble, the plea is not good, inaſmuch as the patron, biſhop, and incumbent have joined in plea where they ought to have ſevered; and alſo he ſaid that the feoffees were ſeiſed to the uſe of W. H. in tail, and *does not ſhew the commencement of* it, inaſmuch as it is of *a ſpecial eſtate*, and alſo *W. H. has pleaded to the right* of the patronage, *where it* appears that

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that he *is not patron;* and therefore *ought to have ſaid* that *ne diſturba pas.* Br. Quare Impedit, pl. 165. cites 13 H. 7. 18.

13. If 4 *jointenants bring quare impedit*, and the one will not ſue, he ſhall be *ſummoned and ſevered;* but if he will *vary in title*, there the *writ ſhall abate without remedy;* for then it appears that they have joined upon ſeveral titles,; quod nota. Br. Quare Impedit, pl. 2. cites 26 H. 8. 5.

14. In a quare impedit the plaintiff declared, that the church was void, and that the defendant diſturbed him to preſent; the defendant pleaded, that the *church* was *void by acceptance of another benefice with cure*, &c. *and that thereby the right of preſentation devolved to the queen by lapſe*, upon default of the ordinary and metropolitan, &c. and *that ſhe preſented the defendant, who was admitted and inducted;* and upon a demurrer the Court ſaid that every writ, declaration, and action ought to be anſwered by way of plea; that in this caſe the plaintiff alleges a diſturbance by the defendant, which is not any how anſwered; for when the king preſents, &c. pending the writ, this can be no anſwer to the action or grief of the plaintiff done to him before. Whereupon they gave judgment for the plaintiff. And. 238. pl. 255. Stanley v. Chaffin.

Le. 104. pl. 278. Mich. 31 & 32 Eliz. C. B. Arundel v. Biſhop of Glouceſter and Chaffin. S. P. and ſeems to be S. C. and the plea was held inſufficient; for the plaintiff *counted upon a diſturbance to him 1ſt November*, and the *defendant intitled himſelf to an incumbency 1ſt May after*; ſo that the diſturbance ſet forth in the count, is not anſwered by traverſe, nor confeſſed nor avoided; for the diſturbance whereof the plaintiff declared is confeſſed. Afterwards it was moved that the queen might have writ to the biſhop, becauſe her title appears to be by lapſe, which is confeſſed. But the whole court were clear of opinion againſt it; for though it appears that he was lawfully preſented to the ſaid church, and ſo once lawful incumbent, yet it appears alſo, that the *queen's title is once executed, and ſo gone, and nothing remains in her*; and now when the *defendant has loſt his incumbency by ill pleading* (as he may as well by reſignation or deprivation) *the ſame ſhall not turn to the queen's advantage*; for where the queen preſents for lapſe, and her clerk is inſtituted and inducted, ſhe has no more to do, *her clerk muſt ſhift as well as he can for the holding of it*; for by what manner ſoever he loſeth the incumbency, *ſhe ſhall not preſent again*; otherwiſe it had been if ſhe had been patron. And afterwards the plaintiff had a writ to the biſhop.

(B. d. 10) Pleading *Plenarty.*

See (Q. a. 2)

1. 13 *E.* 1. *cap.* 5. ENACTS, That *from henceforth* one form of pleading *ſhall be obſerved among juſtices in writs of darrein preſentment and quare impedit, in this reſpect if the defendant allegeth plenarty of the church of his own preſentation, the plea ſhall not fail by reaſon of the plenarty, ſo that the* writ be purchaſed within 6 months, *though he cannot recover his preſentation within the 6 months.*

By the common law *plenarty*, before the writ of quare impedit brought, was a good plea, but plenarty hanging the writ was no bar at the common law; but now by this ſtatute plenarty is no plea in a quare impedit or darrein preſentment, unleſs it be by the ſpace of ſix months before the quare impedit brought; for if the rightful patron bring his action within the 6 months, it is maintainable by this ſtatute, which ſhort purview doth remedy many miſchiefs at the common law. 2 Inſt. 360.

But this act doth *not bind the king*; for plenarty by the ſpace of ſix months is no bar againſt him, but he may have his quare impedit when he will; for nullum tempus occurrit regi. 2 Inſt. 361.

But ſome have taken a *diverſity when* the king claimeth the advowſon in his own right *in jure coronæ, and when* he claimeth it *in the right of a ſubject*; for then he ſhall not be in better caſe than the ſubject was; as where the king was intitled to preſent in the right of a ward, and one did uſurp, and the church was full by the ſpace of ſix months; and it was adjudged within 12 years after the making of this act, that the king by this plenarty was barred of this quare impedit; but ſince that time the law hath been otherwiſe taken. 2 Inſt. 361.

Plenarty

Plenarty by 6 months *againſt the queen* is a good plea, *albeit ſhe claim* the advowſon *by the king's inducement.* 2 Inſt. 361.

And yet in all cases, plenarty by ſix months is no plea in a quare impedit; [as] if an advowſon be aliened in *mortmain*, and the church becomes void, and a *ſtranger uſurps*, and his clerk is in by ſix months, yet the immediate *lord ſhall have a quare impedit within the year*; for the ſtatute of 7 E. 1. * de religioſis, giveth him a year, and the immediate lord half a year after, &c. and for that cauſe alſo no deſcent of lands in the mean time ſhall take away his entry. 2 Inſt. 361.

* [445]

(B. d. 11) Pleadings *by* the *Biſhop.*

1. QUARE impedit by Sir J. Denham *againſt the biſhop of E. and T.* Chanon, and *counted that the advowſon of the abbey of* St. Edes, *was appendant to his manor of Hatland, and that W. his father preſented one B. Chanon of the abbey, who of his preſentment was admitted and inſtituted, and conveyed the manor to him by deſcent, and that the abbey voided by the death of B. and he preſented, and the defendant diſturbed him; the biſhop ſaid that by the foundation the abbot is elective by the prior and the monks who preſent him to the biſhop, and he ſhall examine and admit*, and if he be able, then the biſhop ſhall admit and inſtal, and put him in corporal poſſeſſion, *and that the abbey voided by the death of B. and they elected C.* and he upon the preſentment of him made to him, examined and found him able, and admitted and inſtalled him, &c. and ſo *claimed nothing but as ordinary*; judgment if without ſpecial diſturbance, tort, &c. It is no plea *without traverſing the title of the plaintiff*; for *where he ſhews title in deſtruction of the title of the plaintiff, he ought to traverſe*, &c. *or confeſs and avoid* the title of the plaintiff, *notwithſtanding that he claims nothing but as ordinary*; by which *afterwards he traverſed* abſque hoc, *that the ſaid* B. *was admitted and inſtituted by the biſhop of E. at the preſentment of W. father of the plaintiff*; and the other e contra. And per Port, the biſhop *as ordinary cannot plead any plea which touches the right of the patronage*, but a *diſturber may*, and here the biſhop is diſturber; for it appears that the *plaintiff preſented to him, and alſo the prior, and he accepted the preſentation of the prior without inquiring de jure patronatus*, and therefore a diſturber, quod Newton and Paſton conceſſerunt, that he ought to have inquired, &c. as well as between two patrons. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

Br. Traverſe per Sans, pl. 21. cites 33 H. 6. 13, 14. S. C.—— Br. Negation, pl. 3. cites S.C.

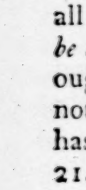
2. Quare impedit was brought by H. againſt B. and the biſhop and the incumbent, and *counted that he was ſeiſed of the advowſon as in groſs, and this as of fee and of right*, &c. *tempore pacis*, &c. *and died*, &c. *and the church now voided*, &c. *and he preſented, and the defendants diſturbed him*, and the *biſhop ſaid that he claimed nothing but admiſſion, inſtitution, and induction*; and prayed judgment if without ſpecial diſturbance, &c. and the *plaintiff ſaid that the church voided by the death of J. N.* as above, *and that he preſented ſuch a day, year, and place, W. P. his clerk, and required him to admit him, and he refuſed*, and ſo diſturbed him, &c. to which *the biſhop ſaid that the defendant preſented ſuch a day, and that after in the feaſt of St. Hugh the plaintiff preſented, by which he refuſed, and made inquiry de jure patronatus*, (which was afterwards adjudged no plea,

becauſe he *did not ſay what end the inquiry took) which refuſal in the ſaid feaſt* of St. Hugh, &c. *is the ſame ſpecial diſturbance*, &c. *abſque hoc, that he refuſed after the ſaid feaſt*, & hoc, &c. to which the *plaintiff ſaid that he ſuch a day and place after the feaſt aforeſaid, required him to admit*, &c. *and he refuſed*; and upon this they were at iſſue; and after by the opinion of the Court the *iſſue is misjoined*, and the plaintiff has *departed from his firſt plea*; for he *alleged diſturbance ſuch a day, which the biſhop has juſtified*, and he comes *and alleges another diſturbance, by another refuſal another day*, and therefore this is a departure; by which they repleaded; and the *biſhop ſaid that the defendant preſented E. his clerk the ſame day that the plaintiff preſented F. his clerk, and ſo the church became litigious; and that* [446] the law of holy church is, that *when it is litigious, the ordinary is not bound to preſent till it be inquired de jure patronatus, and this at the ſuit of the one patron or the other, or their incumbent; and that if the 6 months paſs, that he preſent by lapſe, and none required him within the 6 months, by which he made collation to one T. his clerk, by lapſe*, & hoc, &c. and demanded judgment, &c. and upon this the *plaintiff demurred*; and there it is agreed that the jure patronatus *ſhall be ſued at the coſts of the party or his clerk*, and the biſhop is not bound to be at the coſts, for he is judge in this caſe; but where the Court writes to the biſhop to certify baſtardy, or matrimony, or the like, there he ſhall do it at his own coſts; for there he is a miniſter. But per Littleton, the Juſtices of the ſpecial aſſiſe are not bound to ſit without their fee, nor the Chancellor to make writs without his fee for the writing, &c. And afterwards it was adjudged that *to ſay that the church was litigious*, as above, *and the 6 months paſſed, and he made collation by lapſe, is a ſufficient plea* without the other matter of the jure patronatus, which is alleged before; but this is only ſurpluſage, and the plea is not the worſe; for the jure patronatus is only for the excuſe of the biſhop, therefore it ſeems it had been a good replication for the plaintiff to have ſaid, that he or his clerk required to have jure patronatus, and he refuſed; and therefore as to the biſhop, judgment was given that the plaintiff take nothing by his writ. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 9. 11. 38. & 35 H. 6. 18.

3. Quare impedit by the *king* againſt the ordinary, and *counted that W. N. was ſeiſed of the manor of S. with the advowſon appendant, and preſented J.*, &c. who was admitted, inſtituted, and inducted, &c. *and gave the manor with the advowſon to E. L. in tail*, the *remainder to the right heirs of W. L. in fee*, &c. and that ſuch a day and year it was *found before the eſcheator*, &c. *that the ſaid E. L. died ſeiſed of the manor in tail, and* that *the manor was held of the king in chief, and* that *T. L. is ſon and heir within age*, &c. *and* that *ſuch a day and year the church voided, and the king preſented B. and the biſhop diſturbed him*, and *the biſhop ſaid proteſtando that E. L. died ſeiſed in fee of the ſaid manor, and pro placito that E. L. gave the ſaid manor to M. and others in fee ſaving the advowſon, and after E. L. granted the next preſentation to Butler, and after M. and the others gave the manor to E. L. and his feme and Lewis E. and after E. died, and the church voided, and B. preſented to him C. at D. he being ready to take* Br. Office devant, pl. 11. cites S. C.

horſe; and the biſhop commanded him to attend upon him at N. within the ſame dioceſs within three days, to examine him and inquire his ability; *and he did not come, nor ſix months after, by which the biſhop made collation by lapſe, abſque hoc that W. L. gave the ſaid manor to E. L. in tail,* priſt, &c. And afterwards anno 15 H. 7. 7 and 8. all the Juſtices at length held, that the ordinary ſhall have *time to be adviſed;* for *in the examination he is judge and not officer,* and he ought to give him time and place convenient, and need not give notice to the patron that he did not come to be examined; for he has not refuſed him. Br. Quare Impedit, pl. 91. cites 14 H. 7. 21. and 15 H. 7. 6, 7, & 8.

(B. d. 12) Pleadings *by Incumbent.*



*[447] The incumbent *ſhall not* by this ſtatute *have traverſe to the title of the plaintiff, unleſs the king* be plaintiff; and the miſchief was, that though the incumbent had been 20 years in poſſeſſion, yet if the king had brought quare impedit againſt him and another as patron, who would not appear, the king ſhould have ouſted the incumbent, becauſe nullum tempus occurrit regi, and for that reaſon was the ſtatute made. Fitzh. tit. Incumbent, pl. 11. cites M. 10 H. 4.

1. 25 Ed. 3. ſtat. 3. cap. 7. ITEM, *Becauſe that many preſentments to divers benefices of holy church, as well of the patronage of lay people as of people of holy church, which are void by ſix months, whereof the collation of ſuch benefices by lapſe of time was devolute, and of right * pertaining to the ordinaries of the places, were recovered by the king by judgments thereof given, of the aſſent of the ſaid patrons, in deceit of the ſaid collations ſo made reaſonably by the ſaid ordinaries, in which pleas the ordinaries nor their clerks, to whom they did give ſuch benefices, were not received to ſhew nor defend their right in this behalf, nor to counterplead the king's right ſo claimed, which is not reaſonable; wherefore the king, by the aſſent of the parliament, willed and granted for him and his heirs, that when archbiſhops, biſhops, or other ordinaries, have given a benefice of right devolute to him by lapſe of time, and after the king preſenteth and taketh his ſuit againſt the patron, which per-caſe will ſuffer that the king ſhall recover without action tried, in deceit of the ordinary, or the poſſeſſor of the ſaid benefices, that in ſuch caſe, and all other caſes like, where the king's right is not tried, the archbiſhop or biſhop, ordinary or poſſeſſor, ſhall be received to † counterplead the title taken for the king, and to have his anſwer, and ſhew and defend his right upon the matter, although that he claim nothing in the patronage in the caſe aforeſaid.*

The confeſſion of the patron, or ſuppoſed patron, before this ſtatute bound the incumbent, but now the *incumbent may plead the title of the patron,* but the *ordinary cannot*; for the ſtatute does not extend to him. Jenk. 25. pl. 47.

Scire facias upon a recovery by the king in quare impedit; the *incumbent defendant ſaid, that after the judgment J. N. preſentee of the king, was inſtituted and inducted by the biſhop by the ſame judgment,* &c. And per Haſty, the ſame ſtatute which gives the incumbent to plead againſt the king in quare impedit, gives him anſwer in ſcire facias upon judgment therein, quod non negatur; by which they were at iſſue; quod nota. Br. Incumbent, pl. 4. cites ‡ 46 E. 3. 13. ——‡ S. C. cited 2 Le. 85. pl. 112. in caſe of Ognel v. Paſton. —S. P. Fitzh. tit. Incumbent, pl. 10. cites H. 50 E. 3. ——7 Rep. 26. cites S. C. and ſays, the miſchief before this ſtatute was, that by the faint pleading or confeſſion of the patron in quare impedit, the incumbent was without remedy; but that this ſtatute enables the poſſeſſor, &c. (which is the ſame thing as to ſay the incumbent after induction, as was held ‡ D. 1. 4 H. 8.) to counterplead the title taken for the king and to have his anſwer, &c. 7 Rep. 26. a. Paſch. 31 Eliz. Caſes of Quare Impedit.—‡ This caſe is D. 1. b. pl. 8. BATAILE v. COOK, where the patron claimed title to the advowſon by the anceſtor of the plaintiff; and the incumbent would have pleaded the ſame plea, but was ouſted by this ſtatute, which enables the poſſeſſor to plead in bar, but in this caſe the incumbent was not inducted, and *before poſſeſſion he is not incumbent,* and ſo could not plead ne diſturba pas, &c.

† This

† This is *intended where action is commenced*; for *if an incumbent be in, and is ouſted by admiſſion and induction of the incumbent of the king*, he has no remedy but to ſue by petition to the king. Br. Incumbent, pl. 7. cites 2 H. 4. 17.

The particular *cauſe of this law*, is for the relief only of the ordinary that hath collated by lapſe, and of the clerk that is ſo collated, that they may both plead to the title againſt the king, which, when you conſider it, was a neceſſary law as againſt the king more than againſt common patrons; for the king not being bound by lapſe of time, if the common patron ſuffered a lapſe, and the biſhop collated lawfully, yet if the king pretending himſelf patron, brought a quare impedit againſt the ordinary and incumbent, there was no means for them to ſave themſelves, ſince they could not deny the king's title and maintain the patron's in whoſe default the lapſe took place; but the ſtatute gives remedies likewiſe in like caſes, by expreſs words; ſo that *caſes of like nature are rather remedied by letter than equity*. And therefore firſt *in the caſe of lapſe, a common perſon* might by practice have turned out a lawful collatee in one only caſe, and that was this, a common perſon *no true patron, preſents within 6 months*, and the *true patron himſelf preſents not in time*; whereupon the *ordinary collates* by lapſe, againſt whom the *pretender brings a quare impedit*, becauſe his clerk was refuſed, wherein he muſt needs prevail, if *his title* be good, and it *muſt be taken for good, becauſe neither ordinary nor incumbent could deny it*; for de non apparentibus & de non exiſtentibus eadem eſt ratio. This is one of the like caſes meant in the ſtatute; for all in other caſes the lapſe is an equal title againſt all common perſons. But the commoneſt like caſe, and that which extends fartheſt, is the purview; for every incumbent that is called a poſſeſſor, as well by preſentment as by collation, is allowed by the words of the law to counterplead the king's title, and to ſhew and defend his own right upon the matter, though he claim nothing in the patronage in the caſe aforeſaid; note *all the words*, for they *have all their weight*; for firſt the *incumbent muſt be a poſſeſſor*; ſo that if he have his preſentation, admiſſion, and inſtitution upon the lawful title, yet he remains as he was before, under the miſchief of the common law, becauſe he is not a poſſeſſor according to the letter of the law, but *by induction*. And further, that though he be a poſſeſſor, *he muſt*, by the letter and meaning of this law, *as well ſhew* and defend *his own right as counterplead his adverſary's*; and therefore clearly he cannot make himſelf parſon impariſonee of the preſentation of J. S. and defend himſelf by the title of J. D. under whom he claims not, though that were ſufficient to deſtroy the plaintiff's title, by confeſſing and avoiding, or the like; neither can he counterplead the plaintiff's title, but muſt alſo make a title to himſelf by the word and meaning of this law, which I ſpeak not to bind the incumbent by the patron's plea, whereof I will ſpeak hereafter when I come to the incumbent's plea; but touching plea of the *ordinary* upon this ſtatute, I hold plainly that he *can no otherwiſe plead than* he could *at the common law, but only where* * *he hath collated actually by lapſe*; for though the incumbent in by preſentation be alſo admitted to plead by the meaning of this law under the word (like caſe), becauſe the caſe is like indeed, yet the ordinary's caſe before actual collation, is no ways like in caſe; for he hath gotten no intereſt for himſelf nor his clerk in the church. And therefore if the incumbent, inſtituted only at the preſentation of another, be not within the relief, much leſs ſhall the ordinary, that hath no intereſt, but an office only, that ought to be indifferent to all patrons, and maintain no ſide. And yet more, *if the incumbent* which is inducted, be defendant in quare impedit (which may plead by the ſtatute) and do *reſign hanging the writ, he hath loſt his privilege of pleading to the title by the ſtatute*; for as it was granted him to defend his poſſeſſion, ſo when his poſſeſſion is gone, there is no cauſe for him to uſe it, which reaſon alſo turns ſtrongly againſt the ordinary, where there is no poſſeſſion under him; for *yet* that incumbent that hath reſigned *may plead, as he might have pleaded at the common law*. And note that caſe of the perſon reſigning hanging the writ, which the perſon may plead againſt him, to defeat him of his plea that he might once have had hanging the writ; whereas in a precipe quod reddat, if the tenant plead a releaſe, the demandant cannot ſay that he had aliened hanging the writ, but is eſtopped; the difference is, becauſe in that caſe of the præcipe, the demandant by his writ admits him tenant, but in the quare impedit he is not named an incumbent, but a diſturber only. Neither is the ſuit for the incumbency directly, but for the patronage or preſentation; and therefore in the writ of right of advowſon, the incumbent is never named; neither, if the defendant recover againſt his patron, ſhall he be removed. Per Hobart Ch. J. who ſaid that he had been the larger in this diſcourſe, becauſe he ſaw the inheritances of advowſon ſo incumbered by wilful uſurpations, and diſturbances of pretended patrons, ordinaries, and clerks, and the multiplicity and perplexity of ſeveral pleas of the defendants, be they never ſo many, whereof, if any one paſs againſt him, he is barred, and the uncertainty and variety of the learning upon it, that it is almoſt impoſſible, if a true patron be put to his action, but he will be tired. Hob 319, 320. Sir William Elvis v. Archbiſhop of York.

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2. The incumbent ſhould not have anſwered *to the title of the* patron *by the common law* in quare impedit, *but* now *by the ſtatute* he ſhall plead if the patron pleads faintly; but where his *patron* is *bound by judgment*, or ſuch like, the incumbent is bound likewiſe. Br. Encumbent, &c. pl. 8. cites 38 E. 3. 31. Per Thorpe.

Br. Quare Impedit, pl. 66. cites S. C.—Br. Encumbent, pl. 5. cites S. S.—— Fitzh. tit. Encumbent, pl. 4. S. P. cites M. 2 R. 2.

S. P. But if it had appeared, then he ſhould not be permitted to plead where the patron pleads, and therefore both iſſues were taken; and ſo ſee that the *ſtatute is not intended that the incumbent ſhall plead, but where the patron makes default*, or will not plead; quod nota, good reaſon. Br. Encumbent, &c. pl. 13 cites 39 E. 3. 30. ——— S. C. Cited 7 Rep. 26. a. in caſe of Hall v. the Biſhop of Bath and Wells.

3. Quare impedit *againſt T. & J. N. who was incumbent*, and *counted of the preſentation of his predeceſſor*, and *T. traverſed the preſentation, and made title to have writ to the biſhop*, and *J. N. pleaded the ſame plea*; and there it is ſaid, that *at the common law*, the incumbent ſhall have no plea, becauſe he has nothing in the advowſon, and the ſtatute was for the miſchief, that if the patron would not plead, the incumbent might plead; but now, when the patron pleads, there is no miſchief, and therefore the incumbent need not to plead; but Brooke makes a *quære*, if the patron will maintain the iſſue faintly; and after, becauſe it did not appear by the writ *that he is incumbent*, but ſtands indifferent, and where ſeveral are named, it may be that all are patrons, therefore the plea was ſuffered; quod nota. Br. Quare Impedit, pl. 104. cites 39 E. 3. 20.

So the *king* in a quare impedit *counted that king H. was ſeiſed, and preſented one A.* and *that king H. died, and ſo the advowſon deſcended to himſelf; that A. died, and he preſented B. and that now B. is dead*, and ſo it belongs to him to preſent. The defendant being *incumbent, traverſed the inſtitution and induction of B. without making title to himſelf.* Arg. Le. 46. pl. 58. cites 47 E. 3. 8.

4. In quare impedit by the king the *count* was, *that the king* himſelf *was ſeiſed, and preſented one B.* who at his preſentment was received, &c. and *that B. died*, by which it belonged to the king to preſent; the defendant being the *incumbent, pleaded that the ſaid B. is ſtill alive*; and that plea was allowed without any other title made to himſelf. Arg. Le. 46. pl. 58. cites 43 E. 3. 19.

In quare impedit the incumbent ſhall plead *againſt the king by the ſtatute*, and *againſt a † common perſon by the equity*; and quare impedit lies not againſt the incumbent alone, but where the pope or the king preſents. Br. Encumbent, pl 17. cites 9 H. 6. 30. —— S. P. Per * Babbington; but per Paſton he might have pleaded againſt a common perſon by the common law, but not againſt the king. Br. Quare Impedit, pl. 6. cites S. C. —— S. C. & P. cited 7 Rep. 26. in the caſe of Hall v. the Biſhop of Bath and Wells.—† S. P. Pl. C. 178. b. Mich. 4to. Mariæ in the caſe of Hill v. Grange.

5. Note, by the opinion of all the Juſtices that in *quare impedit* brought by another than the king *againſt patron and incumbent*, the *incumbent ſhall not have anſwer to the title of the patron*, becauſe *the ſtatute does not give it but againſt the king. Contra*, it is held *at this day by the equity of the ſtatute*. Br. Encumbent, pl. 3. cites 44 E. 3. 12.

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S. P. per Brud. Ch. J. Br. Preſentation, pl. 23. cites 14 H. 8. 2.

6. An incumbent ſhall plead *all pleas ſave thoſe which go to the right of the patronage*, and this it ſeems *by the common law*, but now *by the ſtatute* he may plead of the title of the patronage. Per Brudenel Ch. J. Br. Encumbent, &c. pl. 11. cites 14 H. 6. 31.

7. If the *patron* would *confeſs the action* or title, yet the *incumbent may plead in bar*. Br. Encumbent, &c. pl. 11. per Brudenel Ch. J. cites 14 H. 6. 31.

But Br. Quare Impedit, pl. 134. cites 16 E. 4. it was held per tot. Cur. that

8. Quare impedit, the *defendant ſaid, that T. H. is ſeiſed of the manor of D. to which the advowſon was and is appendant, and* the church voided by the death of G. and *T. preſented him, by which he was admitted 6 months before the writ purchaſed*, judgment actio. And per Danby he is only incumbent, and therefore the plea does not lie in his mouth; but per Newton & Cur. the patron

tron may have the plea, and ſo may the incumbent, the reaſon ſeems to be inaſmuch as *by the ſtatute* the incumbent may plead. Br. Quare Impedit, pl. 146. cites 22 H. 6. 14.

this was no *plea for the incumbent, nor for any other, but for him againſt whom the writ of right of advowſon* lies, which lies only againſt the patron; for to the writ it is no plea, becauſe he does not give a better writ againſt any perſon certain; and to the action it is no plea, becauſe he who pleaded it does not entitle himſelf to the patronage. Br. Plenarty, pl. 9. cites S. C.

9. The incumbent ſhall plead the *ſame plea as the patron* pleads; quod nota. Br. Encumbent, 1. cites 33 H. 6. 13.

10. Quare impedit by the abbot, and counted of a *voidance by deprivation of one J.* the *defendant ſaid that the church was full of himſelf 6 months before the writ purchaſed, and the ſaid J. made default in the ſame writ*, et non allocatur, *without anſwering to the deprivation;* and after he ſhewed how he had ſued repeal, and that he was in, and becauſe he did not plead certainly, therefore non allocatur. Br. Quare Impedit, pl. 113. cites 39 H. 6. 19.

11. In quare impedit *againſt two*, the *one pleaded as patron*, &c. and the *other pleaded the ſame plea, and that the patron preſented him to the biſhop, who would not admit* nor inſtitute *him, which is the the ſame diſturbance*, &c. and demanded judgment ſi actio. And per Brian and Hawes it is a good plea; for he cannot ſay, ne diſturba pas; for in fact this is a lawful diſturbance, and *at common law incumbent might plead againſt a common perſon, but not againſt the king*, quære inde; but this is now remedied by the ſtatute; but Keble contra, and that he cannot try the right of the patronage, and that *diſſeiſor, pernor, incumbent*, &c. *ſhall have plea to excuſe them, but not to try the right of the benefice;* quære, and ſee the ſtatute of Weſtminſter 2. cap. 5. of plenarty. Br. Quare Impedit, pl. 157. cites 2 H. 7. 14.

S. C. cited 7 Rep. 26. a. in the caſe of Hall v. the Biſhop of Bath and Wells.

12. The king brought a quare impedit *againſt the biſhop and his collatee by his lapſe;* the *biſhop pleaded a plea, which was held good*, and the *collatee pleaded that he is parſon imparſonee of the church aforeſaid ex preſentatione præfati epiſcopi in forma, & ex cauſa præallegata.* It was ſaid by Yaxley, that it ſhould be ex collatione, and not ex preſentatione; for that it is no more than collation; and Coningſby ſaid, that the plea of ex cauſa præallegata is not good by the incumbent where he does *not join in plea with the biſhop*, but *ſhall ſhew the matter as ſpecially as the ordinary, becauſe he is a ſtranger to the plea of the ordinary;* and the juſtices ſaid plainly, that the plea of the incumbent is not good, pro cauſa antedicta. Br. Quare Impedit, pl. 91. cites 14 H. 7. 21. 15 H. 7. 6. & 7 & 8.

S. P. For the *plea of the incumbent ought not to refer to the plea of the biſhop.* Br. Encumbent, pl. 6. cites 14 H. 7. 21.

13. Where a clerk is in *without preſentation* (as where the dean and chapter of Paul's preſented the dean by the name of B. and not by the name of dean, and this preſentation was alſo without writing) *or by prayer to be admitted*, ſuch incumbent is not aided by the ſtatute to plead in bar; for there is no preſentation in either of thoſe caſes; and the *ſtatute requires an incumbent preſented.* Jenk. 199, 200. pl. 18. cites it as reſolved.

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14. An incumbent preſented and inducted may at this day plead the right of patronage of his preſentor, where the patron confeſſed, or made default, or pleaded faintly; but *cannot plead the right of patronage in another* than in him who preſented him, Jenk. 200. pl. 18. ſays it was ſo reſolved; and that ſo are 16 E. 4. & 14 H. 8. to be underſtood.

15. When the *incumbent pleads the preſentment of a ſtranger*, he muſt *ſhew that the ſtranger had a title*, and that he was ſeiſed of the advowſon, &c. or that he was ſeiſed of a manor, to which, &c. *But* where he pleads that he was *in for ſix months of the preſentment of the plaintiff* himſelf, *or by collation by lapſe* by the ordinary, there he need not make any title. Agreed per Cur. Noy, 30. in the caſe of Liſter v. Crameel.

Het. 17. S. C. adjudged.—Hutt. 96. S. C. but S. P. does not appear.

16. In quare impedit the defendant, the incumbent, pleaded, *that he is perſona imperſonata* of the ſame church *ex preſentatione regis*, &c. exception was taken, becauſe he ſaid he was perſona imperſonata, and does *not ſay, tempore impetrationis brevis*, ſed non allocatur; for it is inferred by the writ brought againſt him, and if he be parſon imparſonee before the writ brought againſt him, it is ſufficient, and divers precedents were cited in the New Book of Entries, as fol. 494. 405. 407. to that purpoſe. Cro. C. 104, 105. pl. 6. Hill. 3 Car. C. B. Lady Chicheſley v. Thompſon and the Biſhop of Ely.

17. Adjudged that the incumbent cannot plead to the title of the parſonage, that he *eſt perſona imperſonata* of the preſentation of the patron, and the ſaying that *fuit* is not ſufficient. Agreed. March. 159. Hill. 17 Car. Palmer v. Hudde.

(B. d. 13) *Double* Pleas.

Br. Double, pl. 134. cites S. C. accordingly.

1. THE *king brought quare impedit, and intitled himſelf to the moiety of the advowſon, becauſe the father of the defendant was ſeiſed and preſented*, &c. *and died, and the defendant, heir to him, was outlawed in treſpaſs, and the church voided by the death of the incumbent of the father*, &c. The *defendant ſaid that the church is ſevered into 3 parts, and ſhewed certain, abſque hoc that the ſaid incumbent was in by the preſentment of the father of the defendant*, and the plea awarded double, viz. *the church divided into 3 parts*, which by the juſtices, is a good plea to the writ, and the *traverſe goes in bar* of action; quod nota. Br. Double, pl. 85. cites 22 Aſſ. 33.

Br. Double, pl. 134. cites S. C.

2. In quare impedit the defendant pleaded, that *N. the tenant granted the land, and the advowſon to him, who preſented twice, and ſhewed who, and ſo is he ſeiſed of the advowſon*, &c. and note the laſt preſentment goes to the writ, and the deed of the grant to the action, and ſo double; but becauſe he *concluded upon the one matter*, viz. the ſeiſin, &c. therefore it is not double. Br. Double, pl. 56. cites 24 E. 3. 37.

3. In *quare impedit*, the *plaintiff entitled himſelf as appendant to his land in ward*; the *defendant ſaid, that after the death of the anceſtor*,

ceſtor, he entered, and is yet ſeiſed, abſque hoc, that the plaintiff is poſſeſſed of the land, and that the anceſtor of the infant held of one A. who held over of the plaintiff, abſque hoc, that he held immediately of the plaintiff. This is double. Br. Double, pl. 135. cites 24 E. 3. 55.

4. *Two preſentments of fee ſimple are double;* contra, upon eſtate tail. Br. Quare Impedit, pl. 101. cites 24 E. 3. 77.

In quare impedit, the plaintiff made *title by gift in tail, and alleged one preſentment in the donor, and another in the donee*; and the beſt opinion was, that *it is not double*; for to ſay that ne dona pas anſwers to all, and ſo of ſeveral deſcents 33 H. 6. And it was ſaid that one preſentment may be alleged in the anceſtor, and another in the guardian by chivalry by nonage of the heir, and good. Br. Quare Impedit, pl. 125. cites 4 E. 4. 3.—Br. Double, pl. 97. cites S. C.

* *Two preſentments* alleged, are double; per Brooke, but Brudnell contra; for the *firſt ſhall be taken for title*, and the *other for conveyance only*. Br. Quare Impedit, pl. 149. cites 12 H. 8. 12.——S. P. Br. Double, pl. 112. cites 13 H. 8. 13.

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5. In *quare impedit* the *plaintiff counted that the abbot and his predeceſſors have uſed time out of mind at every avoidance of the churches of C. to preſent a clerk to the plaintiff and his anceſtors, and he over to the biſhop, and alleged poſſeſſion that he had ſo preſented C. B. who was admitted and inſtituted; and that C. B. after reſigned, and the abbot has preſented to the ordinary now immediately, and ſo diſturbed him.* And per Grene and Skip. *Preſcription* and the *poſſeſſion alleged by the laſt preſentment* is double; and the ſame law of 2 preſentments, quod concordatur in the caſe of ODINGSELS, 33 H. 6. Br. Double, pl. 67. cites 24 E. 3. 78.

6. *Quare impedit by the* † *king*, and he *counted upon 2 preſentments*, and not double. *Contra in caſe of a common perſon.* Note a difference. Br. Double, pl. 22. cites 43 E. 3. 14.

† S. P. For he *may plead ſeveral matters*, and the party ſhall anſwer to all; quod nota. Br. Double, pl. 57. cites 14 H. 7. 26.——S. P. For he may allege as many preſentations as he will; quod nota; per Cur. quia rex, &c. per *prerogitivam*. Br. Double, pl. 82. cites 38 H. 6. 33.

7. In *quare impedit* the *defendant pleaded to the writ, that where the plaintiff ſuppoſed the voidance by the death of R. it voided by the death of W.* judgment of the writ, *and that the brother of the plaintiff, whoſe heir he is, aliened one acre and the advowſon appendant to the brother of the defendant, whoſe heir he is, and his brother preſented, and the church voided*, &c. and not double; for he who pleads to the writ in quare impedit ought to make title; for otherwiſe they ſhall not have writ to the biſhop; quod nota. Br. Double, pl. 23. cites 43 E. 3. 25.

8. *Quare impedit by the king by reaſon of the avoidance during the temporalties of the biſhop being in his hands;* the *defendant ſaid, that the church did not void whilſt the temporalties were in the king's hands, and pleaded ratification of the king of the preſentation;* this is double. Contra, if he relies upon ratification of the king; but after he waved the plea, therefore quære. Br. Double, pl. 125. cites 7 H. 4. 37.

9. *Quare impedit by the king againſt* a *prior who had taken gift of a manor and advowſon in fee to hold in proper uſe without licence*, and the *prior pleaded letters patents of the king made to him then tenant of the manor, and this by conceſſimus & confirmavimus*, and by judgment

But Brooke ſays, ſee often elſewhere that a *feoffment with war-*

ment this is ſingle enough; for by reaſon it was pleaded to the prior, then tenant of the land, it cannot enure by way of grant, but by way of confirmation only. And per Cheney and Weſtbury, becauſe it is *all by one deed, which is entire*, it cannot be double. Br. Double, pl. 9. cites 6 H. 6. 22.

ranty is double *if he does not rely upon the warranty.* Br. Double, pl. 9. cites 6 H. 6. 22. Br. Double, pl. 17. cites 33 H. 6. 12, 13. accordingly. —— For where a *man entitled himſelf to a villein regardant or common appendant*, and *the other alleged urity of poſſeſſion in the manor or land to which*, &c. and *traverſed the regardancy or appendancy*, this is double; for *each is ſufficient matter*. Per Priſot, ibid.

10. Quare impedit brought by H. againſt B. and the biſhop and the incumbent, and *counted that he was ſeiſed of the advowſon as in groſs, and this as of fee and of right*, &c. *and preſented T. his clerk who was admitted*, &c. *in time of peace*, &c. *and died*, &c. *and the church now void; and he preſented, and the defendants diſturbed him. B. ſaid, that W. was ſeiſed of the manor of D. to which the advowſon was appendant, and preſented his clerk, and after W. infeoffed S.*, &c. *who gave in tail to the baron and feme, who were ſeiſed, and preſented, and conveyed the manor to the defendant as heir in tail; and that he leaſed to Q. for ten years, during which term the plaintiff preſented by uſurpation, and now the term is determined, and ſo now it belongs to him to preſent*; and ſo by the title and uſurpation he confeſſed, and avoided the plea of the plaintiff. The *plaintiff ſaid, that during the gift in tail F. his anceſtor, whoſe heir*, &c. *preſented one D.* his clerk, *who was admitted*, &c. *Abſque hoc that the church was appendant to the ſaid manor at the time of the gift, or ever after*; and the opinion of * the Court was, that this is *double*; for the preſentment before the gift made the advowſon in groſs againſt all; and the traverſe of the appendancy is another matter, and therefore double. But by all the juſtices, if the plaintiff had *ſaid, that he himſelf preſented, as he declared, abſque hoc that the advowſon was appendant at the time of the gift*; this had been a good plea. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12. 32. 34 H. 6. 11. 38. And 35 H. 6. 18.

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And per Priſot and 2 others, *of advowſon in groſs*, if the *plaintiff counts of ſeveral preſentments*, this is not double; for none is traverſable but the laſt preſentment, and if the laſt be omitted, the defendant may plead it in abatement of the count. Br. Double, pl. 16. cites 33 H. 6. 32.

11. In *quare impedit* the *plaintiff counted that* one *J. S. was ſeiſed of the manor of D. ad quod advocatio prædicta pertinet, and preſented one J. N. and alleged gift in tail to one M. his anceſtor, and deſcent, and that the heir preſented upon another avoidance; and* though he *alleged ſeveral deſcents to himſelf as heir*, yet upon long argument it was agreed, that the count was enough ſingle; for the *gift* is the effect, and only traverſable; and the *deſcents are only conveyances*, and therefore it is not double; and ſo judgment, quod reſpond' ultra; but Littleton prayed bill to be ſealed of the exception, and had it. Br. Double, pl. 16. cites 33 H. 6. 32.

12. In *quare impedit* the *defendant ſhewed conveyance of eſtate in tail*, viz. *ſeiſin in fee in M. who made a feoffment in fee of the manor and advowſon appendant, and retook in tail; and after diſcontinued the manor, and after preſented to the advowſon*, &c. his clerk, *and* then he *died, and ſo conveyed remitter to the iſſue in tail*; and this matter is not double, for he cannot convey the *remitter* without expreſſing theſe matters, which are the *conveyance of it*, and cannot aver the one without the other; and therefore it is not double. Per Vaviſor,

viſor, Davers, and all; for the one cannot appear without the other. Br. Double, pl. 92. cites 5 H. 7. 36.

13. In quare impedit the *one preſentment in the anceſter of the plaintiff* and the *other in the guardian* is not double. Br. Double, pl. 150. cites 4 E. 4. 3. and 7 E. 4. 20.

In *quare impedit* the *plaintiff alleged, that N. P. held of him certain land and an advowſon, in chivalry, and preſented, &c. who was received, &c. and that a guardian in right of the heir preſented, &c. and that N. tenant is now dead, &c. the heir in his ward, and ſo it belongs to him to preſent,* &c. and the count awarded good notwithſtanding the 2 *preſentments*, for it is *purſuant*; for the preſentment of the guardian only is no title. Br. Double, pl. 56. cites 24 E. 3. 37. —— Br. Double, pl. 134. cites S. C. accordingly. —— Br. Quare Impedit, pl. 88. S. C.

14. *So* of the *one in the anceſtor*, and the *other in tenant for life.* Br. Double, pl. 150. cites 4 E. 4. 3. and 7 E. 4. 20.

15. *Quare impedit by M.* and *counted that J. was ſeiſed of a manor ad quod*, &c. *and after conveyed the manor to the king by act of parliament, and the church voided, and the king granted the ſame avoidance to the plaintiff; and by the ſame patent granted to him the fee ſimple of the advowſon; and that the plaintiff preſented after the grant, and the defendant diſturbed him;* and the defendant demurred for doubleneſs, and yet the plaintiff recovered by award; for the firſt preſentment, and the act of parliament, and the grant, and the preſentation of the plaintiff, is only *conveyance.* Br. Double, pl. 162. cites 10 H. 7. 7, 8.

(B. d. 14) Pleas in *Bar.*

1. THE *king* brought quare impedit, and *counted of a preſentation by J. S. who was ſeiſed in fee*, &c. *and of two others in himſelf by the ward of the heir of the ſaid J. S.* and that the church is now void, and it belonged to him to preſent, and the defendant diſturbed him. Caund. ſaid, *the clerk alleged by the king to be inſtituted*, &c. *by the ſaid J. S. was not received nor inſtituted by the preſentation of J. S.* and it ſeems to be a good plea; for the 2 preſentments of the king during the cuſtody does not make title to him nor to the heir, without alleging ſeiſin by preſentment in the anceſtor of the heir, or in the feoffor of the anceſtor of the heir, et adjornatur. Br. Quare Impedit, pl. 143. cites 42 E. 3. 4. [453]

2. A man may plead *warranty and aſſets deſcended* to bar the plaintiff in quare impedit, or to have ſcire facias after, if he has not aſſets now. Per Finch. quod Mowbray conceſſit. Br. Quare Impedit, pl. 31. cites 43 E. 3. 24. Br. Aſſets per Deſcent, pl. 32. cites 43 E. 3. 26. S. P.

3. Leſſee may *recover twice in two quare impedits againſt ſeveral diſturbers, by ſeveral writs of quare impedit.* Br. Parliament, pl. 8. cites 46 E. 3. 4.

4. *Releaſe of actions real* is a good plea in quare impedit. Br. Quare Impedit, pl. 7. cites 9 H. 6. 56. But per Rolfe, if one recovers in quare impedit, and dies, his heir ſhall not have execution, and therefore it is not an action real. Ibid.

Releaſe of actions perſonal is a good bar in quare impedit. Per Porting. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

5. If

5. If the plaintiff be *nonſuited* in quare impedit after title made, this is a good bar in another quare impedit, as nonſuit in writ of right after appearance. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

6. The *ordinary cannot plead in bar* in quare impedit *as ordinary*; per Bingham. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

Mo. 455. pl. 625. S.C. —Cro. E. 518. pl. 44. Mich. 38 & 39 Eliz. Fitton and the Counteſs of Northumberland & al. v. Hall & al. S. C.

7. There were *ſeveral perſons and their wives plaintiffs* in a quare impedit, the defendant pleaded the *releaſe of one of the huſbands pending the writ*; adjudged, that this goes only in bar of him who made it and his feme, and that the writ ſhall ſtand good for the reſt. 5 Rep. 97. Mich. 39 & 40 Eliz. C. B. the Counteſs of Northumberland's caſe.

See Traverſe.

(B. d. 15) Pleadings. *Traverſe; neceſſary*, in what Caſes.

1. IN quare impedit, if the plaintiff makes *title as appendant to ſuch land*, the defendant *ſhall not ſay that it is in groſs or appendant to other land, without ſaying how, and traverſing the plaint.* Br. Quare Impedit, pl. 7. cites 9 H. 6. 56.

S. C. cited accordingly, Vaugh. 16. in caſe of Sir John Tufton v. Sir Richard Temple, that the plea was allowed a good plea without anſwering to the appendancy alleged by the plaintiff, which is in effect avoided by the defendant's preſentation after, and that in this caſe the plaintiff was without remedy, (unleſs he could traverſe the preſentation alleged by the defendant) otherwiſe than by his writ of right of advowſon.

2. The *plaintiff* in quare impedit *ſaid, that he was ſeiſed of two acres in D. with the advowſon appendant, and preſented*, &c. and now the church is void again, and he preſented, and the defendant diſturbed him; the *defendant ſaid, that after the firſt preſentation of the plaintiff he himſelf was ſeiſed of the advowſon as of groſs, and the church voided, and he preſented, and his clerk in*, and now it is void again, and he preſented, prout ei licuit, &c. and well, without traverſing the appendancy. Br. Confeſs and Avoid, pl. 60. cites 15 H. 6. and Fitzh. Quare Impedit, 77.

[454] Br. Quare Impedit, pl. 17. cites S. C. and P. and ſays, that then the defendant would have alleged that the advowſon is *appendant to every ſecond avoidance, and in groſs to every other avoidance to the plaintiff*, & non allocatur; for his own plea proves that he has but the one moiety of the advowſon appendant, and that the plaintiff has the other moiety in groſs; quod nota, per tot. Cur.

3. In quare impedit, the plaintiff *counted, that the advowſon is in groſs, and entitled himſelf*, &c. The *defendant ſaid, that the moiety is to him appendant to his manor of D. and entitled himſelf to every 2d preſentment*, and the plaintiff to every ſecond preſentment *as in groſs, and that this is his turn*; this is no plea without *traverſe that the advowſon is not in groſs*, prout, &c. for otherwiſe it is only argument; for he has not confeſſed and avoided, nor traverſed. Br. Traverſe per, &c. pl. 31. cites 35 H. 6. 32, 33.

But againſt the king he can *not* traverſe the title of the king without entitling himſelf; per Noting. Ch. Baron, which Brian denied; but erroneouſly, as it ſeems. Ibid.

4. Between common perſons the *defendant may traverſe the title of the plaintiff without entitling of himſelf*, but then *he ſhall not have writ to the biſhop.* Br. Quare Impedit, pl. 138. cites 21 E. 4. 1. 3. Per Noting. Ch. Baron.

5. In

5. In quare impedit the *plaintiff ſaid, that he preſented J. S. who was admitted, inſtituted,* &c. and after *J. S. reſigned,* and *he preſented, and the* * *defendant diſturbed,* &c. The *defendant ſaid, that before the preſentment of the plaintiff he himſelf preſented the ſaid J. S. who was admitted,* &c. *and after the plaintiff preſented this ſame J. S.* the ſaid *J. S. then being incumbent there,* and ſo the preſentment of the plaintiff void, and no plea; per Brian and Vaviſor; inaſmuch as the defendant *did not traverſe that the church was not void at the time of the preſentation of the ſaid plaintiff;* but Townſend e contra, inaſmuch as the lay gents cannot take conuſance of the voidance; but at laſt Keble took the traverſe. Br. Quare Impedit, pl. 164. cites 11 H. 7. 17.

* The word in Brook is (plaintiff), but ſeems miſ-printed in all the editions, and the word in the Year-book is (defendant.)

6. Where the *plaintiff makes title by appendancy,* and the *defendant alleges two preſentments after,* there he *need not traverſe the appendancy;* for uſurpation is ſufficient title in quare impedit. Br. Quare Impedit, pl. 149. cites 12 H. 8. 12.

7. In quare impedit the plaintiff *counted that he was ſeiſed in fee as of groſs, and preſented A.,* &c. and after he died, and he preſented now and is diſturbed, &c. The *defendant ſaid, that before this he was ſeiſed in fee as of groſs, and preſented B. who was admitted,* &c. *and after he granted the next preſentation to the plaintiff who preſented A. and he died, and ſo now it belonged to the defendant to preſent,* and did not traverſe the ſeiſin in fee of the plaintiff; and well per Fitzherbert clearly, for he has confeſſed and avoided it; quod mirum. Br. Confeſs and Avoid, pl. 1. cites 26 H. 8. 4.

Br. Traverſe per, &c. pl. 2. cites S. C.

(B. d. 16) Pleadings. Traverſe. *Good;* in what Caſes.

1. IN quare impedit, the *laſt preſentment* is traverſable, and *not the preſcription alleged;* quod nota. Br. Traverſe per, &c. pl. 99. cites 22 H. 6. 26.

Br. Quare Impedit, pl. 83. cites 22 H. 6. 25. S. C. per tot. Cur.

2. *In quare impedit, where the king is entitled to the manor and advowſon appendant by ward of the heir of his tenant, and alleges preſentment in the anceſtor of the plaintiff, and that the ward fell to him, and the defendant makes title to him as in groſs, and traverſes the preſentment,* this is * not good; for he *ſhall traverſe the appendancy;* becauſe this is the title of the king; quod nota, by all the juſtices after great argument. Br. Traverſe per, &c. pl. 257. cites 20 E. 4. 13 & 14.

But between common perſons the preſentment ſhall be traverſed, and not the appendancy; for the preſentment makes poſſeſſion; per Callow. Br. Traverſe per, &c. pl. 257. cites 20 E. 4. 13, 14.——*But yet where both the parties claim by one and the ſame perſon,* and the one claims in groſs, and the other as appendant, there the appendancy ſhall be traverſed; per Collow; to which Littleton and Bryan, Juſtices, agreed. Br. Ibid.——Br. Traverſe de Office, pl. 40. cites 20 E. 4. 14. and 21 E. 4. 1. S. C.

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3. In quare impedit, the *plaintiff made title that his mother was ſeiſed and preſented, and ſhe died, and the church voided, and the biſhop preſented;* and *the biſhop ſaid, that the church voided in the time of the mother of the plaintiff, by which he preſented by lapſe,* abſque hoc *that the church voided after* the death of the mother of the

Br. Negativa, pl. 37. cites S. C.

the plaintiff, and the Court held the abſque hoc good. Br. Traverſe per, &c. pl. 175. cites 1 H. 7. 9.

S. C. cited by Vaughan Ch. J. Vaugh. 9. in caſe of TUFTON v. TEMPLE. Hill. 17 & 18 Car. 2.

4. In quare impedit, the *plaintiff ſaid, that he was ſeiſed of the advowſon*, &c. *and preſented, and now the church is void*, &c. The *defendant ſaid, that it is appendant to the manor of D. whereof his anceſtor was ſeiſed and preſented, and conveyed the manor to himſelf by abſque hoc that the advowſon is in groſs*; and no plea, by reaſon that he did *not deny the preſentment of the plaintiff*, which is material if the advowſon be in groſs or not, and therefore it was adjudged, that he ſhould traverſe the preſentment, and not the being in groſs. Br. Traverſe per, &c. pl. 384. cites 10 H. 7. 27.

——*But* it was agreed, that *if the plaintiff entitles himſelf by preſentation as appendancy, and the demandant pleads another plea, abſque hoc that the advowſon was appendant*, this is a good traverſe. Br. Traverſe per, &c. pl. 384. cites 10 H. 7. 27.——*So if he traverſes the preſentment*; *for every of them deſtroys the declaration of the plaintiff.* Br. Ibid.

Quare impedit by Lord Buckhurſt againſt the Biſhop of Chicheſter, and T. Bickley, for the vicarage of Weſtfield, and *counts, that the advowſon of the vicarage appertains to the rectory of Weſtfield, whereof he was ſeiſed in fee, &c. and preſented M. Sackvil, who was admitted, &c. and inducted*, and that the vicarage *was of the yearly value of 8 l. and void by his acceptance of another benefice, and the plaintiff preſented*, and the defendants diſturbed him, &c. The *biſhop pleaded, that* Richard *his predeceſſor was ſeiſed* of the advowſon of the ſaid vicarage *in fee, as of an advowſon in groſs, and collated* to it (being void) one Maurice Berkley, who was inducted; that the ſaid biſhop died; that the defendant was created biſhop, and ſo became ſeiſed of the advowſon, and being ſo ſeiſed the church became void, the ſaid M. S. having taken another benefice with cure, and he collated the other defendant T. Bickley, and *traverſed that the vicarage appertained to the ſaid rectory*; and the ſaid Bickley pleaded the ſame plea. And upon a ſpecial demurrer to theſe pleas, for that the appendancy was not traverſable, the court agreed, that (though in many caſes the books are, that the appendancy is traverſable, yet) *as this caſe is* here, *the appendancy is not traverſable*; for the *material parts* of the declaration *are the ſeiſin in fee, the preſentation*, the *admiſſion and inſtitution* of his clerk *and the avoidance*, ſo that it is not material, whether the advowſon was appendant or in groſs; and therefore when the appendancy ſhall be traverſed, it ought, upon the matter ſhewn, to be material, or elſe the traverſe is ill. As if the plaintiff counts of a ſeiſin of an advowſon in groſs, and that he preſented, and the church became void, &c. if the defendant ſays, that he was ſeiſed of the manor to which the advowſon belongs which became void, and he preſented, abſque hoc, that the advowſon was in groſs; the court held this to be no plea, and cited 10 H. 7. 27. and it was ſaid, that notwithſtanding the book there, the law will be the ſame, where the plaintiff makes title as to an advowſon appendant, and divers books were cited; the court adjudged the plea ill 35 H. 6. 32. and there were alſo cited 27 H. 9. 33 H. 6. 12. 32. 34. nota thoſe and other books And. 269. pl. 276. Paſch. 33 Eliz. Lord Buckhurſt v. Biſhop of Chicheſter and Bickley.——S. C. cited Vaugh. 10. and Ld. Vaughan ſays, pag. 11. that the caſe of 10 H. 7. was principally relied on as warranting the judgment, which he ſays it fully does, it being adjudged for the ſame reaſon there, that the ſeiſin in fee of the advowſon in groſs was not traverſable but the preſentation was, as it was in this caſe adjudged that the appendancy was not traverſable but the preſentation. And Ld. Vaughan ſaid he obſerved, that in LD. BUCKHURST'S CASE it is admitted, that the plaintiff in the caſe of 10 *H.* 7. *did count that he was ſeiſed of the advowſon in groſs and preſented*, whereas he ſaid, he noted that the original caſe in the book is, that *he counted only upon his preſentation*, and ſays, that probably it was ſo for the reaſons given by Lord Hobart in DIGBY'S CASE, that *a bare preſentment is only militant when ſo alleged by the plaintiff, and may be in ſuch a caſe as may prove the defendant to have a right of preſenting at the preſent avoidance, if no right be alleged by the plaintiff why he ſhould preſent*; whence he collects, that in both theſe caſes of 10 H. 7. and this of the Lord Buckhurſt, though there were a manifeſt inconſiſtency in the firſt caſe between the plaintiff's count, that he was ſeiſed of the advowſon in groſs, and preſented, and the defendant's title, that he was ſeiſed of a manor to which the advowſon was appendant (for it was impoſſible it ſhould be appendant for the defendant, and in groſs for the plaintiff) and in the LD. BUCKHURST'S CASE, who counted that he was ſeiſed of the rectory of Weſtfield, to which the advowſon of the vicarage belonged, and the defendant made title, that he was ſeiſed of the advowſon in groſs, which titles * were directly inconſiſtent, yet neither the ſeiſin in groſs in the firſt caſe, nor the appendancy in the laſt caſe were traverſable, but the preſentation of the plaintiffs in both, which made their immediate titles to preſent at the next avoidance, whether there were a ſeiſin in groſs, or an appendancy or not when they firſt preſented. As in theſe two caſes the true reaſon of the law appears, why the ſeiſin in groſs of the advowſon nor the appendancy of the advowſon alleged by the plaintiffs were not traverſable, but only the preſentation, by theſe caſes the Lord Hobart's ſcruple in DIGBY'S CASE is ſatisfied, where he thinks, that if a man has gained a title by uſurpation, at the next avoidance he muſt not declare, that he was ſeiſed in fee formerly of the advowſon, and preſented; but muſt declare ſpecially of the true patron's former preſentation, and then the church becoming void, that himſelf preſented, leaſt otherwiſe by declaring that he was ſeiſed of the advowſon in fee, the

defendant ſhould trace him by traverſing his ſeiſin, which was falſe, when in truth he had a right to preſent by uſurpation; for by theſe caſes it is clear, that the ſeiſin in groſs nor appendancy are traverſable, though alleged by the plaintiff when he has gained a title by uſurpation, but the preſentation ought to be traverſed.—But if the plaintiff declare the advowſon to be appendant to a manor, and withal ſets forth in his declaration the letters of preſentation to the church as appendant, there the defendant may traverſe either the appendancy or the preſentation; for though the advowſon were appendant, yet if the plaintiff preſented not, he had no title. Whence he infers, that if the plaintiff had counted of a ſeiſin of the manor, to which the advowſon was appendant, without ſhewing the preſentment to be to the church by virtue of the appendancy, the traverſe of the appendancy had not been good; but it muſt have been of the preſentation, which might have been by uſurpation, notwithſtanding the alleging barely of the appendancy, as is reſolved before in the point in the LORD BUCKHURST'S CASE in Anderſon, and in the principal caſe of 10 H. 7. But when the count is of the appendancy of the advowſon, and alſo of the preſentation to it as appendant, there could be no uſurpation according to the reſolutions in SIR HENRY GAUDIE'S CASE in the Lord Hobart, and in GREEN'S CASE in the 6th report of the Lord Cook; and he ſaid, that the not obſerving of this difference made the reporter at the end of the LORD BUCKHURST'S CASE deny this latter part of the caſe in 10 H. 7. becauſe it was clearly againſt the reaſon of the principal caſe in 10 H. 7. and againſt the reſolution of the LORD BUCKHURST'S CASE, if the words of ſhewing the preſentment to have been as appendant had been omitted in the caſe; but thoſe words make the latter caſe in 10 H. 7. exactly to agree with the judgments both in Sir Henry Gaudie's caſe in Hob. and Green's caſe in the 6th Rep. Per Vaughan Ch. J. Vaugh. 15. in caſe of Tufton v. Temple.

5. Where the *title of the plaintiff is to the manor and advowſon appendant*, and that the *defendant diſſeiſed him of the manor*, and the *defendant ſays, that it is appendant to four acres, whereof J. N. was ſeiſed and infeoffed him*, there the *diſſeiſin* of the manor *is not traverſable, but if* it was *appendant to the manor or to the four acres*; quod nota. Br. Traverſe per, &c. pl. 8. cites 27 H. 8. 29.

Br. Quare Impedit, pl. 4. cites S. C. —S. C. cited by Vaughan Ch. J. Vaugh. 12. Hill. 17 & 18 Car. 2. and ſays, this traverſe was adjudged not good; for the diſſeiſin or non-diſſeiſin of the manor was not material to intitle the plaintiff to the qua. imp. but all his title was by the appendancy of the advowſon to the manor, and therefore the traverſe ought to have been, and was ſo reſolved, to the appendancy, which deſtroyed the plaintiff's entire title to preſent, and was alſo inconſiſtent with the defendant's appendancy of the advowſon to his 4 acres.

6. In a quare impedit for the church of Chelmsford the plaintiff *ſet forth, that Sir T. M. was ſeiſed and preſented P. and then leaſed the manor, to which the advowſon was appendant, to the plaintiff, and that the church became void by the reſignation of P.*, &c. whereupon it belonged to the plaintiff to preſent. The *defendant confeſſed the title of Sir T. M. and the leaſe* made to the plaintiff, *and pleaded over a ſimoniacal contract, upon which P. was preſented, which being void* by the ſtatute of 31 Eliz. *the king preſented the defendant, who was* admitted, inſtituted, and *inducted* thereon, *abſque hoc, that the church became void by the reſignation of* P. and upon demurrer it was objected, that this traverſe is ill; for the preſentation is the principal thing, which being confeſſed and avoided, cannot be traverſed; but all the court conceived the plea good; for the plea makes the traverſe argumentative only, that he might not reſign; and being alleged that the church is void per mortem vel reſignationem, or otherwiſe it ought to be confeſſed or traverſed; for that is the cauſe of his preſentment, and the *iſſue ought to have been ſi vacavit per mortem, vel deprivationem, vel reſignationem*; for *the preſentation, admiſſion, and inſtitution are conducing only to the reſignation*, and the reſignation or avoidance is the chiefeſt matter. Cro. J. 61. pl. 6. Mich. 2 Jac. C. B. Fenner v. Nicholſon and Paſfield.

S. C. Litt. Rep. 14. argued, but no judgment.—Vaugh. 16. in the caſe of Sir John Tufton v. Sir Richard Temple, cites S. C. and ſays, that becauſe the defendant doth admit the advowſon to be in groſs, or appendant, in the plaintiff, and that neither of them is inconſiſtent with the title made by the defendant, he ſhall not traverſe the ſeiſin in groſs, nor the appendancy; but becauſe ſomewhat elſe is neceſſary to give the plaintiff right

right to preſent, viz. the vacancy of the church, either by death or reſignation, or deprivation, which the plaintiff muſt allege, and which are inconſiſtent with the defendant's title, who claims not by vacancy by death, reſignation, or deprivation, but by the ſimony, therefore he ſhall traverſe the vacancy alleged either by death, reſignation, or deprivation, as the caſe falls out, without one of which the plaintiff makes no title, and if the preſent vacancy be by either of them, the defendant hath no title.

S. C. cited in the caſe of Sir John Tufton v. Sir Richard Temple, Vaugh. 13. and there ſays, that in this caſe the traverſe of the appendancy by the defendant was clearly good, and ſo admitted; for the plaintiff Gawdy had no more, nor other title to preſent, than by the appendancy of the advowſon to the manor, and the incumbent's death; and the appendancy to the

7. Sir Henry Gawdy knt. brought a quare impedit againſt the archbiſhop of C. Sir W. B. and H. R. clerk, and *counted that Sir R. S. was ſeiſed of the manor of Popenho in Norfolk, to which* the advowſon was appendant, *and preſented M.* his clerk, *who was inſtituted and inducted*, and that Sir R. ſo ſeiſed, *bargained and ſold the manor to* one *Barow, who being ſeiſed, the church became void by the death of M. and ſo continued for* 18 *months, whereby the queen*, in default of the patron, ordinary, and metropolitan, *preſented* by lapſe *one Snell, and* by mean conveyances *derives the manor*, to which the advowſon is appendant, *to himſelf, and that by Snell's death it belongs to him to preſent*, and is diſturbed by the defendants; the archbiſhop claims nothing but as ordinary ſede vacante of the Biſhop of Norwich. Sir W. B. pleaded ne diſturba pas, and H. the preſent *incumbent pleaded, that he was parſon by the king's preſentation; and that long before Sir R. any thing had in the manor, Q. Elizabeth was ſeiſed* of the advowſon *in groſs in right of the crown, and preſented Snell*, and that ſhe dying ſeiſed, *the advowſon deſcended to king James, and he*, being ſeiſed and the church becoming void by Snell's death, *preſented the defendant H. R. who was inſtituted and inducted, abſque hoc, that the advowſon was appendant* to the manor of Popenho, and thereupon iſſue was joined. Hob. 301. pl. 380. Hill. 17 Jac. Gawdy v. the Archbiſhop of Canterbury & al.

manor was inconſiſtent with the defendant's title by the advowſon's being in groſs. And this proves that the traverſe is *well taken to the appendancy* of the advowſon *when it is all the plaintiff's title to preſent, and is inconſiſtent with the defendant's. But in Gawdy's caſe, the jury found ſpecially, that Sir R. S. was ſeiſed of the manor with the advowſon appendant, and preſented, and that the incumbent dying the ſecond of February* 1588, *the queen, the* 15th *of Feb. the ſame year, preſented Snell to the church then void per mortem naturalem ultimi incumbentis ibidem vacantem, et ad noſtram præſentationem jure prerogativæ coronæ noſtræ Angliæ. ſpectantem, and her clerk inſtituted by letters of inſtitution running per dominam reginam veram & indubitatam, ut dicitur, patronam.* And *after the death of Snell, King James preſented H. Rone* in theſe words; *ad noſtram preſentationem, ſive ex pleno jure, ſive per lapſum temporis, ſive alio quocunque modo ſpectantem, and referred to the court, whether the advowſon were appendant the manor or not*; it was adjudged, 1ſt, That the advowſon remained appendant, notwithſtanding the queen's preſentation. 2dly, That her preſentation could not be by lapſe; for her preſentation, inſtitution, and induction were in the ſame month of February, wherein the avoidance was. 3dly, If the queen had preſented by lapſe, it had made no ſeverance of the advowſon. 4thly, That the queen's preſentation made no uſurpation, becauſe ſhe preſented, as ſuppoſing ſhe had a title in the right of her crown, as appeared by the form of her preſentation, which is very remarkable, and therefore her preſentation was merely void; for it ſhall not be intended, the queen took away another's right againſt her own will and declared intention. 5thly, For the ſame reaſon King James's preſentation of Rone, who by the form of his preſentation ſuppoſed he had a good title, when he had none, was alſo void; and this agrees with the reſolution in Green's caſe the 6th Rep. that the Queen's preſentation, as made by lapſe, when ſhe had no ſuch title to preſent by lapſe, but another title either in right of her crown, or by ſimony, or ſome other way, was void, becauſe ſhe was miſtaken in her preſentation; ſo if ſhe preſents by reaſon of ſome ſuppoſed title in her letters of preſentation when indeed ſhe has no title at all, the preſentation is merely void; and though ſuch preſentation makes a plenarty, ſo as to avoid lapſe, yet the right patron is out of poſſeſſion, but may preſent 7 years after; and if his clerk be inducted, the former preſentee is immediately ouſted. Vaug. 13. cites Hob. 301. Sir Henry Gawdy's caſe.

S. C. Jo. 11, 12. Mich. 18 Jac. C. B. adjudged accordingly;

8. In a quare impedit, &c. the plaintiff *counted of a ſeiſin in fee, and that he preſented*, &c. the *defendant pleaded, that he is parſon imparſonee*, &c. *and that long before the plaintiff any thing had in* the advowſon,

vowſon, king *H.* 8. *was ſeiſed in fee, and preſented, and died ſeiſed; and* that it *deſcended to Ed.* 6. and *ſo to queen* Mary and *Elizabeth, who* being ſeiſed jure coronæ, *preſented one B., and after his death, the now plaintiff preſented by uſurpation the defendant; that queen Elizabeth died ſeiſed, and it deſcended to king James, who granted it to one under whom the defendant made title, and the defendant was inſtituted and inducted.* The *plaintiff* * replied, and *took proteſtation of the ſeiſin of Q. Mary, Q. Elizabeth, and the now king, and for plea confeſſed the ſeiſin of the plaintiff,* &c. and the ſeiſin *of* H. 8. *and Ed.* 6. *and then derived a title to himſelf under a grant* made of the advowſon *by Ed.* 6. and *that queen Elizabeth preſented, but* that *the ſame was by lapſe;* and that by the death of her preſentee, it now belongs to the plaintiff to preſent, *abſque hoc, that king Ed.* 6. *died ſeiſed,* &c. and upon demurrer it was objected, that he does not traverſe the ſeiſin of queen Mary and Elizabeth, and their dying ſeiſed, nor the preſentments alleged by reaſon of the ſeiſin in fee, but only ſays, that they were by lapſe; but as to this point, the Court held the replication well enough; for the *dying ſeiſed was the principal matter* to be traverſed, *and the other* were *but the conſequents thereof,* and the plaintiff may traverſe any part of the defendant's plea; and ſo a former judgment was affirmed in error; but becauſe the plaintiff in the firſt action died pending the plea, the entry of the judgment was ſtaid. Cro. J. 650. Mich. 20 Jac. B. R. Savil *v.* Thornton.

for the grant alleged to be made by E. 6. proves prima facie that he did not die ſeiſed, and therefore it ought to be traverſed. 2dly, The Court held the preſentation of the queen to be well confeſſed, by ſaying, that it was by lapſe; for it is not alleged certainly, that the queen preſented as vera patrona, but only that ſhe is ſeiſed in jure coronæ, and ſo ſeiſed, preſented

generally, without ſaying either the one way or the other, and then the ſaying it was * by lapſe was a good avoidance.——[* The original has the word (not), but it ſeems miſprinted.]——S. C. Winch. 13, 14. but it ſeems very imperfectly printed; for after the grant pleaded to be made by E. 6. and that the preſentment made by Queen Elizabeth was by reaſon of lapſe, it ſays, "that Queen Eli- "zabeth preſented L. only abſque hoc, that E. 6. granted, &c." So that the words (preſented L. only) muſt be printed probably according to the ſhort writing in the manuſcript, whence it was taken, inſtead of (preſented by lapſe only.)——S. C. Palm. 306. and there 111. it was reſolved that the traverſe of the dying ſeiſed of E. 6. was good, becauſe it was material to the title of the defendant, and if this be true, it will deſtroy the plaintiff's title, and for that reaſon he ought to traverſe it; but if the defendant had commenced his title by the preſentment of the queen, in ſuch caſe the preſentment ſhould be traverſed; and they agreed, that when the queen preſented by lapſe, this is as ſupreme patron, and not as ſupreme ordinary; and therefore though the allegation of the defendant in bar is, that the queen preſented, yet this is well confeſſed and avoided by the plaintiff in the replication, when he ſays that thoſe preſentments were by lapſe; for preſentments by lapſe maintain the poſſeſſion of the true patron, and do not gain any patronage from him.——2 Roll. Rep. 239. S. C. but not S. P.

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9. In a quare impedit, the plaintiff entitled himſelf by grant of the next avoidance, and *that T. C. was preſented, admitted, inſtituted, and inducted;* and that the ſaid church became void by *acceptance of a ſecond benefice* above value; the † archbiſhop pleaded a plea, to which there was a demurrer; and S. the *incumbent* pleaded a plea, and *traverſed that T. C. was admitted and inſtituted* therein; and upon this they were at iſſue, and a writ awarded to the archbiſhop for that trial; but afterwards the plea of S. being adjudged ill, a repleader was awarded, becauſe *the induction, being alleged, ought alſo to have been traverſed;* whereupon S. amended his plea, and traverſed the admiſſion, inſtitution, and induction; iſſue was joined thereupon, and found for the plaintiff; afterwards error was brought, and among other things it was aſſigned, that the repleader was not well awarded; for that the iſſue, which was joined before the writ awarded to the archbiſhop, was well

† Quære if this ſhould not be (biſhop) without (arch).

enough, and needed not any repleader; but all the Court contra, and that the repleader was well awarded; for the induction being alleged, as well as the inſtitution, there ought to be a traverſe to it, which alters the courſe of the trial according to the caſe in 22 H. 9. 27. & 2 H. 4. 17. ſo as it ſhall be tried per pais. Cro. C. 379, 380. pl. 6. Mich. 10 Car. B. R. Stevens v. Facone.

2 Jo. 8. S.C. by the name of the King v. Jervis. Adjudged for the defendant. —— Mod. 276. Trin. 29 Car. 2. The arguments of Wild, Archer, and Tyrrel J.

10. The king *counts that queen Elizabeth was ſeiſed of* the advowſon of the church of Northfield *in groſs in fee in jure coronæ, and preſented one W.*, &c. *and ſo derives a title to himſelf*, and that the church became void by the death of the ſaid W. and ſo it belonged to him to preſent, but the defendants diſturbed him. T. J. *one of the defendants, pleaded, that before the preſentation of the queen, his anceſtor* R. J. *was ſeiſed in fee of the manor of N. to which* the advowſon of the church was and is appendant, *and that it became void by the death of the then laſt* * *incumbent, and ſo continued for* 2 *years; whereupon the queen preſented the ſaid W. by lapſe, and* then *derives a title to himſelf* of the ſaid manor and advowſon; and that his anceſtor, whoſe heir he is, upon the death of W. granted the next turn to W. R. who preſented J. S. who was inſtituted and inducted, and died, and that he preſented the other defendant Hunkley, and *traverſed the queen's ſeiſin* of the advowſon *in groſs*: the Attorney General *replied*, and maintains the ſeiſin of the queen, and ſo of the preſent king, *and that the ſaid W. R. preſented by uſurpation, and traverſed, that the advowſon* of the church was, or *is, appertaining to the manor*, and upon a demurrer to this replication, the defendant, the patron T. J. had judgment. Vaughan Ch. J. obſerved the faults on both ſides in this pleading; and firſt the fault in the plea where the *defendant* had not well traverſed the king's title, it being only in part; for he traverſed only the ſeiſin, when properly *he ſhould have traverſed the ſeiſin and preſentation of the queen by reaſon of her ſeiſin*, (viz.) *abſque hoc, that the queen was ſeiſed of the advowſon in groſs and preſented.* The ſeiſin of an advowſon makes not a title alone, nor is it traverſable; but there being no demurrer, nor iſſue thereupon, he would not ſay any more to it. He ſaid that the defendant's traverſe was not neceſſary, becauſe he had confeſſed and avoided the queen's preſentation, by ſaying it was by lapſe; and if he had reſted there, the Attorney General ought to have maintained his count, and traverſed the queen's preſentation by lapſe, whereas he deſerts making out the king's title, and falls upon the defendant's title, viz. that the advowſon was not appendant; and he offers a *double iſſue*, viz. *that the preſentation of W. R. was by uſurpation, and that the advowſon was not appendant* to the manor. Judgment for the defendant. Vaugh. 53 to 56. Trin. 21 Car. 2. in C. B. the King v. Biſhop of Worceſtor, Jervis and Hunckley.

* [459]

S.C. Vaugh. 1 to 17. And there Vaughan ſays, it ſeems clear, that in all caſes of

11. Quare impedit for the church of Burton Daſſet, in the county of Warwick. The *manor* of B. D. *was divided*, and the *defendant had* 2 *parts* of it, *and the plaintiff the* 3*d*; and the *plaintiff ſet forth, that the right of preſenting every* 3*d turn was appendant to his* 3*d part, and that it belonged to the defendant to preſent twice, by reaſon of his two parts*; and ſo ſets forth, that the defend-

fendant had preſented twice, and ſo it belonged to him to preſent now; the *defendant ſays, that the whole* advowſon *did belong to him, ſans ceo, that one turn was appendant to the plaintiff's third part*; the plaintiff demurred generally. It was among other things *objected*, that the defendant *ought to have traverſed the preſentment, and not the appendancy*: for though in ſome caſes it may be done, yet that is when the appendancy is material, and when the defendant muſt ſet forth a title, and cited 10 H. 7. 27. 20 E. 4. 13. 21 E. 4. 1, 2. But to this it was anſwered for the defendant, that the traverſe is well taken; and that if the advowſon be not appendant the plaintiff hath no title, for he hath alleged the laſt preſentation in us; and if he had gained a title by former preſentations, yet when we preſented again, we are remitted, and cited 1 Inſt. 363. Nat. Brev. 35. and he differenced this caſe from that in 1 And. 269. becauſe there was a ſpecial demurrer, and ſo might take advantage of matter of form, and there the defendant made a title to an advowſon in groſs, and then the preſentment makes the title; but where it is appendant, the appendancy makes the title, and therefore muſt be traverſed; and it hath frequently been ſo. Freem. Rep. 34. pl. 43. Trin. 1672. TUFTON v. TEMPLE, cites D. 260. 1 Cro. 61. Hob. 321. 10 Co. Chancellor of Oxford's caſe. But no judgment appears to be given.

quare impedits, the defendant may ſafely traverſe the preſentation alleged in the plaintiff's count, if the matter of fact will allow him ſo to do; for the plaintiff has no title without alleging a preſentation in himſelf, his anceſtor, or thoſe from whom he claims the advowſon; but the defendant muſt not traverſe (that is deny) the preſentation alleged, when there was a preſentation; for then the iſſue muſt be found againſt him; therefore Lord W. under whom the plaintiff claims, having preſented, be it by what right ſoever, there was no traverſing his preſentation; but whatever right the Lord W. preſented by, the plaintiff has no right to preſent, unleſs the Lord W.'s preſentation, was by the appendancy to the 3d part of the manor; for he deriving no title to the advowſon as in groſs, nor any other way, but as belonging to the 3d part of the manor, which he derives from the Lord W. therefore nothing is traverſable by the defendant but the appendancy, which if found againſt the plaintiff he has no colour of title.

(B. d. 17) Pleadings. *Proſert or Monſtrans* of Deeds, &c. *Neceſſary in what Caſes.* [460]

1. IN quare impedit, if the *defendant makes a title by grant by deed*, and does not ſhew it, by which the *plaintiff demurs* for the not ſhewing, which is adjudged againſt the defendant, and that he ought to have ſhewn the deed, this is *peremptory*, and the defendant ſhall loſe the preſentation. Br. Peremptory, pl. 70. cites 19 E. 3. and Fitzh. Monſtrans, 172.

2. In quare impedit by the *king againſt the biſhop and patron*, it was agreed, that the biſhop *need not to ſhew the letters of preſentation*. Br. Quare Impedit, pl. 65. cites 38 E. 3. 3. 8, 9. Br. Monſtrans, &c. pl. 43. cites S. C.

3. If the *king makes preſentation* to the biſhop *by his letters patents*, the patent belongs to the ordinary. *But if he makes collation*, it belongs to the incumbent, and he ſhall ſhew it. Br. Monſtrans, pl. 70. cites 9 E. 4. 16.

4. In caſe of an *advowſon*, if the party makes title where it is by way of defence, he ſhall ſhew title. Per Brian. Br. Monſtrans, pl. 60. cites 15 E. 4. 16.

5. In *quare impedit* the plaintiff made title, that *J. S.* was *ſeiſed of the manor* of B. *to which the advowſon is* and was *appendant*, and *granted* *So in quare impedit*, the plaintiff

made title, that *J. S. was ſeiſed of the advowſon*, and *granted the next preſentation to* one *A.* and after the ſaid *advowſon became void*, and *A. preſented* L. and after J. S. died, and the *advowſon deſcended to T. S. who granted the next preſentation to B.* and *B. died inteſtate*, and the *ordinary ſequeſtred and granted the advowſon to the plaintiff*, and the incumbent died, the plaintiff preſented, and the defendant diſturbed him, and per Reade, Brian, Davers, and Fineux, he ſhall ſhew all the deeds, except the *deed made by J. S.* for that *does not belong to the plaintiff, nor does he make his title by it*, nor does he claim by J. S. but Vaviſour contra; for by this preſentment J. S. was out of poſſeſſion, and therefore he ought to ſhew the deed to prove that it was not granted but for one turn only. Br. Monſtrans. pl. 111. 9 H. 7. 23.

granted the next preſentation to B. and the ſaid *B. granted it to A.* which *A. granted to the plaintiff*; the plaintiff muſt ſhew all the deeds of the grants. Per Fineux and Vaviſour, quod fuit conceſſum. Br. Monſtrans, pl. 109. cites 9 H. 7. 16.

6. In quare impedit the plaintiff *declared, that* A. his anceſtor *was ſeiſed* in fee of the vicarage of B. in groſs, &c. *and ſo ſeiſed granted the next avoidance to* E. who granted it over to F. and that the church becoming void by the death of the incumbent, the ſaid F. preſented J. N. who was admitted, &c. that afterwards A. by deed granted the ſaid advowſon to *truſtees and their heirs, to the uſe of A. for life*, then *of B. his ſon* and heir, *and the heirs male of his body*; and for want of ſuch iſſue, to the uſe of the heirs male of the body of B. And *that during* the time of *the troubles in* 1659, *the church voided, and that* one *W. R. by uſurpation preſented T. S. who was put into poſſeſſion by the perſons then in authority, and was afterwards by the* 12 *Car.* 2. *confirmed* in the ſaid church *for his life; that the church became void, and* that *it belonged to the plaintiff as heir in tail of B. to preſent.* The defendants demurred, becauſe the plaintiff had not pleaded the ſaid grant by A. to the truſtees, with a profert; for that here the deed is neceſſary ex inſtitutione legis, to make it a good grant, becauſe without the deed the advowſon will not paſs. But it was reſolved, that in this caſe the plaintiff ſhall not be compelled to produce it. 1ſt, Becauſe *it does not belong to* him who is only *ceſty que truſt, but* it belongs *to the grantees.* 2dly, Becauſe he *has no remedy* in law *to get poſſeſſion of it.* 3dly, He is in merely by operation of law, and not in the per. Carth. 315. Trin. 6 W. & M. Reynell v. Long.

[461] See (B. d. 19) pl. 5.

(B. d. 18) *Iſſue. Upon what* to be *taken, and of what* Things the *Jury muſt inquire.*

1. IN a quare impedit, beſides the point in iſſue, the jury ought ex officio to inquire, 1ſt, *De plenitudine eccleſiæ.* 2dly, Et *ex cujus præſentatione.* 3dly, *Si tempus ſemeſtre præteriit.* 4thly, *De valore eccleſiæ per annum.* Jenk. 206. pl. 36.

2. In quare impedit by the *king*, who *made title by ſeiſin of the temporalties of the biſhop of R.* and *that R. late biſhop of B. preſented to the hoſpital of C. R. his clerk, who was received and inſtituted, and voided by permutation made between R. and a prebendary*; and the defendant *ſaid that the hoſpital is not permutable.* And the Court ſaid they would not try the cauſe of the voidance, but *whether it voided while*

while the temporalties were in the hands of the king, or not; quod nota. Br. Quare Impedit, pl. 69. cites 21 E. 3. 6, 7.

3. In quare impedit by the *king againſt the biſhop of S. of the prebend of H.* he *pleaded, that after the voidance, the king preſented E. who was received and inſtalled,* and the *other that he was not received and inſtalled,* and the others e contra. Br. Quare Impedit, pl. 68. cites 21 E. 3. 50. & 40 E. 3. 17.

In quare impedit by the *king*, the *incumbent ſhewed collation* made to him *by the biſhop, by which he was inducted and inſtalled, and* after the *king confirmed to the incumbent for life,* judgment; and the *king ſaid that he was not inducted nor inſtalled at the time of the confirmation,* and after the *iſſue* was taken *upon the induction only, and not upon the induction and inſtallation.* Br. Quare Impedit, pl. 50. cites 11 H. 4. 7.

4. In quare impedit the defendant *pleaded, that the church was full by 6 months before the writ purchaſed* of his own preſentment, judgment of the writ; and there the iſſue was taken if it was void or not, and not if it was full or not; quod mirum. Br. Quare Impedit, pl. 21. cites 40 E. 3. 20.

5. In quare impedit the *defendant ſaid,* that *he is in of the preſentment of the ſame plaintiff,* and *he ſaid* that he *did not preſent, priſt;* and the others e contra. Br. Quare Impedit, pl. 25. cites 42 E. 3. 8.

6. In quare impedit the *defendant ſaid, that there is no ſuch church in the ſame county;* and held a good plea, by reaſon of the viſne. Br. Quare Impedit, pl. 33. cites 45 E. 3. 6.

So, that *nul tiel will,* &c. in the ſame county. *And* ſo in præcipe quod reddat of the manor of D. to ſay that there is no ſuch manor in the ſame county; and after *iſſue* was taken if *there is a church known by ſuch name* in the ſame county or not. Ibid.

7. Quare impedit by the *king,* and *made title by tenure of him as appendant to the manor of D.* The *defendant ſaid, that not appendant,* priſt; and the *king ſaid that he and his anceſtors time out of mind, have preſented to it as appendant, priſt,* &c. and was not ſuffered to have ſuch iſſue, but to rely upon the appendancy, viz. appendant or not appendant, &c. quod nota. Br. Quare Impedit, pl. 38. cites 46 E. 3. 30.

8. Quare impedit was *præſentare ad eccleſiam de B.* The *defendant ſaid that it was only the chapel of B. and time out of mind had been, and is within the pariſh of C.* and becauſe the writ did not ſay ad capellam, he prayed judgment of the writ; and the Court being of opinion that the writ ſhould abate, the plaintiff ſaid that the church is *parochial,* and the other ſaid that it is a *chapel and not parochial.* But the Court ſaid they would be adviſed if this be an iſſue. Br. Quare Impedit, pl. 77. cites 8 H. 6. 37.

9. Where a man preſents, and his *title is found upon a jure patronatus,* and *he ſues to have his clerk admitted,* and after *another preſents,* there, *if the biſhop might have admitted the clerk of him who had the verdict, and did not, but deferred till the lapſe fell, and then preſented his own clerk;* in this caſe he is diſturber againſt both the preſentors; and *iſſue* ſhall be taken *whether he who preſented, and had his title found, ſued to have his clerk admitted or not, and whether the ſecond preſented to him ſo haſtily that he could not admit the clerk of the firſt by due proceſs before the preſentation of the ſecond or not;* [462]

and ſo the church not litigious. Br. Quare Impedit, pl. 80. cites 21 H. 6. 44.

Br. Replication, pl. 42. cites S. C.

10. In quare impedit the plaintiff *counted that his anceſtor was ſeiſed* of the advowſon, and his clerk in, *and after he granted* the advowſon *to J. S. for life*, the church voided, *J. S. preſented*, and his clerk in, and *J. S. died*, and after *the church voided*, by which the *plaintiff as heir of the anceſtor preſented*, and the defendant diſturbed him. And it was held that he *ſhall allege the one preſentation and the other;* for the preſentation of the tenant for life does not make title to the plaintiff, nor the preſentation of a guardian nor termor, *and the defendant ſhall anſwer the firſt preſentation, and have iſſue thereupon, and not upon both.* And per Littleton, he ought to anſwer to both, but the iſſue ſhall be upon the firſt only, and the plaintiff ſhall not reply to him as to the ſecond preſentment. Br. Quare Impedit, pl. 129. cites 7 E. 4. 20.

11. Quare impedit of a *chantery* where the *compoſition was, that if the patron does not preſent within one month*, that *then the ordinary ſhall preſent;* and the jury was compelled to inquire if the month was paſt, and of the value of the chantery, and if it was void or not. Br. Quare Impedit, pl. 131. cites 13 E. 4. 3.

(B. d. 19) *Judgment. When* and *how*, and of the *Entry* thereof.

But if he makes default *after continuance taken*, he ſhall have diſtreſs.

1. IN *quare impedit*, if the *defendant makes default after appearance*, the plaintiff ſhall recover immediately, and his damages. Br. Proceſs, pl. 27. cites 2 H. 4. 1.

6 R. 2. Which ſeems to be *diſtreſs ad audiendum judicium.* Br. Proceſs, pl. 27.

And if it had been brought *againſt the patron and incumbent*, and found againſt the king, the judgment ſhould be *eat ſine die.* Per Markham. Br. Judgment, pl. 14. cites 3 H. 4. *2. — *It ſhould be 3. b. pl. 11.

2. *Quare impedit by the king againſt the incumbent alone*, and at the niſi prius it was *found againſt the king.* It was objected that the judgment ought not to be given; for the *patron is not named in the writ; and* yet *judgment was given that the defendant eat ſine die, without entering any cauſe:* ſo that by ſome, the judgment ſhall be intended to be for the not naming the patron, and ſo the king at another time at no prejudice; quære inde; for it ſeems that it *ſhall have relation to the matter pleaded.* And it was prayed that the cauſe of the judgment be entered. But per Thirn, it ſhall not be; for it appears in the record; for if a man takes exception to a count or to a preſentment, or indictment, by which it abates, judgment ſhall be, viz. *pro eo quod it is inſufficient in law, therefore nihil capiat*, and the cauſe ſhall not be entered, becauſe it appears in the record; quod Mark. conceſſit. And ſo it ſeems that the words of the judgment are all one to the writ, to the count, and to the bar; but this ſhall be expounded by the matter which is pleaded, when it goes to the writ or count, and when in bar. And Hull and Hank. agreed that this judgment ſhall have relation to the plea. Br. Judgment, pl. 14. cites 3 H. 4. 2.

3. In

3. In quare impedit the ſheriff returned nihil at the ſummons, and attachment at the diſtreſs. And per Danby, Cott, Newton, Paſton, and Godred, the *plaintiff ſhall recover by the equity of the ſtatute*; but Martin and Strange contra. Br. Quare Impedit, pl. 152. cites 11 H. 6. 3.

If the *ſheriff returns nihil* upon the ſummons pone & diſtringas *in quare impedit*, yet the plaintiff ſhall recover. Per Aſhton. Br. Judgment, pl. 6. cites 27 H. 6. 5.

4. In a quare impedit *againſt an archbiſhop, biſhop, and others*, the *archbiſhop and biſhop plead that they claim nothing but* the one as metropolitan, and the other *as ordinary*; the *other defendants plead other pleas*; the plaintiff has *judgment againſt the archbiſhop and biſhop to have a writ to the biſhop*; but in this judgment againſt them, there is an *omiſſion of* the uſual clauſe; *ſed ceſſet executio quouſque* the other iſſues are tried; and in truth *no writ iſſued before the trial of the other iſſues*; the iſſues are found for the plaintiff, he had judgment affirmed in error. In this caſe *the ſaid omiſſion was not erroneous*; for it was after judgment; and if it be error, it is error in executione judicii; and in this caſe no writ of execution was ſued out againſt them. Jenk. 323. pl. 36.

[463] S. C. Roll. Rep. 363. Adjornatur, 397. 398. S. P. Held accordingly by Coke, and afterwards judgment was affirmed Trin. 14 Jac. B. R. Grange v. Denny.— 3 Bulſt. 174. S. C.

5. Quare impedit by H. againſt B. and the biſhop and the incumbent; and as to the biſhop, whoſe plea was allowed, judgment was given that the plaintiff take nothing by his writ, and all the *other defendants confeſſed the action*; and the jury, which was ready to have paſſed upon the iſſue, were put to inquire of the value of the church per ann. which found 20l. and therefore judgment of *double damages* (that is to ſay) of 40l. was given for the plaintiff *againſt the other defendant and the incumbent, and* the *judgment entered as well againſt the incumbent as againſt the other*; for now it was *full by lapſe*. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 6. 11. 38. and 35 H. 6. 18.

6. Where a man has a *quare impedit againſt one*, and the *defendant has a darrein preſentment againſt the plaintiff, and recovers* in the darrein preſentment, and the *plaintiff is nonſuited in the quare impedit*; the defendant ſhall have two judgments againſt the plaintiff to have writ to the biſhop in both actions. F. N. B. 39. (D).

7. In a quare impedit the *biſhop pleaded*, that he examined the preſentee, and found him to be *ſchiſmaticus inveteratus, of which he gave the plaintiff notice, who did not preſent within 6 months*, &c. and upon demurrer the Court gave *judgment, that the plaintiff recover againſt the biſhop his preſentation* to the church, and a writ to the metropolitan, &c. becauſe the biſhop is party, *et idem epiſcopus in miſericordia*; afterwards a *writ of inquiry of the value* of the church *was awarded*; whereupon the value and other points of the writ were found and returned; and *thereupon judgment* was *entered again*, viz. that the plaintiff ſhould have a writ to the archbiſhop ut ſupra, and that he recovered damages againſt the biſhop. *Et præd. Epiſcopus in miſericordia*; and this was aſſigned for error, becauſe the biſhop was *twice amerced*, which he ought not to be by law. But it was anſwered, that *the laſt judgment was but a recital*

And. 189. pl. 225. S. C. but not S. P. as to the damages.— 3 Le. 198. pl. 251. S. C. but not S. P. as to the damages.— Goldſb. 35. pl. 10. S. C. but not S. P. as to damage.— Jenk. 258. pl. 55. cites

S. C. and S. P. *of the firſt*, and ſo to give a full judgment of all, with the damages, and not a new judgment; for he can no more have two writs to the metropolitan than he can be twice amerced; but if it was erroneous, yet the firſt judgment is good and perfect in itſelf, and ſhall not be impeached by any error in the ſecond, becauſe *the firſt was the judgment* which was *at common law* in a quare impedit; for before the ſtatute of W. 2. the plaintiff never recovered any damages in a quare impedit, and now he may waive the benefit of that ſtatute, and take the judgment at common law, if he will. Quod fuit conceſſum per tot. Cur. And ſo the firſt judgment was affirmed. 5 Rep. 58. b. Hill. 32 Eliz. upon a writ of error in B. R. Specot's caſe.

8. Where the king has judgment *by default* in a quare impedit, he, as well as a ſubject, muſt *by ſuggeſtion on the roll ſet forth his ſpecial title*. Per Holt Ch. J. 2 Salk. 559. pl. 2. Trin. 5 W. & M. in caſe of the King, &c. Biſhop of London and Dr. Lancaſter.

[464] (B. d. 20) Judgment. *What recovered*, and *who* ſhall *have Execution*, and the *Effect* thereof.

1. BY quare impedit a man *ſhall not recover the advowſon but the preſentment*; but if he has execution, all others beſides the incumbent, are thereby *out of poſſeſſion*. Br. Quare Impedit, pl. 7. cites 9 H. 6. 56.

2. If a man recovers in quare impedit, and dies, his *heir* ſhall not have execution, and therefore it is not a real action. Per Rolf. Br. Quare Impedit, pl. 7. cites 9 H. 6. 56.

(B. d. 21) Of *Damages* and *Coſts*, &c.

Before the making of this act the plaintiff in qua. imp. recovered no damages, leſt any profit the patron ſhould take ſhould favour of ſimony, which the common law did ſo deteſt; and this is the cauſe that the *king* in a quare impedit *recovereth no damages, becauſe he could recover none by the common law*; *and* the king *is not within the purview* of this act for the cauſes ſhewed in Boſwell's caſe. 2 Inſt. 362.—S. P. Co. Litt. 123. b.

1. 13 *E.* 1. *cap.* 5. *ſ.* 3. ENACTS, That *from henceforth in writs of qua. imp. and darrein preſentment* damages *ſhall be awarded, that is to wit, If the time of* †6 *months paſs by the diſturbance of any,* ‡*ſo that the biſhop do confer to the church, and the very patron loſeth his preſentation for that time, damages ſhall be awarded for two years* ‖ *value of the church. And if the 6 months be not paſſed, but the preſentment be deraigned within the ſaid time, then damages ſhall be awarded to the half year's value of the church. And if the diſturber be not able to render damages, he ſhall in the firſt caſe have impriſonment of two years, and in the other of half a year.*

The *king ſhall not recover* damages *in quare impedit for lapſe nor diſturbance*. Br. Damages, pl. 15. cites 34 H. 6. 3.——S. P. Br. Prerogative, pl. 110. cites Fitzh. Quare Impedit, 54.——S. P. for *damages are given only where there may be an uſurpation* by W. 2. 5. and there can be no uſurpation upon the king. Jenk. 281. pl. 7.

Though the king declares ad damnum, &c. yet he is not within the ſtatute. The firſt part of the clauſe for recovery of damages is, ſi tempus ſemeſtre tranſierit, &c. now he is not within this part of the clauſe for recovery of damages; for by his prerogative he cannot loſe his right of preſentation, though the biſhop has collated. And then the ſecond clauſe (viz. *et ſi tempus ſemeſtre non tranſierit*, &c.) is only dependant on the firſt; and ſo, as he is not within the 1ſt, he cannot be within the 2d. 6 Rep. 51.

51. Mich. 3 Jac. Boſwell's caſe.—S. P. Le. 149. pl. 207. Trin. 36 Eliz. B. R. The Queen v. Buckbeard.——Cro. E. 162. Bugheard v. the Queen.

Some think that the *king* ſhall recover damages in a quare impedit; and it ſeems to them to be weak reaſoning, that he ſhall not recover ſingle damages, becauſe he cannot recover double; *argumentum a majori ad minus* negative non valet, valet e converſo. The king ſhall have benefit of any ſtatute though he be not named in it. Coſts are given at common law in a quare impedit in the time of E. 1. Fitzh. Quare Impedit, 161. Damages were given to the king in a quare impedit, and thoſe judges were living when the ſaid ſtatute of Weſtminſter 2. was made. Jenk. 281. pl. 7. cites Brooke's caſes. 22 H. 8. 17.

And foraſmuch as no damages were in a quare impedit at the common law, and this act after the ſtatute of Glouceſter giveth damages only, the plaintiff ſhall recover *no coſts*. 2 Inſt. 362.——S. P. Br. Coſts, pl. 1. cites 27 H. 6. 10. For where damages are given by ſtatute after the ſtatute of Glouceſter in certain out of the courts of the common law, a man ſhall recover that which is limited in the ſtatute and not otherwiſe; as in decies tantum, the plaintiff ſhall recover no caſts. Contra, it is ſaid in raviſhment of ward; and therefore he ſhall not have coſts in quare impedit. Br. Coſts, pl. 1. cites 27 H. 6. 10.——*At common law* a man ſhould recover coſts in quare impedit, but *contrary after the ſtatute*, becauſe the ſtatute gives now great damages in quare impedit. Per Newton; but all the argument there was for damages. Br. Coſts, pl. 25. cites 9 H. 6. 32.—But H. 22 H. 8. Spilman J. agreed with Newton.—S. P. Jenk. 234. pl. 36.——S. P. Jenk. 281. pl. 7. ad finem.——S. P. Br. Damages, pl. 182. cites 9 H. 6. 30.——But Trin. 11 Ann. it was held per tot. Cur. that where *judgment* is given *for the defendant upon a demurrer* in quare impedit, the defendant ſhall have his coſts. Rep. of Pract. in C. B. 4. Anon. [This ſeems to be by reaſon of the ſtat. 8 & 9 W. 3. cap. 11. ſ. 2.]

In a quare impedit againſt a prior, patron, and incumbent, the prior pleaded in bar, and the incumbent pleaded the ſame plea, whereupon iſſues are joined, the prior dies, and the iſſue is found for the *incumbent*, he *ſhall not recover damages by this act*, for he cannot have a writ to the biſhop and he continued in poſſeſſion. 2 Inſt. 362.—S. P. 12 Mod. 547. in the caſe of Pratt v. Rutleis.——S. P. Br. Damages, pl. 182. cites 9 H. 6. 30.——Br. Quare Impedit, pl. 6. cites S. C.——*But* per Newton in * quare impedit againſt patron and incumbent, if the *patron* dies, and the *plaintiff is nonſuited*, the *incumbent ſhall recover* damages by the ſtatute of Weſtminſter 2. For the incumbent may plead. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.—— *And* where *patron and incumbent plead one and the ſame plea*, there *both ſhall recover* damages *if the incumbent was admitted*; for otherwiſe he ſhall not recover damages; per Newton. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.——*So* where an abbot claims to hold in proprios uſus, he ſhall recover damages; for he is patron and incumbent. Br. Quare Impedit, pl. 6. cites 9 H. 6. 3.

† If *upon the foundation of a chauntry the compoſition is*, that *if the patron preſent not within a month the ordinary ſhall collate*; in a quare impedit brought for this chauntry, *if the month be paſt, the plaintiff ſhall recover* damages *for* 2 *years* within the equity of this ſtatute; for that the patron, in this caſe, loſeth the preſentation, although the words of the ſtatute be per tempus ſemeſtre, and this is *per tempus menſis tantum*. 2 Inſt. 361, 362.

‡ Here [*conferat*] is to be taken for legitime conferat. 2 Inſt. 363.

Albeit the biſhop hath not collated, yet if he hath *jus conferendi*, the plaintiff ſhall, if he will, recover double damages within the meaning of this act. 2 Inſt. 363.

But albeit the 6 months be paſt, ſo as the biſhop hath a juſt title to preſent by lapſe, yet *if the church remains void*, the plaintiff at his peril may pray a writ to the biſhop; but then *he ſhall not recover* double damages, *but for half a year only*; becauſe, in that caſe he ſhall recover his preſentation; ſo that it is in the plaintiff's *election*, in that caſe, either *to loſe his preſentation and have double damages, or to have his preſentation and ſingle damages*. 2 Inſt. 363.——If he takes a *writ to the biſhop at his peril, he ſhall not have* damages *after* 2 *years* to the value of the church, *though the biſhop has preſented by lapſe*; for he takes notice thereof at his peril. Br. Damages, pl. 189. cites 11 H. 4. 80.——Br. Quare Impedit, pl. 53. cites S. C.

The *plaintiff* in a quare impedit, *after appearance, was nonſuited*; whereupon the *court awarded a writ to the biſhop* for the defendant, and a writ to the ſheriff to inquire when the church became void, the yearly value thereof, and whether the church was full, &c. The ſheriff returned the time of the voidance, the yearly value, and that *the biſhop had collated by lapſe*; whereby it appeared *tempus ſemeſtre was paſt before the writ could be ſerved, yet* ſeeing the *judgment* was *given within the* 6 *months, he could recover* the damages *but for half a year*. 2 Inſt. 363.—S. P. Br. Damages, pl. 151. cites 24 E. 3. 25.——Br. Quare Impedit, pl. 93. cites S. C. Brooke ſays, the reaſon ſeems to be, inaſmuch as *where the biſhop makes collation within the* 6 *months, his clerk ſhall be removed*, and therefore only damages of half a year; *but where* the biſhop has made collation *after the* 6 *months and the party has judgment after the* 6 *months*, there the clerk ſhall not be removed, and therefore he who recovers ſhall have damages of 2 years; note the difference. Br. Quare Impedit, pl. 93. cites 24 E. 3. 25.

And it is to be obſerved, that albeit the *biſhop doth collate*, yet if *his incumbent is removed by judgment* within the 6 months, or after, the *plaintiff ſhall recover* the damages *but for half a year*; for the words of this branch are et verus patronus ea vice præſentationem ſuam amittat; ſo that if he loſe not his preſentation, the collation of the biſhop is not material. 2 Inſt. 363.

‖ This ſhall be accounted *according to the very true value*, as the ſame may be let. 2 Inſt. 363.

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2. In *quare impedit, if writ is awarded to the biſhop, who will not receive the preſentee*, this is a contempt to the king, and the plaintiff Br. Brief, al. Eveſque, pl. 12. cites S. C.

tiff ſhall recover damages againſt him. Per Thorp. Br. Contempts, pl. 5. cites 38 E. 3. 12.

3. Quare impedit *againſt the biſhop of N. and another quare impedit againſt J. T. of the ſame church.* The *biſhop confeſſed the diſturbance*, and *J. T. traverſed the title of the plaintiff*, and found for the plaintiff, and the value of the church 40 marks, and that the church is *full of the preſentment of J. T.* and the biſhop is ordinary, and the 6 months are paſt. The plaintiff prayed writ to the biſhop, and value of the church by 2 years; but per Thorp, *you cannot have the value of 2 years and writ to the biſhop.* And becauſe the ordinary cannot have the lapſe where he confeſſes the diſturbance, therefore it was awarded, that the plaintiff ſhall have writ to the biſhop, and damages of half a year, &c. quod nota bene. Br. Quare Impedit, pl. 103. cites 39 E. 3. 15.

Br. Quare Impedit, pl. 27. cites S. C. and that the plaintiff *recovered his preſentment and damages* for 2 years, notwithſtanding the defendant alleged, that the plaintiff *had recovered damages of half a year in another quare impedit againſt A. B.* —— If the 6 *months paſs pending the writ*, ſo that *the biſhop preſents by lapſe*, now the plaintiff cannot have the preſentment, and yet the writ ſhall not abate, but he ſhall recover all in damages; and therefore, to prevent this, it is uſual to name the ordinary in the quare impedit. Br. Quare Impedit, pl. 147. cites 9 E. 4. 30. —— S. P. Br. Brief, pl. 220. cites 9 E. 4. 50. Per Choke.

4. In quare impedit they were at iſſue, and it was *found, that at the time when the jury was charged the church was void, and at the time that they gave their verdict it was full of the preſentment of the biſhop by lapſe;* and the plaintiff recovered damages of 2 years by judgment. Br. Damages, pl. 26. cites 43 E. 3. 10.

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5. In quare impedit the plaintiff recovered, and if there be no other diſturbance but the *preſentation of the king, who has revoked it*, and there was *no other diſturbance by the incumbent*, the plaintiff ſhall not have damages. Br. Damages, pl. 171. cites 44 E. 3. 35.

But the opinion of Kirton and Cand. was, that he ſhall not have it; for the *plaintiff and defendant are each actor againſt the other*, and each may recover againſt the other. Contra of one of the defendants againſt the other, and therefore ſhall have judgment againſt the plaintiff only. But Finch. contra; and that the one defendant ſhall have attaint againſt the other. And per Kirton, where two defendants are in quare impedit, and the one can ſhew title to bar the plaintiff, there it ſhall not be inquired if the other be a diſturber or not. And in quare impedit againſt two, if the one comes and pleads to iſſue, the inqueſt ſhall be taken between the plaintiff and him, though the other does not come; and if it be found for the defendant againſt the plaintiff, it ſhall not be inquired, nor title made againſt the plaintiff; but Finch. denied it, and ſaid that the one inqueſt ſhall not be taken againſt the other. And ſo in ward upon priority the one inqueſt ſhall ſtay the other, &c. Br. Quare Impedit, pl. 35. cites S. C.

6. Quare impedit *by A. againſt* 2. *One made title to have turn*, and *the other the like;* and *it was found, that it was the turn of one defendant, and likewiſe againſt the plaintiff and againſt the other defendant;* and by the beſt opinion he ſhall have a writ to the biſhop againſt both, and damages *againſt the plaintiff and the other defendant.* But Brooke makes a quære; for there is no original between the 2 defendants. Br. Damages, pl. 173. cites 45 E. 3. 14.

Br. Quare Impedit, pl. 36. cites S. C. and plaintiff recovered the preſentment alſo.

7. In quare impedit *after 6 months* paſt, it was awarded, that the plaintiff ſhould recover damages for 2 years *as well againſt the incumbent as againſt the defendant*, becauſe *both had counterpleaded the plaintiff's title* and the diſturbance; and yet it did not appear, whether the ordinary had preſented by lapſe or not. Br. Damages, pl. 185. cites 46 E. 3. 15.

8. It

8. It was admitted, that in *ſcire facias in nature of quare impedit upon compoſition to preſent by turn between parceners* the plaintiff ſhall recover the preſentment and damages. Br. Damages, pl. 36. cites 50 E. 3. 23.

9. In quare impedit the plaintiff ſhall recover, and ſhall have a writ to the biſhop, and damages *upon the default of the defendant after appearance*. Quære, if it had been after a continuance. Br. Damages, pl. 192. cites 2 H. 4. 1.

Br. Quare Impedit, pl. 43. cites S. C. but ſays, that if he had made *default after continuance*, a diſtringas ſhould iſſue, as appears H. 6 R. 2. ——— Br. Quare Impedit, pl. 151. cites S. C.

10. In quare impedit the *plaintiff made title by the heir in his ward*, the *defendant made title by coparcenary to preſent by turn*; to which the *plaintiff ſaid, that ſaving to him his courſe at another time that ne diſturba pas*; wherefore Hull awarded for the defendant a writ to the biſhop, and a writ of inquiry of damages againſt the plaintiff; for it does not lie in the mouth of the plaintiff to plead this plea. Br. Brief de Enquire, &c. pl. 12. cites 5 H. 5. 10.

11. In quare impedit, if one *ſues execution of the greater damages*, he ſhall make *mention* of *all the record*. Per Priſot. Br. Pleadings, pl. 51. cites 30 H. 6. 5.

And where *judgment* is given, and *quod ceſſet executio*, yet he ſhall make mention of this alſo, though it be againſt him. Ibid.

12. In quare impedit the *biſhop prayed damages*. And per Aſhton, Danby, Newton, and Porting. he ſhall recover damages; but by others he ſhall not recover damages, unleſs he can have writ to the biſhop, which he cannot have. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

13. If I preſent, and my *clerk is inducted*, and *J. N. brings quare impedit* againſt me for this, *and after is nonſuited*, I ſhall have damages, and yet cannot have writ to the biſhop. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25. Per Aſhton.

So if I preſent my ſon, who is admitted, and quare impedit is brought againſt me and my ſon and after title made I die, and the *plaintiff is nonſuited*, my *ſon ſhall recover damages*, and cannot have writ to the biſhop. Ibid. ——— *And* per Danby, if the *defendant entitles himſelf* in a quare impedit *to hold* the church *in proper uſe*, and the *plaintiff is nonſuited*, the defendant ſhall recover damages, and cannot have writ to the biſhop. Ibid. ——— *So* where the defendant in quare impedit *claims free chapel to induct his clerk without preſentation to the biſhop*, and the *plaintiff is nonſuited*, the defendant ſhall recover damages, and no writ to the biſhop. Ibid.

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14. A man ſhall recover damages in quare impedit *where he was never diſturbed*. Per Newton. Br. Quare Impedit, pl. 83. cites 22 H. 6. 25.

As where *I preſent*, and *my clerk is* admitted, and J. N. *admitted*, and *J. N. brings quare impedit* againſt me, *and is nonſuited after iſſue*, I ſhall recover damages. Ibid.

15. A man may recover damages for two years in quare impedit, and *yet the church is not full by the biſhop*, for it was a *chantery by creation, and without cure of ſouls*. Br. Damages, pl. 164. cites 13 E. 4. 3.

Br. Quare Impedit, pl. 131. cites S. C.

16. In quare impedit, if the defendant *pleads*, that *ne diſturba pas*, the plaintiff ſhall have writ to the biſhop immediately, and writ

Br. Quare Impedit, pl. 132. cites S. C.

writ of inquiry of damages, and judgment thereof after, per tot. Cur. except Brian. Br. Judgment, pl. 122. cites 13 E. 4. 7.

—S. P. Br. Brief, al. Eveſque, pl. 14. cites 21 H. 6. 45. and 22 H. 6. 28, 29.

17. In quare impedit *againſt three*, the plaintiff *recovered by default againſt one*, and judgment was, that he have writ to the biſhop, and damages for half a year, and ceſſet executio till it be tried againſt the other defendants; for otherwiſe this execution againſt the one alone, ſhall abate the writ againſt the others; for he cannot recover the preſentation againſt the others when he has the preſentation by the firſt judgment; as in treſpaſs againſt two, and it is tried againſt the one, and he takes execution againſt him, the writ ſhall abate againſt the other. Br. Quare Impedit, pl. 137. cites 20 E. 4. 1. and 10 E. 4. 11. 13.

S. C. cited Arg. 3 Buls. 174. in caſe of Grange v. Denny.

18. Where a man has a *quare impedit againſt one*, and the *defendant has a darrein preſentment againſt the plaintiff, and recovers* in the darrein preſentment, and the *plaintiff is nonſuited in the quare impedit*, the defendant ſhall have two writs to inquire of the damages, but he ſhall not render double damages for one diſturbance. F. N. B. 39. (D).

19. Damages for half a year were adjudged, where it appeared that the *ſummons was not dereigned within the 6 months*, and held good. D. 77. pl. 35. Mich. 6 E. 6. Henſlow and Stanby v. Biſhop of Sarum and Keble.

20. In quare impedit the jury found the value of the church only. The omiſſion of the other three points may be ſupplied by writ of inquiry of damages. D. 135. Marg. pl. 12. cites 10 Rep. 118. fol. 119.

And ſuch a precedent is in the Book of Entries, fol. 110. et *quod interim ceſſet executio 'de brevi epiſcopo habend'*, and at length the plaintiff relinquiſhed his damages, and had judgment and writ to the biſhop; Quod nota. D. 135. pl. 12. Mich. 3 & 4 P. & M. Poyner v. Charleton and Charels.——And the reaſon, why ſuch omiſſions in the finding by the jury in a quare impedit may be ſupplied by a writ of inquiry of damages, is, becauſe as to the 4 points to be inquired, no attaint lies of them; for as to them it is only an inqueſt of office. 10 Rep. 119. Mich. 10 Jac. per Cur. in Cheyney's caſe, cites 11 H. 4. 80.

21. The *patron* defendant *died pending* the quare impedit for a preſentment to a *prebend*, yet the plaintiff had judgment to recover the preſentment and damages to 10 l. only, and to remove the incumbent and a writ to the biſhop ad petitionem querentis dirigend'. D. 194. pl. 33. Mich. 2 & 3 Eliz. Biſhop Litchfield and Merrick's caſe.

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22. In quare impedit *againſt the archbiſhop*, the *biſhop* of Lincoln, *and one G.* they *all made default at the diſtreſs*, and judgment was given againſt them for the plaintiff to have a writ to the biſhop, and to recover *damages againſt all* of them, becauſe by this default all of them are ſuppoſed to be diſturbers; *but* the *plaintiff was compelled to make* title*, and proceſs iſſued to inquire whether the church is void, and how long, and of what value, &c. Mo. 81. pl. 214. Hill. 17 Eliz. Watſon v. Biſhop of Canterbury & al.

D. 241. a. pl. 48. Trin. 7 Eliz. S. C. and the inquiſition found that the church was void for 3 years paſt, and remained void 2 years and more, and that the church is now full of G. of the collation of the ſaid archbiſhop; and by the opinion of the Court judgment was given, that the plaintiff recover the preſentation, and have writ to the biſhop of Lincoln aforeſaid, and damage to the value of the church to half a year, &c. and that all the defendants be in miſericordia.——Bendl. 149. pl. 207, S. C. ſays, the plaintiff had

had judgment to recover his preſentation and damages for 2 years, and that he was of counſel with the plaintiff.

23. *Error of a judgment* in quare impedit, the judgment being for the plaintiff, and the value of the church found to be 80 l. per annum, a writ of error being brought of the judgment *before the exigi fac.* and after the record removed, and the judgment being affirmed, and having depended a year and more, the court awarded, that the defendant in error ſhould have *damages for a year*, during which time the writ of error was depending, according to the value of the church found by the verdict, which was 80 l. per annum, and they awarded him 80 l. *beſide coſts*, according to the precedent in 6 Edw. 6. D. 77. Cro. Car. 145. Mich. 4 Car. pl. 24. Anon.

But ſee Cro. C. 175. EARL OF PEMBROKE v. BOSTOCK, where damages were mitigated on account of the clerk's having had poſſeſſion.

24. If upon a *writ of error* brought *judgment be affirmed*, the defendant in the writ of error ſhall have damages; per Whitlock J. Godb. 439. Trin. 5 Car. Earl of Pembroke v. Boſtock.

25. In a quare impedit there was a *demurrer and an iſſue.* The *plaintiff had a verdict*, and the jury who tried the iſſue found the value of the church, and that it is yet vacant, and taxed damages for the half year; and the plaintiff had *judgment likewiſe upon the demurrer.* It was moved, that *the church being yet vacant*, and that the patron might have the fruit of his preſentation, he ought not to recover damages for the value of the half year; and the prothonotaries ſaid, that it is the conſtant courſe, that the plaintiff ſhall not recover damages for the half year where the church remains void; and though the jury tax damages, yet in ſuch caſes they enter a remittitur of the damages where the church remains void, and ſo they would have done in this caſe without troubling the court, if the parties had applied themſelves to them. 3 Lev. 59. Trin. 34 Car. 2. C. B. Holt v. Holland.

S. C. Skin. 25. Mich. 33 Car. 2. C. B. ſays, the queſtion was, If the plaintiff ſhould have coſts? and it was ruled, that if it be a quare impedit by common law, then there ſhall be no coſts; but otherwiſe if by ſtatute; and if the church is full of the defendant by inſtitution, then it is a quare impedit within the ſtatute; but if it is not, then it is at common law; and cites Co. Ent. 508, 509. ——— 3 Neſ. Abr. 35. tit. Quare Impedit (C) pl. 6. in abridging this caſe of Lev. 59. ſays the court was of that opinion, viz. that the plaintiff ought not to have damages for the value of half a year. [But I do not obſerve any thing in the caſe to that purpoſe; and I preſume the law is otherwiſe.]

26. In quare impedit to preſent to the vicarage of B. the plaintiff ſet forth, that E. C. was ſeiſed of the rectory of B. to which the ſaid vicarage belongs, and that the ſaid *E. C. preſented* one S. *and then conveyed* the rectory *to the plaintiff F. and others truſtees*, and their heirs, to the uſe of the ſaid E. C. and her heirs, *till marriage had* between her and C. D. *and after to the uſe of the plaintiffs for* 500 *years, for raiſing* 4000 *l.*, *&c. that the marriage was had, and ſo the plaintiffs poſſeſſed*, &c. that the vicarage became void by the death of S. and ſo it belonged to them to preſent. The biſhop claimed nothing but as ordinary. H. the incumbent pleaded, that king James I. was ſeiſed of the ſaid rectory in fee, and that it being void by the death of L. he preſented one Solbear, and ſo derived a deſcent down to king William, &c. abſque hoc, that E. C. was ſeiſed in fee; there was judgment againſt the biſhop, and the plaintiffs took iſſue upon the traverſe, which was tried at the aſſiſes at Exon, and the plaintiffs had a verdict; and the jury farther found, that the vicarage was full of the defendant H. ex præſenta-

ſentatione of the king, and that it was afterwards void on the 25th of December 1697, by the death of Sainthill the laſt incumbent, and that 20 May, 10 W. 3. the plaintiffs brought a quare impedit againſt the biſhop and the defendant, and that the vicarage was of the yearly value of 60 l. ultra reprizas, and thereupon the plaintiffs prayed judgment according to the ſtatute, and a writ to the biſhop to remove the defendant H. and to admit idoneam perſonam at the preſentation of the plaintiffs, and damages to the value of the vicarage of the church for half a year, and had judgment accordingly; and a writ of error was brought, and the plaintiff in error was nonſuited. Lutw. 901. Hill. 10 & 11 W. 3. Biſhop of Exeter and Heſkett v. Freake & al.

See (B. d. 19) pl. 4.

(B. d. 22) *Error.* And Judgment reverſed.

Br. Preſentation, pl. 28. cites S. C.

1. A. *Seiſed of the manor and advowſon appendant had iſſue B. and died ſeiſed,* and *B. entered and endowed M. his mother of the 3d part of the manor, and the 3d part of the advowſon to preſent by turn,* and *took S. to wife,* and *demiſed two parts of the manor, and the reverſion of the 3d part with his part of the advowſon in demeſne and in reverſion, and retook to him and his feme for their lives,* and *preſented twice to the* advowſon, and *after granted two acres of the manor with the advowſon, to W. who preſented,* and then *W. releaſed to the heirs of B. and to S. his feme, all his right. B. died. M. died,* and the *church became void. S.* to whom the eſtate was made for life, ut ſupra, *preſented,* and *T. the ſon of W. the diſcontinuee, diſturbed, and he brought aſſiſe of darrein preſentment againſt S. and recovered,* and *S. brought* writ of *error;* and becauſe the two parts of the advowſon which remained appendant may lie in diſcontinuance by demiſe of two acres with the advowſon, yet the 3d part of the advowſon which the tenant in dower had, which remained in reverſion and lies in grant, this does not lie in diſcontinuance, and therefore the grant of B. was not good of this but during his life, and therefore, becauſe the baron had two preſentments, this 3d preſentment belonged to M. if ſhe had been alive, and now by her death it belongs to S. to whom it was re-granted for life, and therefore the judgment erroneous which was given againſt S. for by the death of B. her baron, his grant was void; wherefore it was awarded, that the firſt judgment be reverſed, and that *S. have a writ to the biſhop, and* that ſhe *rehave her damages loſt by the firſt judgment; and of the damages after* the firſt judgment *the court took adviſement;* and there it was agreed, that though a man be nonſuited in writ of error, he may have another writ of error. Br. Error, pl. 121. cites 23 Aſſ. 8.

2. In quare impedit, the *defendant appeared by attorney who had no warrant,* and *writ was awarded to the biſhop for the defendant, becauſe the plaintiff was demanded and did not come;* and becauſe it was perceived afterwards that the defendant's attorney had no warrant, the *judgment and execution were appealed, and writ of repeal*

pend awarded to the biſhop, and the defendant's attorney committed to priſon till they ſhould conſider further what to do with him. Br. Impriſonment, pl. 16. cites 38 E. 3. 8.

3. Error; the *provoſt of C.* brought qua. imp. *againſt J. H.* and *counted, that the advowſon was appendant to his manor of D.* and *ſhewed a preſentation* in himſelf, *by which his clerk was inſtituted and inducted*, &c. *J. H. ſaid, that one J. was maſter of the hoſpital of G. and* was *ſeiſed of the advowſon as in groſs in right of the houſe, and preſented one P. who was inſtituted*, &c. *and the maſter died, and M. was made maſter, which M. and his confreres preſented the ſaid J. H.* now defendant; and the *plaintiff ſaid, that the ſaid J. maſter,* [470] *and the ſaid J. H. defendant, are one and the ſame perſon*, and not diverſe; upon which they demurred, and the provoſt plaintiff had judgment to recover in C. B. and the defendant brought writ of *error*, and *aſſigned, becauſe he brought quare impedit where he is out of poſſeſſion, and therefore ought to have writ of right of advowſon*; and he ſaid further, *that no patron is named in the writ*; and alſo, *that by the averment that the ſaid J. H. and J. the maſter are one and the ſame perſon, and that the maſter and confreres preſented the maſter, he has by this confeſſed no patron to be named*, &c. Br. Error, pl. 83. cites 14 H. 8. 2.

4. The plaintiffs had a verdict in a quare impedit againſt the ordinary and the incumbent, and a writ awarded to the metropolitan, and a fieri facias to the ſheriff. Writ of error was brought; and one of the errors aſſigned was, that *damages were given for half a year*, when it *appears that the nonſummons was not deraigned within the ſix months*; but the firſt judgment was affirmed. D. 78. b. pl. 34. Mich. 6 E. 6. Henſlow and Stanſby v. Biſhop of Sarum, and Keble.

5. A. recovers in a quare impedit againſt the biſhop and incumbent by verdict, and has *judgment before the judges of aſſiſe*, and niſi prius by the ſtatute of *Weſt.* 2. 20. A. has a writ to the metropolitan, quia epiſcopus eſt pars, the church is in the dioceſe of the biſhop defendant; the biſhop and incumbent bring a *writ of error directed to the Ch. J. of C. B.* to reverſe the judgment given there, whereas it was not given there; yet the writ was good, for there is *no other form*, and the original was returnable in C. B. and the count, plea and iſſue, and venire facias for the trial, are there. And this is not *like a judgment in an aſſiſe*, and a writ of error brought upon it; for there the original, and proceſs and verdict, are all before the juſtices of aſſiſe. And in ſuch caſe a ſpecial writ of error is framed, and this judgment in aſſiſe can only be reverſed in the King's Bench; and ſo it is of a judgment given by juſtices of niſi prius. Jenk. 206. pl. 36.

The verdict in this caſe *ex officio found*, that the *incumbent was in by the preſentation of B.* who is *not a party to the writ*; this was aſſigned for error. Non allocatur; for this finding is only ex officio, and the incumbent by not pleading it, but it would

has waived it. If ſuch plea or matter had been pleaded, it would not have abated the writ, *have made the writ abateable*, and ſuch matter is not aſſignable for error. Jenk. 206. pl. 36.

6. In a *quare impedit by the queen againſt the biſhop* of Glouceſter, &c. *and one S.* the *biſhop pleaded that he claimed nothing but as ordinary*; and *the queen recovered*; afterwards *the biſhop* and S. *joined in* a writ of *error*. It was inſiſted that they ought not to join in this

Cro. E. 65. pl. 11. S. C. by name of Biſhop of Glouceſter and Savage's caſe,

and awarded that the writ was well brought; for Wray ſaid that the *biſhop hath loſs, for* by this judgment *the writ ſhall be to the archbiſhop for admiſſion and inſtitution*, and ſo he has loſs, and therefore may join.—Cro. J. 94. in caſe of Lancaſter and Lowe, was cited the caſe of JONES v. DIXON, where Jones and the Archbiſhop of York ſued a writ of error of a judgment againſt them, and Jones only aſſigned the errors, and therefore held to be ill.——If the biſhop and defendant join in bringing a writ of error, the biſhop, unleſs *ſummoned and ſevered*, muſt join in the *aſſigning* them. Cro. J. 92. Lancaſter v. Lowe.

If a quare impedit be brought againſt a biſhop and others, and judgment be againſt them all, the *defendants muſt all join in a writ of error*, unleſs where the biſhop claims only as ordinary. 3 Mod. 134. in caſe of Hacket v. Herne.

this writ, becauſe the biſhop had diſclaimed the patronage; *and* the concluſion of the *writ was, ad grave damnum epiſcopi*, which cannot be; for the biſhop cannot be grieved by the judgment, when he neither had or claimed any thing in the church. Wray ſaid that it had better been left out, but that the biſhop ſhall join for conformity and for privity of record; and the plea of the biſhop is not ſo ſtrong as a diſclaimer; for in diſclaimer the judgment is, that the plaintiff take nothing by the writ, whereas here it is quod querens recuperet præſentationem ſuam verſus dictum epiſcopum ad eccleſiam prædictam. And afterwards the writ of error was awarded good. 3 Le. 176. pl. 228. Trin. 29 Eliz. The Queen v. the Biſhop of Glouceſter.

Noy, 66. S. C. but not S. P.

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7. The queen had judgment in quare impedit, by reaſon of lapſe; error was brought, but the *incumbent was ſummoned and ſevered;* and after judgment was reverſed at the ſuit of the heir and executor, (being the ſame perſon) and as heir and executor. It was ſaid that the incumbent might well enter, for by the reverſal there is no record of the recovery againſt him. Cro. E. 324. Paſch. 36 Eliz. Pipe, &c. v. the Queen.

8. In error to reverſe a judgment in a quare impedit it was aſſigned, 1ſt, That a *ſtranger* was *poſſeſſed for years*, and *deviſed it to the plaintiff, and that he had it by the aſſent of the executor*, but did *not ſay virtute legationis præd.* 2dly, He *ſhews not how the church became void*, either by the death or deprivation of the incumbent, nor for what cauſe; and it might be ſuch a cauſe for which the queen ſhould have the preſentation, as for ſimony, &c. 3dly, Becauſe the value of the church is found to be 40 l. per annum, and the judgment is, *quod recuperet damnum, viz. medietatem dicti valoris dictæ eccleſiæ per dimidium unius anni, quæ ſe attingunt ad* 20 *l.* which is not according to the precedents. But the court being full, the judgment was affirmed. Cro. E. 678. Trin. 41 Eliz. B. R. Biſhop of Glouceſter v. Veale.

2 Bulſt. 36. S. C. and 38. S. P.

9. Judgment was given againſt Dr. Harris in a quare impedit in C. B. who brought a writ of error in B. R. and the error aſſigned was, for that Auſten the *defendant in the original action had pleaded in bar, that one Peaking was incumbent, and that the church became void by his deprivation* (but *no time ſhewn when* he was deprived), *and that queen Mary preſented one Wood uſurpando on the rightful patron, who was in for ſix months*, &c. The plaintiff *replied, that after Wood was preſented* by the queen, *the earl of Pembroke, who had purchaſed the advowſon before, brought a quare impedit* againſt the ordinary and incumbent; *to which* the ordinary pleaded, that he claimed nothing but as ordinary, and the *defendant's attor-*

ney pleaded non ſum informatus, by which he recovered, and the *incumbent legitimo modo amotus fuit*, and it doth *not appear whether* this quare impedit was *brought within ſix months after Wood was preſented:* it was inſiſted that this plea ſhould be taken ſtrongeſt againſt the pleader, and therefore the quare impedit ſhall be intended to be brought within 6 months; for otherwiſe the incumbent could not be legitimo modo amotus: and the judges being of this opinion, the judgment was affirmed. 1 Roll. Rep. 210. Trin. 13 Jac. B. R. Harris v. Auſten.

10. Judgment was in quare impedit, and the ſame term a *writ of error* was delivered to the ſame court, *before a writ to the biſhop* was awarded to admit the clerk. Per tot. Cur. the writ of error ought to have been allowed without any other ſuperſedeas, becauſe a writ of error is a *ſuperſedeas* in itſelf. Godb. 439. Trin. 5 Car. Earl of Pembroke v. Boſtock.

11. In error brought upon a judgment in quare impedit given in Ireland, it was inſiſted that the *plaintiff muſt ſet forth* both *ſeiſin and vacancy*, but that here he had failed in both. For 1ſt, As to the ſeiſin the declaration ſtands thus, *ſeiſitus fuit & in advocatione eccleſiæ;* here the *(et)* couples nothing, and ſeiſitus refers to nothing. 2dly, Vacancy; the record is thus, *eccleſia prædict. vacavit per ceſſionem*, &c. Now this is pleading a conſequence *without ſetting forth the act of which this is a conſequence;* it ought to have been pleaded thus, that the parſon was made a biſhop, or advanced to a living incompatible, &c. as the fact was, per quod eccleſia præd. vacavit. Third exception taken to the record was, that the concluſion was, *et hoc paratus eſt verificare*, inſtead of *inde producit ſectam*, and ſo no ſuit before the court, and that this is not mere matter of form. But it was anſwered that the word *(et)* may be left out or tranſpoſed thus, et de feodo & de jure. And as to the vacancy and the paratus verificare, advantage might poſſibly have been taken of them by demurrer, which advantage is loſt by taking iſſue. Per Cur. the objection of the ſeiſin is the ſtrongeſt, for it is *nonſenſe* at preſent, and every thing may be cured by leaving out and putting in. Poſſibly in tranſcribing the record *(de)* was [472] omitted; and if the fact be ſo, it may be ſet right by a certiorari: *de & in advocatione* would be well. As to the omiſſion of the inde producit ſectam, this would have excuſed the defendant in not anſwering; but in fact he has anſwered it. And as to the objection about pleading the vacancy, it ought to have been pleaded as above objected that it ought to be, but *the vacancy is admitted by pleading a preſentment under it.* Adjornatur. 10 Mod. 308, &c. Paſch. 1 Geo. B. R. the King v. the Biſhop of Meath.

(B. d. 23) *Scire Facias* in Quare Impedit, *and Pleadings* therein.

See (C. c. 2) pag. 396. the note in the middle, and the ſections following.

1. IN quare impedit *by the king againſt the patron he recovered, and after confirmed the eſtate of the incumbent of the defendant*, and then the *king had ſcire facias upon this judgment againſt the patron*; he

he cannot plead this confirmation made to the incumbent, for the incumbent had nothing in the patronage. Br. Barre, pl. 96. cites 9 E. 3.

2. Where the *king ſeiſes the temporalties* of a biſhop *by judgment*; and *a prebend annexed voids*, the king ſhall have ſcire facias of the preſentation, and ſhall have execution; quod nota. Br. Quare Impedit, pl. 71. cites 21 E. 3. 29.

F. N. B. 47. (I. the note in the marg. cites 21 H. 7. 3.

3. A man had proximam præſentationem by grant; the church voided; a *ſtranger preſented*, and the *grantee brought quare impedit, and recovered, and had writ to the biſhop*, who *returned that the preſentee of the diſturber reſigned, and another is in*; and upon this the plaintiff had *ſcire facias to have execution*, notwithſtanding that it be a ſecond avoidance now, *becauſe he recovered the firſt avoidance*, and the covin of the defendant ſhall not prejudice the plaintiff. Br. Preſentation, pl. 33. cites 21 H. 7. 8.

4. Where *partition* is made *betwixt coparceners, by licence* of the king, of an advowſon *in a court of record*, as in the common pleas, and afterwards the *coparcener who hath the next turn dieth, her heir* within age, and *in ward to the king*, and the *church voids*, the king ſhall have a ſcire facias againſt the other coparcener, &c. upon that partition; and yet he was a ſtranger to the partition. F. N. B. 34. (H.)

Ibid. in the new notes (a) ſays ſee 12 E. 3. 9. 13 H. 8. 14. 22 E. 4. 9. 27 H. 8. 11.

5. If 2 coparceners *make partition to preſent by turns*, although that *one* of the coparceners *afterwards uſurps upon the other* coparcener, and preſents in her turn, that preſentment ſhall not put her out of poſſeſſion, but ſhe ſhall have her turn when it falls again, and ſhall have a quare impedit or a ſcire facias upon the compoſition, if it be upon record, if ſhe be diſturbed to preſent, &c. F. N. B. 34. (I).

F. N. B. 33. (I) in the new notes there (d) cites 14 E. 2. Quare Impedit, 171, 172. That a man may have a

6. Where a man doth *recover in a writ of right* of advowſon, he ſhall preſent *at the next avoidance*, and ſhall have a quare impedit without alleging any preſentment to himſelf or his anceſtors, but ſhall declare upon the record, or *may have a ſcire facias* upon the recovery, and *ſo may his heir* have a ſcire facias upon that recovery, againſt the heir of the other party, *at the next avoidance* after the recovery, *but not after*, as it ſeemeth. F. N. B. 36. (A).

ſcire facias on the judgment for the diſturbance, but that on the judgment in a writ of right, he had ſeiſin delivered by the ſheriff; and yet *becauſe he cannot have ſeiſin of the church without a preſentment*, when the church avoids *he ſhall have a ſcire facias for the preſentment*. 15 E. 2. Quare Impedit, 172. ——F. N. B. 36. (A) in the new notes there (b) cites 13 E. 3. Scire Facias, 118. where the conuzee of a fine of an advowſon brought a ſcire facias at the next avoidance againſt the heir of the conuſor, and held good without ſhewing any preſentment.

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Ibid. in the new notes (c) ſays, he

7. [So] if a man *recover in quare impedit*, he ſhall have a *ſcire facias againſt the patron and the incumbent who made default*, if he will ſue execution of this recovery. F. N. B. 36. (B).

ſhall have a *ſcire facias againſt the heir* at the next avoidance. 39 E. 3. 25. *But* the *heir ſhall not have a ſcire facias* on a recovery in a quare impedit, 9 H. 6. 57. becauſe in the quare impedit the preſentment only is recoverable, and not the advowſon.

Ibid. in the new notes (d) ſays, Yet ſee the

8. If *coparceners make partition in the chancery, or in C. B. to preſent by turns*, and afterwards a *ſtranger uſurps in their ſeveral turns*; yet after, *when their turns come, every of them may have a ſcire facias upon*

upon this partition againſt the ſtranger, when his turn cometh, to ſhew wherefore he ſhould not preſent, notwithſtanding the uſurpation aforeſaid. But *otherwiſe* it ſeemeth it is *if the partition be of record*, then they ſhall be put to their writ of right by reaſon of the uſurpation. F. N. B. 36. (c).

contrary, 33 E. 3. Quare Impedit, 196. which ſeems not to be law; for

there it was brought againſt an eſtranger, and held, that though by ſuch uſurpation he put the one coparcener (whoſe turn it was) out of poſſeſſion, yet it did not put the other out of poſſeſſion. 43 E. 3. 15. 22 E. 4. 9.

(C. d.) *Aſſiſe of Darrein Preſentment. Who ſhall have it without* any *Preſentment* before.

See (N. c) &c.

[1. IF a *tenant* by ſervice of *chivalry preſents and dies*, his heir in ward, during which wardſhip the church voids, the *guardian in chivalry* may well maintain this writ of darrein preſentment if he be diſturbed, though he himſelf never preſented before. 32 E. 1. 89. Admitted. Contra 50 E. 3. 14. Per Holt.]

[2. The *ſame law of the grantee of the ward*, for he may maintain this writ. 32 E. 1. 89. Admitted.]

3. 13 E. 1. *cap.* 5. enacts, That *as often as any, having no right, doth preſent during the time that* heirs *are* in ward, *or during the eſtates of* tenants in dower, *by the* courteſy, *or otherwiſe for* term of life, *or* * *of* years, *or* † *in* tail, ‡ *at the next avoidance, when the heir is come to full age, or when, after the death of the tenants before named, the advowſon ſhall revert unto the heir, being of full age, he ſhall have ſuch action* ‖ *by writ of advowſon poſſeſſory*, § *as the laſt anceſtor of ſuch an heir ſhould have had the laſt avoidance happening in his time, being of full age before his death, or before the demiſe was made for term of life, or in fee tail as before is ſaid.*

* *Tenant for* term of *half a year* or a year, and *grantee of the next avoidance*, are within the purview and meaning of this act; tenant by *ſtatute merchant, or*

ſtaple, or *elegit*, are within the purview of this ſtatute. 2 Inſt. 359.

† *Tenant in tail* was of a manor, whereunto an advowſon was appendant, and *before* this ſtatute an eſtranger uſurped, and then *the ſtat. of donis* condit' and this act was made tenant in tail dies, and the manor deſcends to his iſſue; yet the heir in tail hath no remedy, becauſe the advowſon was ſevered by the uſurpation; and *this act extendeth not to uſurpations before* this act. 2 Inſt. 359.

But if tenant in tail ſuffer an uſurpation *after* this act and dieth, his iſſue ſhall have remedy by quare impedit within the purview of this ſtatute. 2 Inſt. 359.

‡ Note, albeit the *heir* hath the advowſon *by deſcent*, yet if he ſuffereth an uſurpation he *hath no remedy* by this branch *until after he cometh of full age*; this is to be intended *when* the heir is *in ward*, for ſo this act putteth the caſe; *but if* the heir be *out of ward*, he may have his quare impedit or his aſſiſe of darrein preſentment during his minority. 2 Inſt. 359.

‖ This is by a *quare impedit or* aſſiſe of *darrein preſentment*. 2 Inſt. 359.

§ Then put caſe, that *one purchaſeth* an advowſon in fee, *and dieth before* any *preſentation* made by him, *and this deſcends to his heir within age*, the *church becomes void*; if the heir be in ward the heir may have his quare impedit at his full age, and if he be within age, and out of ward, he may have his quare impedit, and count of a preſentation made by him of whom the purchaſe was made; but he can have no writ of right of advowſon, becauſe neither his anceſtor nor he never preſented. 2 Inſt. 359.

Note, It is *not ſaid* here *qualem habuit, but* qualem *haberet*, as the anceſtor ſhould have had if the church had become void in his time, and his title to preſent had accrued unto him; for there the right, or at leaſt the poſſibility of action doth deſcend. 2 Inſt. 359.

One ſeiſed of an advowſon *in fee, preſents* to the church being void, *and grants* the ſame *to A. for life*, and after grants the *reverſion to K. and his heirs*; *A.* tenant for life *ſuffereth an uſurpation* to the church, the heir of K. having the right of this advowſon by deſcent, ſhall, after the death of A. the church becoming void, preſent, and yet K. could not have had a quare impedit; but if A. had died before the uſurpation, then might K. have had a quare impedit, and therefore his heir ſhall have at the next avoidance that remedy which by the poſſibility he might have had; and herewith agreeth the authority of the book of 2 E. 3. 10, 11. For there Tond. taketh this exception, but doth not demur. 2 Inſt. 359, 360. ——See (C. c. 2).

4. A man ſhall have aſſiſe of darrein preſentment, *though he nor his anceſtors did preſent to the laſt avoidance; as if* the *tenant for life*, or for *years*, or in *dower, or by the courteſy, ſuffers an uſurpation* unto a church, &c. and dies, *he in the reverſion, who is heir* unto the anceſtor who laſt preſented, ſhall have an aſſiſe of darrein preſentment, if he be diſturbed. F. N. B. 31. (G).

*F. N. B. 31. (G) in the new notes there (c) cites 2 E. 3. 11. That the heir of the grantee of a reverſion ſhall avoid this for a purpriſe on the tenant for life; in a quare impedit brought by Stanhope againſt the Biſhop of Lincoln, this was denied by all but one. But ſee the contrary held by Moyle and Priſot, 34 H. 6. 26, 27. And ſo is 33 H. 6. 12.

5. *But if a man preſents*, and then * *grants the advowſon* unto another *for life, and he ſuffers* one uſurpation, or 2 or 3 *uſurpations*, now at the next avoidance he in the reverſion ſhall not have an aſſiſe of darrein preſentment, if he be diſturbed to preſent; and that appeareth *by the ſtatute of Weſtminſter* 2. *cap.* 5. that *the remedy* of the ſtatute *is* given *for the heir* of him who made the demiſe, who is in reverſion, and *not for the leſſor* himſelf. F. N. B. 31. (G) cites 18 E. 2. pl. 20. 6 E. 3. 41.

6. If the *aſſiſe finds that tenant by the courteſy, or* tenant in *dower, was the laſt who preſented*, by that the *heir* ſhall have a writ to the biſhop, and yet he cannot make title by that preſentment. Contra, in a quare impedit. And Seton gives the reaſon, becauſe he cannot convey by them; but if the heir do allege the laſt preſentment in herſelf, and the aſſiſe be to her by default, and found ut ſupra, yet the heir ſhall recover. Contra, if they be at iſſue upon that preſentment. F. N. B. 31. (G) The note in the margin.

But if the infant purchaſe the advowſon and preſent, and afterward the church becomes void, and a ſtranger preſents and uſurps upon the infant, and then the incumbent dies, the infant preſents, and is diſturbed by a ſtranger, he ſhall not have a darrein preſentment, but ſhall be put to his writ of right. F. N. B. 31. (K) [according to the new edition, but in the old editions it is (I) ſ. 4.]

7. If a man *uſurps upon an infant*, and preſents, *which* infant *hath the advowſon by deſcent*, and afterwards the *incumbent dieth*, the infant ſhall preſent; and if he be diſturbed, he ſhall have an aſſiſe of darrein preſentment. F. N. B. 31. (K) [according to the new edition, but in the old editions it is (I) ſ. 4.]

(D. d) Who ſhall have it *after Preſentment.*

[1. IF a *guardian in chivalry preſents*, and after the church voids, he ſhall have an aſſiſe of darrein preſentment if he be diſturbed. Fitz. Na. 31. J. Contra, 50 E. 3. 14. Per Holt.]

Watſ. Comp. Inc. 8vo. 432. cap. 22. cites S. C. See (H. d) pl. 3. and the notes there.

[2. So a *leſſee for years* ſhall have this writ if he has preſented before. Fitz. Na. 31. J. 5 H. 7. 16. b. Per Fairfax. Contra, 50 E. 3. 14. Per Holt. Kell. Incerti Temporis, 118. b.]

Watſ. Comp. Inc. 8vo. 432. cap. 22. cites S. C. This is the caſe of the rectory of

[3. So a *tenant at will*, after he has once preſented, ſhall have this writ. Contra, 50 E. 3. 14. Per Holt.]

4. If the king's *patentee of an advowſon preſents twice* to the ſame advowſon, and his *clerk is inſtituted and inducted*, though the *patent is*

is void in law, ſo that the advowſon does not paſs thereby, yet the patentee has * ſo gained the advowſon by uſurpation againſt all ſtrangers, that if he be diſturbed at the next avoidance, he may maintain an aſſiſe of darrein preſentment againſt a ſtranger that has no title to it. Watſ. Comp. Inc. 8vo. 222. cap. 13. cites Dyer, 351. 18 Eliz. West Bodwin in Wiltſhire. D. 350. b. pl. 21.—Bendl. 252. pl. 270. S. C.

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(E. d) Aſſiſe of Darrein Preſentment. [*In what Caſes it lies. Eſtate altered.*]

Fol. 381.

[1. HE who will have this writ *ought to have the ſame* eſtate, *or parcel of the ſame eſtate which he had at* the time of *the firſt preſentment.*] Watſ. Comp. Inc. 8vo. 432. cap. 22. cites S. C.

[2. If a man being *tenant pur auter vie* of an advowſon preſents, and after *his eſtate is enlarged for his own life*; and after the church voids again, he ſhall not maintain an aſſiſe of darrein preſentment upon the ſaid preſentment, becauſe it is not the ſame eſtate, nor any parcel of the eſtate upon which the firſt preſentment was, but a *new eſtate*. Kell. Incerti Temporis, 118. b.] Watſ. Comp. Inc. 8vo. 433. cap. 22. cites S. C. This was in caſe of a *tenant by the curteſy*, who *preſented in the life of his wife*, who was ſeiſed in fee. Keilw. 118. b.——See pl. 13.

[3. So it is if *leſſee for years* of an advowſon preſents, and after *his eſtate is enlarged for life or in fee*, and then the church voids, he ſhall not have aſſiſe of darrein preſentment, becauſe he has a new eſtate by enlargement.] Watſ. Comp. Inc. 8vo. 433. cap. 22. cites S. C.—S. P. F. N. B. 31. (H) in the new notes (b) accordingly.

[4. The *ſame law* if *leſſee at will* preſents, and after his eſtate is enlarged for life or years, and this is more ſtrong; for he could not have this writ upon the firſt eſtate.] Watſ. Comp. Inc. 8vo. 433. cap. 22. cites S. C.

[5. If *leſſee for life* of an advowſon *upon condition to have fee* preſents, and after *the fee accrues*, and then the church voids, it ſeems that he ſhall have this writ, becauſe parcel of the old eſtate continues, and he had the poſſibility of accruer at the time of the firſt preſentment.] Watſ. Comp. Inc. 8vo. 434. cap. 22. cites S. C.

[6. If *leſſee for years* of an advowſon preſents, and after *the term incurs*, and he *takes a new leaſe for years* of the advowſon, it ſeems clearly that he ſhall not have this writ, becauſe he is in of other eſtate than that upon which the firſt preſentment was made.] Watſ. Comp. Inc. 8vo. 433. cap. 22. cites S. C.

[7. If the *grantee of a next avoidance preſents*, and after *purchaſes the advowſon*, and after the church voids, he ſhall not have this writ, becauſe this is merely a new eſtate, and no parcel of the eſtate upon which the firſt preſentment was.] Watſ. Comp. Inc. 8vo. 433. cap. 22. cites S. C.

[8. So if *leſſee for years or pur auter vie* preſents, and after *purchaſes the reverſion*, and then *the years expire, or ceſty que vie dies*, and afterwards the church voids, he ſhall not have this writ, becauſe he is in of other eſtate.] Watſ. Comp. Inc. 8vo. 433. cap. 22. cites S. C.

[9. *So* ſhall it be, though the *church voids during the years, or* during the *life of ceſty que vie*; for the firſt eſtate is extinct by his Watſ. Comp. Inc. 8vo. 433. cap. 22. cites S. C.

own act, and therefore he ſhall not have any benefit of the firſt eſtate.]

Watſ. Comp. Inc. 8vo. 434. cap. 22. cites S. C.

[10. If *two jointenants for years, life, or in fee* preſent, and then one dies, and after the church voids, *the ſurvivor* ſhall have this writ; becauſe he has the ſame eſtate which he had upon the firſt preſentment.]

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Watſ. Comp. Inc. 8vo. 435. cap. 22. cites S. C.

[11. If *tenant in fee or in tail* of an advowſon *upon condition to have for life or years* preſents, and after *his eſtate decreaſes*, he ſhall have this writ when the church voids again, becauſe he has parcel of the old eſtate.]

Watſ. Comp. Inc. 8vo. 435. cap. 22. cites S. C.

[12. *So* if *tenant in tail* preſents, and after *becomes tenant after poſſibility*, and after the church voids, he ſhall have this writ, becauſe this is a remnant of the tail.]

Watſ. Comp. Inc. 8vo. 434. cap. 22. cites S. C. —F. N. B. 31. (G) in the new notes there (b) cites Kitchen

[13. If the *baron ſeiſed in right of his feme* of an advowſon preſents, and after *has iſſue, and feme dies*, and after the church voids, the baron ſhall not have this writ, becauſe he is in of other eſtate than that upon which he preſented before; for before he had not any eſtate, but was only ſeiſed in right of the feme, and now he is ſeiſed of an eſtate for life. Dubitatur. Kell. Incerti Temporis, 118. b.]

[but it ſeems it ſhould be Kelw.] 118. that in this caſe the huſband ſhall have aſſiſe, &c. [But the caſe ſeems to be only the arguments on either ſide.]

* Fol. 382.

Watſ. Comp. Inc. 8vo. 434. cap. 22. cites ſame caſes.

[14. *But if the baron after iſſue had, had preſented*, and after the feme dies, and afterwards the church voids, the baron ſhall have this writ, becauſe he had an * *inception of an eſtate for life* by the curteſy at the firſt preſentment, the which is now completed.]

[15. If a *feme* be *leſſee for life, the remainder for life to the baron*, of an advowſon, and the *baron preſents*, and after the *feme dies*, it ſeems that the baron ſhall not have writ when the church voids again; becauſe before, he preſented in the right of the feme by reaſon of her eſtate for life, and now he is ſeiſed of another eſtate.]

16. If the *huſband and wife preſent to an advowſon* in the right of the wife, which is *appendant to the manor of the wife's*, and after the *huſband aliens one acre, parcel* of the manor, *with the advowſon in fee* to a ſtranger, *and dies*, and the *ſtranger preſents, and aliens the acre* to another in fee, *ſaving the advowſon* to himſelf, and then *the church voids*, the wife ſhall preſent; and if ſhe be diſturbed, ſhe ſhall have an aſſiſe of darrein preſentment; becauſe the advowſon was ſevered from the acre; but if the advowſon were appendant to the acre, then the wife ought to recover the acre before ſhe preſent to the advowſon. F. N. B. 31. (K) f. 2. [according to the new edition, but in the old editions it is (I) f. 5.]

Watſ. Comp. Inc. 8vo. 431. cap. 22. S. P.

17. *Wherever a man may have* aſſiſe of *darrein preſentment, he may* have a *quare impedit*, but *not e contra*. Godolph. Rep. 643. cap. 44. f. 1. cites Terms of Law, verb. Quare Impedit.

(F. d.) *What* ſhall be *good Preſentment to maintain it.*

See (K. d) (O. d).

[1. IF *J. S. preſents in my name, and by my aſſent*, and after the church voids, this is a ſufficient preſentment for me to have an aſſiſe of darrein preſentment againſt J. S. for this was my preſentment. Tr. 5 E. 1. b. Rot. 25. adjudged.] Watſ Comp. Inc. 8vo 431. cap. 22. cites S. C.

2. Where the *king or the pope preſents* to my advowſon without title, I ſhall have aſſiſe of darrein preſentment. Br. Darrein Preſentment, pl. 4. cites 3 H. 7. 7.

3. If a man *preſents unto an advowſon unto which he hath right*, and afterwards the *incumbent dies*, and a *ſtranger uſurps*, and preſents unto this advowſon *in the time of war*, and after that *incumbent dies*; now, if *he who hath right preſents again*, and be diſturbed, he ſhall have an aſſiſe of darrein preſentment, and this preſentment made in time of war by the ſtranger ſhall not grieve him. F. N. B. 31. (I). *So if* a man *preſents* unto an advowſon, and afterwards the *incumbent dies*, and another or- *dinary preſents by lapſe* and if he be

another incumbent, and after that *incumbent dies*; now the right patron ſhall preſent, and if he be diſturbed, he ſhall have an aſſiſe of darrein preſentment, notwithſtanding the mean preſentments. F. N. B. 31. (I) —— *But if* a man *preſents* unto an advowſon, *and after leaſes the ſame for* term of *years*, and after the church is void, *and the tenant* for years *preſents*, &c. and then the *incumbent dies*, and the *leſſor preſents*, and is diſturbed, it ſeemeth that he ſhall not have an aſſiſe of darrein preſentment, becauſe the *tenant for years did preſent in his own right*. F. N. B. 31. (I).

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(G. d) *In what Caſes* the *Preſentment of one ſhall be of the others.*

See (E. d).

[1. A Preſentment *by the grandfather* is ſufficient *for the ſon* to maintain this writ without any preſentment by himſelf, this being the laſt preſentment. Tr. 5 E. 1. b. Rot. 25.] Watſ. Comp. Inc. 8vo. 432. cap. 22. cites S. C.

[2. If a tenant by ſervice of chivalry preſents and dies, his heir in ward, during which wardſhip the church voids, the *guardian in chivalry* may well maintain this writ if he be diſturbed, though he himſelf never preſented before. 32 E. 1. 89. Admitted.]

[3. The *ſame law of the grantee of the ward*; for he may maintain this writ. 32 E. 1. 89. Admitted.]

[4. An *heir* who comes in *by deſcent* ſhall maintain this aſſiſe upon a preſentment made *by any anceſtor*. Britton, fol. 242. b.] Watſ. Comp. Inc. 8vo. 432. cap. 22.

cites S. C. —— If the *guardian preſents in the right of the heir*, and the incumbent dies, the heir ſhall preſent; and if he be diſturbed, he ſhall have an aſſiſe of darrein preſentment, although the guardian did preſent the mean and the laſt preſentment. F. N. B. (J).

(H. d) Aſſiſe of Darrein Preſentment. *What Perſon ſhall have it.*

See (E. d).

[1. *TENANT in fee* of an advowſon may have this writ without doubt.] Watſ. Comp. Inc. 8vo. 431. cap. 22, cites S. C.

[2. *Tenant in tail* of an advowſon may have this writ as well as tenant in fee thereof, and is not neceſſarily put to his quare impedit. † 46 Aſſ. 4. Adjudged.] † Br. Taile, pl. 24. cites S. C. —

Aſſiſe of darrein preſentment was brought by the heir *in tail*, who claimed it *as appendant to a manor*, Chelre

Chelre ſaid, he claims in tail, therefore he ought to have quare impedit, and not this action; but per Finch. he may † have the one or the other, therefore anſwer, quod nota; and yet the heir in tail ſhall not have aſſiſe of mortdanceſtor, but formedon, as appears tit. Formedon in F. N. B. and elſewhere. Br. Darrein Preſentment, pl. 1. cites 46 Aſſ. 4.

† Br. Quare Impedit, pl. 148. cites S. C.

See (E. d) pl. 6. S. P. For he ſhall not recover the advowſon

[3. *Leſſee for years* ſhall have this writ, if he has preſented before, though he has not a franktenement; for this aſſiſe is not like to an aſſiſe of novel diſſeiſin. Fitz. Na. 31. J. Contra Kell. Incerti Temporis, 118. b.]

in the darrein preſentment, but only the preſentation, as in quare impedit, per Fairfax J. but *quære* of the aſſiſe for termor; for it ſeems that *none* ſhall have aſſiſe *by the common law, but he who has title of franktenement*; but by the ſtatute tenant by *ſtatute merchant & elegit*, may have aſſiſe. Br. Darrein Preſentment, pl. 2. cites 5 H. 7. 16.

[4. *Guardian in chivalry* ſhall have this writ, if he has preſented before. Fitz. Na. 31. J. 32 E. 1. 89.]

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* Upon this branch two concluſions are to be obſerved, firſt, That the heir in reverſion is provided for in this caſe, and not the

5. 13 *E.* 1. *cap.* 5. enacts, That *where it chanceth that after the death of the anceſtor of him that preſented his clerk unto a church, the ſame advowſon is* aſſigned in dower *to any woman*, or to tenant by the curteſy, *which do preſent*, and after the death of ſuch tenants the very heir is diſturbed *to preſent when the church is void;*

It is provided, That from henceforth it ſhall be in the election *of the party diſturbed, whether he will ſue a writ* of quare impedit, or *of darrein preſentment; the* ſame *ſhall be obſerved in advowſons demiſed* for term of life, of years, or in fee-tail.

leſſor himſelf; for here it is ſaid, verus hæres. 2dly, That albeit, tenant by the curteſy, tenant in dower, tenant for life, or tenant in tail preſented laſt, yet the *heir to whom the reverſion falleth in poſſeſſion*, ſhall have by this branch an aſſiſe of darrein preſentment, albeit the heir or his anceſtor did not immediately preſent before. 2 Inſt. 362.

For on this writ the advowſon ſhall be recovered;

6. Aſſiſe of darrein preſentment is not maintainable *by the baron alone, in jure uxoris, without naming the feme with him.* Contrary of quare impedit. Br. Darrein Preſentment, pl. 3. cites 14 H. 4. 12.

but in quare impedit nothing ſhall be recovered but the preſentation or damages; and if in quare impedit brought by the patron alone, a writ ſhould be awarded to the biſhop againſt him, it would not bind the feme, who is not party. Br. Quare Impedit, pl. 41. cites 50 E. 3. 13.

S. P. Jenk. 1. pl. 1. For the preſentment only is to be recovered.

7. The *king* may maintain an aſſiſe of darrein preſentment. F. N. B. 31. (C).

Underſtand that the king may maintain this writ of any other church, but *not of a prebend.* Jenk. 1. pl. 1.

F. N. B. 32. (A) in the note in the margin, cites 20 E. 2. Darrein Preſentment, 11 & 13. but ſays they ſeem to make a *difference, when the diſturbance is before the compoſition* to preſent by turns, *and when after.*

8. Aſſiſe of darrein preſentment doth *not* lie *for one coparcener againſt the other*, as appeareth M. 20 E. 3. & M. 15 E. 3. pl. 10. F. N. B. 32. (A).

‡ Both the tranſlations leave out the word (not), but it is in the French original.

9. If a *parſon* be *patron of a vicarage*, and the *vicarage voids*, and a *ſtranger preſents*, the parſon ſhall have a quare impedit, or darrein preſentment; but if the ſix months paſs, he ſhall ‡[not] have a writ of right of advowſon; becauſe that writ is given only for him who hath the entire fee and right in him, and the parſon hath not the

the ſame; for the right is in the patron and ordinary. F. N. B. 49. (K).

(I. d) Aſſiſe of Darrein Preſentment. *Of what Thing.*

[1. THIS writ *is all in the poſſeſſion*, and the preſentment is the poſſeſſion. 21 E. 4. 2.]

2. An aſſiſe of darrein preſentment does not lie *de prebendis or eccleſiis prebendatis*; ita proviſum eſt coram rege, archiepiſcopis, epiſcopis, comitibus & baronibus. Jenk. 1. pl. 1. cites 19 H. 3.

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Fol. 383.

(K. d) *What* will be *ſufficient Seiſin* to maintain it.

See (F.d)—(O. d).

[1. *INSTITUTION* of his clerk *without induction* is ſufficient to maintain this writ. 38 H. 6. 16. b.]

Where the ordinary, metropolitan, or king preſents for *lapſe*, any of theſe collations will ſerve the patron for poſſeſſion in his aſſiſe of darrein preſentment. Godolph. Rep. 643. cap. 44. ſ. 1.

(K. d. 2) Darrein Preſentment. *Proceedings, Pleadings*, and *Judgment.*

1. IN an aſſiſe of darrein preſentment of an advowſon in groſs, *jointenancy* is not a good plea. By the Judges of both Benches, Jenk. 13. pl. 23. cites 15 E. 3.

2. Where the *king* or the pope *preſents to my advowſon without title*, I ſhall have aſſiſe of *darrein preſentment againſt the incumbent alone without naming the king* or the pope; for proceſs cannot be made againſt either of them. Br. Darrein Preſentment, pl. 4. cites 3 H. 7. 7.

3. If a man *preſents* to an advowſon, and afterwards the *parſon reſigns or is depoſed*, and the *patron preſents again*, and is diſturbed, he ſhall have an aſſiſe of darrein preſentment; and the *form of the writ* ſhall be *quis advocatus tempore pacis preſentavit ultimam perſonam, quæ mortua eſt, ad eccleſiam*, &c. although he reſign and be living. And the form of the writ is to ſuppoſe, that the defendant does deforce him of the advowſon, and yet by his count he counts, that he or his anceſtors laſt preſented to the advowſon, by which he does ſuppoſe that he is in poſſeſſion of the advowſon; and yet the ſame is good. F. N. B. 31. (H).

4. If *one defendant* in a darrein preſentment *dies*, the writ is good by the ſurvivor againſt the other. F. N. B. 32. (B).

5. If a diſturber preſent to an advowſon, and the patron bring an aſſiſe of darrein preſentment, and *pending the writ*, the *incumbent dies*, if the *diſturber preſents another incumbent and dies*, yet the patron ſhall have an aſſiſe of darrein preſentment upon the 1ſt diſturbance againſt the heir of the diſturber by Journey's accounts; and *ſo if the diſturber preſents two or three times within the 6 months*,

the very *patron ſhall have* an aſſiſe of *darrein preſentment upon the firſt diſturbance.* F. N. B. 32. (C).

† S. P. Becauſe nullum tempus occurrit regi, and therefore the king

6. A man ſhall *not tender a* † *demymark againſt the king* to enquire of the ſeiſin alleged in the king's count or declaration, as he ſhall in caſe a common perſon brings the writ; neither ſhall a man have *final judgment againſt the king*, although it be after the miſe joined betwixt the king and the tenant. F. N. B. 31. (D).

ſhall allege that he or his progenitor was ſeiſed without ſhewing any time. Co. Lit. 294. b.——F. N. B. 31. (D).

Mo. 883. pl. 1239. S. C. Noy, 18. S. C. by the name of the Village of St. Andrew's v. Archbiſhop of York and Counteſs of Shrewſbury.——Brownl. 27. S. C. by name of Sir

7. In darrein preſentment it was pleaded in abatement of the writ, that the *ſame plaintiff had brought a quare impedit for the ſame church againſt the ſame defendants, which writ was* ‡ *returned, and that they did appear to defend it.* The Court held the plea good in abatement of the writ; for the quare impedit is a writ of a higher nature, it being for the right and the poſſeſſion. And the ſtatute of W. cap. 5. ſays, it may be in the *election* of one, whether he will have an aſſiſe of darrein preſentment or quare impedit, and therefore he cannot have them * both. And the Court awarded, that the aſſiſe abate. Hutt. 3, 4. Mich. 15 Jac. Andrews v. Hacker.

William St. Andrew v. Archbiſhop of York and the Counteſs of Shrewſbury & J. H.——S. C. Hob. 184. pl. 222.——G. Hiſt. of C. B. 207. cites S. C.——Watſ. Comp. Inc. 8vo. 435, 436. cites ſame caſes.

So where aſſiſe of darrein preſentment was taken by *default againſt the clerk*, and the other tenant *pleaded in abatement* of the aſſiſe, that there was a *quare impedit* depending, the plea was adjudged good. Brownl. 28. Trin. 12 Jac. Lovelace v. Lady Spencer.——‡ Warburton J. cited 10 E. 3. Statham in Darrein Preſentment 3. that it was urged by Hank. and Hill, that the quare impedit was not depending till defendant had appeared. Hutt. 4. but the book ſays, vide 2 E. 4. fol. that it is depending when it is returned.

* [480]

Watſ. Comp. Inc. 8vo. 493. cap. 26. cites S. C. Ibid. 530. cap. 28. cites S. C.

8. If darrein preſentment be brought *in Middleſex*, at the return of the writ the *aſſiſe ſhall be* there *arraigned* by the ſerjeants at the bar *in French, and the tenant* ſhall be *demanded*, and if the tenant do not appear, when he is demanded, a *reſummons* ſhall be awarded; and *if upon the reſummons the tenant ſhall not appear*, the *aſſiſe ſhall be taken* againſt him *by default*; and if the tenant appear, he may demand oyer of the writ and the return, and the writ ſhall be read to him in hæc verba, and the return thereof, and the *jury ſhall have the view*, and the tenant may take exception either to the writ or to the return thereof, if there be cauſe; and if there be no cauſe, then he may pray a *day to plead*; and if the Court give a day, then the jurors that appeared ſhall be diſcharged of their attendance, and ought to appear upon a new proceſs to be awarded againſt them. The *judgment* in this aſſiſe *is to recover*

‖ S. P. Jenk. 2. pl. 1. cites 5 H. 7. 16.

the ‖ *preſentation, damages, and the value* for half a year, and if 6 months be paſſed, the value of the church for 2 years, by the ſtatute of Weſtminſter the 2d, and 6 of the jury ought to have the *view* of the church, to the intent that they may put the plaintiff into poſſeſſion if he recover; and in this writ the plaintiff ſhall not recover the advowſon but the preſentation. The *proceſs* in this writ *is ſummons, reſummons againſt the tenant, and ſummons, habeas corpus and diſtreſs againſt the jury*, and the proceſs ſhall be

returned

returned from 15 days *to* 15 *days*, and *no eſſoign nor voucher* lies *after a reſummons*. Brownl. 160.

9. The declaration in aſſiſe of darrein preſentment was *quod ipſe preſentavit*, without ſaying *ad eandem eccleſiam*. Upon error brought it was adjudged well enough; for it cannot have any other *intendment* than that he preſented to the ſame church mentioned in the plaint; and the words after *(quod admiſſus, &c. fuit in eadem)* refer to the church mentioned in the plaint, and therefore it was held good enough, and ſo affirmed a judgment given in the grand ſeſſions in Wales. Cro. C. 341. 348. Hill. 9 Car. B. R. Cort v. Biſhop of St. David's, Owen, and Pritchard.

Jo. 330. Lort v. Biſhop of St. David's. S. C. but not S. P.

(K. d. 3) *Verdict*. Good, in Darrein Preſentment.

1. IN darrein preſentment verdict found the iſſue for the plaintiff, and that the *church was full of P. the defendant, per tempus ſemeſtre modo præteritum*, and ſhewed not when or how long it was void, ſo as it might appear to the Court; and it was objected, that this might be a long time before the writ brought. But all the Court delived their opinions ſeriatim that the verdict is good, and that it is not neceſſary to find when. But the jury having found, quod tempus ſemeſtre modo tranſivit, the *modo tranſivit* ſhall be *intended that the 6 months paſſed hanging the writ*, which is the only thing inquirable in reſpect of the * damages. Cro. C. 341. 348. Cort v. Biſhop of St. David, Owen, & Pritchard.

It ſhall be intended, that it was well brought, and that there was no plenarty before the writ purchaſed, unleſs it be pleaded. Jo. 330. Hill. 9 Car. B. R. the 5th reſolution in S. C. by the name of Lort v. the Biſhop of St. David.

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(L. d) *Right of Advowſon. Of what* Thing.

[1. A Right of advowſon lies of an *appropriation*. 44 E. 3. 34. 14 H. 4. 14. b. Contra Com. Grendon, 501.

2. The king brought writ of right of advowſon *of the 4th part of the church of St. Dunſtan in L.* the defendant put himſelf in inqueſt in lieu of grand aſſiſe; per Pole, upon grand aſſiſe niſi prius is not grantable; quod nota. Br. Droit de Recto, pl. 14. cites 24 E. 3. 23.

In right of advowſon *of the 4th part of the tithes and offerings of the church of S. D. in L.* Cand. demanded judgment of the writ; for the *ſtatute of W. 2. gave tithes only*. Per Thorp, the chancery may make writ of tithes and offerings *in conſimili caſu*, and therefore he awarded the writ good. Br. Droit de Recto, pl. 8. cites 38 E. 3. 13.——S. P. F. N. B. 30. (G).——*But* one ſhall *not* have a writ of right of advowſon *of the tithes of a carve of land*, becauſe it does not thereby appear, whether it be of the value of the 4th part of the church. F. N. B. 30. (G) in the new notes there (a) cites 18 E. 2. Brief, 825.

3. Writ of right lies well *of the † moiety of an advowſon of a church, or of a 3d or 4th part* thereof; and yet an advowſon is entire. Br. Brief, pl. 316. cites 5 H. 7. 7.

S. P. Where a man claims to have fee ſimple in the advowſon. F. N. B. 30. (G).——† S. P. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.—Where *two advowſons in one church are conſolidated into one church*, there each ſhall have writ of right de advocatione medietatis eccleſiæ; for now they are two advowſons, and yet but one church, where they were two before. Br. Quare Impedit, pl. 10. cites 33 H. 6. 11.

F. N. B.

F. N. B. 31. (B) ſays, that in 31 E. 1. it appears, that a man ſhall have a writ of right *de medietate* advocationis *where an advowſon is partible betwixt 2 coparceners, and one* of them *is diſturbed* by a ſtranger. —— *But* the writ of right de advocatione medietatis eccleſiæ *lay where 2 coparceners do preſent 2 parſons to one advowſon*, &c. as there are in ſome churches 2 parſons, &c. F. N. B. 31. (B).

4. Writ of right quod reddat advocationem *of the tithes of* 4 *acres*, or of one acre, and the like, *was at common law*, and therefore the ſtatute was made, that writ of right of tithes ſhould not be granted of leſs part than of the 4th part of the tithes. And ſo præcipe quod reddat advocationem decimarum quartæ partis, tertiæ partis, &c. Per Markham. Br. Prohibition, pl. 7. cites 38 H. 6. 19.

†S.P. Jenk. 1. pl. 1. ‡ A man ſhall have this writ *of a chapel* which is a *donative*, as well as he ſhall have if it were preſentable to the ordinary. F. N. B. 31. (E).

5. *A* writ of right of advowſon lieth *de advocatione vicariæ, vel* † *præbendæ vel* ‡ *capellæ*, and ſuch like, as well as de advocatione eccleſiæ. F. N. B. 31. (C).

(L. d. 2) Writ of Right of Advowſon. *By or againſt whom* it lies.

1. WHERE a *partition* is made *between parceners to preſent by turn*, they are all tenants thereof, and writ of right of advowſon ſhall be brought againſt all. Br. Quare Impedit, pl. 73. cites 21 E. 3. 30, 31.

2. *Tenant in tail* cannot have a writ of right. Br. Quare Impedit, pl. 31. cites 43 E. 3. 24.

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3. Where *a prior was parſon imparſonee*, and *J. N. preſented his clerk to the ſame church*, who was admitted, *inſtituted, and inducted*, yet by this the prior is not out of poſſeſſion; for *he* ‖ *cannot have writ of right nor quare impedit;* for he is in poſſeſſion, and ſo he *ſhall have no action unleſs treſpaſs or ſpoliation in the ſpiritual court*, becauſe the church is adjudged always full of him. Per Priſot. Br. Preſentation, pl. 36. cites 39 H. 6. 20.

Br. Quare Impedit, pl. 114. cites S. C. ‖ S. P. Br. Quare Impedit, pl. 111. cites 38 H. 6. 20. —S. P. Br. Prohibition, pl. 7. cites 38 H. 6. 19. Per Danby, Davers, and Moyle; but Yelverton contra. —— S. P. but Brooke ſays, *quære inde*; for the contrary was held in the Exchequer-chamber by Yelverton and Forteſcue, that a ‡ parſon imparſonee ſhall have writ of right, and ſhall allege eſplees ſpecially by their hands. Br. Droit de Recto, pl. 22. cites 39 H. 6. 20, 21. —— ‡ S. P. Br. Spoliation, pl. 4. cites 38 H. 6. 19. that he may have it as patron. Per Yelverton.

4. Writ of right of advowſon lies *againſt the patron only*. Br. Quare Impedit, pl. 6. cites 9 H. 6. 30.

Ibid. pl. 134. cites 16 E. 4. 11. —— Br. Judgment, pl. 51. cites 39 H. 6. 23.

But if a man have an advowſon to *him and the heirs of his body begotten*, and for default of ſuch iſſue, &c. the *remainder to him and his heirs in fee ſimple*; if he be diſturbed, he ſhall not have this writ, but a quare impedit, becauſe he hath not title to the advowſon but in tail, which is in poſſeſſion; for the fee ſimple is not properly in poſſeſſion during the eſtate tail, and he ought

5. A writ of right of advowſon *lies only for him who has* an *eſtate in* the advowſon to him and his heirs in *fee ſimple, or right of eſtate to him and his heirs in fee ſimple* in the advowſon; and if he be diſturbed to preſent, then he ſhall have the writ. F. N. B. 30. (B).

ought to maintain the action by that title that he claimeth the poſſeſſion of the advowſon by, and that is of an eſtate in tail. F. N. B. 30. (B).

And therefore by Thorp, if a clerk be inſtituted but not inducted, he ſhall not have this writ of right of advowſon. F. N. B. 30. (B) in the new notes there (b) cites 38 E. 3. 9. a.

6. Where *one uſurps upon leſſee for years*, by this the uſurper has the fee, and againſt him the writ of right lies, and that deſcends to his heirs. Hutt. 66. The firſt reſolution in the caſe of Rudd v. the Biſhop of Lincoln.

(M. d) Right of Advowſon. In what Caſes a *Seiſin* is *neceſſary*.

[1. *EVERY one muſt* † *count of ſome ſeiſin.* If ‡ *purchaſer ſuffers an uſurpation*, and ſuffers 6 months to paſs, he is without remedy perpetually (for he cannot count of any ſeiſin). Co. 10. 134. b. 43 E. 3. 15. 1 H. 4. 2. b. 43 Aſſ. 21. Per Thorpe.]

† S. P. Watſ. Comp. Inc. 8vo. 241. cap. 13.

‡ S. P. Jo. 49. in the caſe of Dalton v. the Biſhop of Ely. Watſ. Comp. Inc. 8vo. 242. cap. 13. cites ſame caſes.

[2. If *purchaſer in tail* ſuffers an uſurpation before preſentment, he is without remedy during his life. 43 E. 3. 15. Adjudged. (And by the common law the iſſue for ever before the ſtatute of *W.* 2.)]

[3. He ought to *ſhew poſſeſſion in him or his anceſtors.* 21 *E.* 4. 1. 1 H. 4. 2. 21 E. 3. 27. b.]

S. P. Otherwiſe the writ does not lie. F. N. B. 30. (B).

4. Where the *king has title to an advowſon by alienation in mortmain*, he cannot have writ of right where preſentation is got after, becauſe this *is upon other poſſeſſion*, and alſo *he has no right but only a title*; and therefore ſhall have quare impedit, which is in the poſſeſſion, after divers preſentments within the year; quod nota. Br. Droit de Recto, pl. 5. cites 47 E. 3. 11.

Br. Quare Impedit, pl. 40. cites S. C.

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(N. d) *In whom* it is to be alleged. *Seiſin.*

[1. IF an advowſon be *given in frankalmoigne before limitation to a religious houſe*, which is after *diſſolved*, and after the church voids, *the poſſeſſion of the houſe* is not ſufficient for the founder. 21 E. 4. 1, 2. b.]

[2. If the *lord claims* to have an advowſon aliened in *mortmain* by his tenant, a *ſeiſin in the tenant* is not ſufficient to maintain this writ, becauſe this is not any ſeiſin in him or his anceſtors. 21 E. 3. 27. b.]

Watſ. Comp. Inc. 8vo. 242. cap. 13. cites S. C.— Ibid. 212. cap. 13. cites S. C.

By whom.

[3. *Taking of eſplees by the incumbent* is ſufficient for the patron. 21 E. 4. 1. b.]

F. N. B. 30. (B).

See (F. d) (K. d).

(O. d) Right of Advowſon. *What Seiſin* ſhall be *ſufficient.*

Watſ. Comp. Inc. 8vo. 241. cap. 13. cites S. C. S. P. Br. Seiſin, pl. 19. cites 38 E. 3. 4.— S. P. Br. Droit de Recto, pl. 1. cites 26 H. 8. 3.——S. P. Br. Quare Impedit, pl. 1. cites 22 H. 6. 27.—— S. P. F. N. B. 30. (B).

[1. *ADMISSION and inſtitution* of his clerk *without induction*, doth not ſuffice to maintain this writ, becauſe in this writ he *ought to allege eſplees in his clerk*, as in perception of *great tithes*, and this he cannot do without induction; for before induction he has no eſtate in the glebe. 38 E. 3. 9. Com. HARE AND BICKLEY, 528. Quære 38 H. 6. 17.]

Fol. 384.

[2. A ſeiſin *before time of memory* is not ſufficient to maintain this writ. 21 E. 4. 1. 2. b. admitted.]

Watſ. Comp. Inc. 8vo. 241. cap. 13. cites ſame caſes.

[3. If a man *has once preſented and his clerk inducted*, if there are after *diverſe uſurpations*, yet this preſentment is ſufficient to maintain this writ. 43 E. 3. 15.]

See (M. d) pl. 1. 3.

(O. d. 2) Right of Advowſon. *Proceedings* and *Pleadings.* And *what ſhall abate the Writ.*

1. QUARE impedit was awarded good, notwithſtanding an *omiſſion of a meſne in the conveyance;* contra in writ of right; and it may be that he in whom omiſſion is alleged, was never ſeiſed; and therefore the writ awarded good. Br. Quare Impedit, pl. 32. cites 44 E. 3. 21.

2. In writ of right of advowſon, the tenant ſhall come and make defence, and may join the miſe by battel, or grand aſſiſe, &c. F. N. B. 30. (C).

[484] 3. If *two bring writ of right of advowſon, or if* it be brought *againſt two*, and the *one dies* of the one part or the other, the writ ſhall abate. Contra in a quare impedit; for there after title made, the defendant is become actor, and he may recover damages againſt the plaintiff. Br. Quare Impedit, pl. 6. cites 9 H. 6. 30.

In this writ the *ſummons ſhall be* made *on the glebe*, and the glebe ſhall be taken into the king's hands at the grand cape. F. N. B. 30. (B) in the new notes there (c) cites 11 H. 6. 3, 4.

4. In writ of right of advowſon, the *ſheriff may ſummon the defendant in the church.* Per Danby & Cott. Br. Quare Impedit, pl. 152. cites 11 H. 6. 3.

5. In writ of right of advowſon, it is ſufficient to plead *recovery, without alleging preſentment.* Per Priſot. Br. Judgment, pl. 51. cites 39 H. 6. 23.

Br. Droit de Recto, pl. 27. cites S. C.

6. In right of advowſon the *tenant ſaid that the demandant was ſeiſed of the ſixth part of the advowſon at the time of the writ purchaſed.* Et per tot. Cur. it ſhall abate the whole writ; for the advowſon

is

is entire, and not ſeverable, and he *cannot abridge his demand, nor* he cannot *recover the entire, according to his demand;* and therefore he ought to have brought his writ of 5 parts. Br. Brief, pl. 316. cites 5 H. 7. 7.

Br. Abridgment, pl. 33. cites S. C.

(P. d.) *Jure Patronatus.* † What. [*In general.*]

† Patron by the canon law, as alſo in the feuds, (wherewith our common law doth herein accord) doth

[1. IF *one man preſents* his clerk to the biſhop *within the 6 months,* ‡*and another alſo preſents his clerk;* in this caſe the church is litigious, and the biſhop may award this writ of jure patronatus to inquire to whom the right belongs.]

ſignify *a perſon who hath* of right in him *the free donation* or gift *of a benefice, granted* originally *upon the bounty* and benefice *of ſuch as founded,* erected, or endowed *churches* with a conſiderable part of their revenue. Godolph. Rep. 178. cap. 16. ſ. 1.

When the ordinary inquires de jure patronatus, he makes commiſſion to his clerk to do it. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12. &c.——The jure patronatus is only for the excuſe of the biſhop. Br. Quare Impedit, pl. 12.

‡ If *two patrons, each preſenting a right* or title to the preſentation, ſhall *preſent one and the ſame perſon ſeverally* to the biſhop, to be admitted and inſtituted to the church, the *biſhop* cannot admit him generally, *but* muſt in his admittance of the incumbent *admit him incumbent of the preſentation only of one of them*; and if they make ſuch ſeveral preſentations, claiming by ſeveral titles, the biſhop is to direct his writ de jure patronatus, for that in ſuch . .e the church is become ‖ litigious, yet the biſhop is not to award the ſaid writ but at the inſtance and requeſt of the ſaid parties. Godolph. Rep. 180. cap. 16. ſ. 3. —— S. P. Watſ. Comp. Inc. 8vo. 405. cap. 20. cites Parſons Law, 100. cap. 13.——‖ Br. Quare Impedit, pl. 8. cites 21 H. 6. 44. S. P.

[2. This writ *iſſues out of the chancery of the ordinary.* 34 H. 6. 39. b. per Moyle.]

Where two patrons preſent, the biſhop is wont to *decree a proceſs* commonly called *negotium de jure patronatus,* (that is) a *day fixed* and certain is appointed by the biſhop to ſit in the church that is void, and a *monition decreed* to be ſerved on the patrons preſenting, and the clerks preſented, then and there to be preſent to ſee proceedings in the ſaid buſineſs according to law, to which end a *citation iſſues to* 12 *perſons,* whereof 6 *of the clergy and* 6 *of the laity,* all *of the neighbourhood* of the ſaid vacant church, to be then and there alſo preſent *by way of an inqueſt,* and on their corporal oaths, to inquire on certain articles then miniſtered to them, touching the right of preſentation to the ſaid benefice. Theſe *articles conſiſt chiefly of* theſe four heads, viz. (1), *Who laſt preſented* to the ſaid church when it was laſt void, as alſo for the laſt two or three times when it was void. (2), *Whether the perſon or* perſons *who laſt preſented,* or theſe laſt two or three times or turns, at the time and times of vacancy of the ſaid church, *did preſent in his* or their own *proper right* and title. (3), *Whether either of the clerks now preſented be* known or *ſuſpected of any notorious crime,* or of hereſy, ſimony, perjury, adultery, or drunkenneſs. (4), *Whether either* of the clerks now preſented, *hath* given or *promiſed,* either by himſelf, or any other, for him and in his name, or by or with his conſent or knowledge, *any* money or other *gratuity* directly or indirectly, *for obtaining of his preſentation* to the ſaid benefice to the patron thereof, or to any other who preſented the ſaid * clerk, or cauſed him to be preſented. On which articles, if it be found by the verdict of the ſaid jury, that ſuch or ſuch of the ſaid patrons was in the poſſeſſion of the preſentation at that time, when the church was laſt void, then is his clerk to be admitted, if there be no other legal impediment to hinder it, that is, nothing to affect him with, contained in the 3d or 4th laſt precedent articles. Godolph. Rep. 179, 180. cap. 16. ſect. 2.—S. P. Watſ. Comp. Inc. 8vo. 422. cap. 22.—S. P. Mal. Qua. Imp. 169. cites Gibſ. Cod. 816. And ſays further, that the jure patronatus being awarded, is *to be executed according to the forms of proceeding in the eccleſiaſtical courts*; that the *biſhop,* if he pleaſes, *may ſit himſelf as judge*; but that the uſual way is by commiſſion iſſued to his chancellor, or to ſuch other perſon or perſons as he ſhall judge proper; that a *general citation of all oppoſers* be alſo affixed to the door of the vacant church in time of divine ſervice; that there ſhall be a citation of a jury of 6 clergymen and 6 laymen of the neighbourhood, or of as many more as the biſhop pleaſes, the proportion being obſerved of clergy and laity, that there be as many of one ſort as the other; and theſe are bound to appear under pain of ſpiritual cenſures, the clergy of ſequeſtration, and the laity of excommunication; and if there be 6 of each, the reſt are pronounced contumacious, and the court proceeds, that the clergy and laity, who are of the jury, *be ſworn to make faithful inquiry,* viz. 1ſt, A clerk, and then a layman. The *articles* or heads *of enquiry are to be delivered to them,* as, [beſides others mentioned above] whether the church became vacant, and if vacant, how it became ſo? Who hath the inheritance of the advowſon? Who ought to preſent to the vacant turn? With ſuch other circumſtances as the biſhop ſhall ſee cauſe to inquire into; that the *parties* or their counſel *do ſet*

forth their title, and produce their evidences; and that the *verdict be given*, either *the ſame day or at ſuch time* and place *as the judge ſhall aſſign*.

[3. The biſhop *ought to make this inquiſition at his peril.* 34 H. 6. 11. b. per Priſot.]

[4. This writ ſhall be ſued *at the coſt of the ordinary*; becauſe it is for his excuſe, and for his eaſe. 5 H. 7. 22. per Brian; but Keble contra.]

[5. *Contra* 34 H. 6. per Danby and 2 Doctors. 35 H. 6. 19. per Priſot.]

[6. But it ſeems *contra*, becauſe the ordinary is *not bound to award* a commiſſion to inquire de jure patronatus ex officio, but at the prayer of the parties. 8 E. 4. 24. b. per Curiam. 5 H. 7. 20. b. per Keble. 22 H. 6. 30. per Mark.]

[7. *For* when the church is litigious, he *may ſuffer the lapſe* to incur *without inquiry*. 34 H. 8. 41. Curia. 35 H. 6. 18. b. and if he ſhall be compelled to award it ex officio, then he ſhall never have any lapſe. 35 H. 6. 19. And by 34 H. 6. 38. it ſhall be *at the coſts of the parties*; becauſe the ordinary is judge in this caſe.]

Br. Nugation, pl. 3. cites 33 H. 6. 13. That in quare impedit the biſhop pleaded, that the law of holy church is, that where the church is litigious, by different clerks being preſented to him by contending patrons, that the ordinary is not bound to preſent any clerk till he has awarded a commiſſion to inquire of the right of patronage, and this at the coſts of ſome of the patrons or their clerks, and that if ſix months paſs they may make *collation by lapſe*. And per Cur. it ſuffices to ſay that the church was litigious, and ſhew how, as above, and that the 6 months paſſed, and he made collation by lapſe, judgment, &c. without ſhewing the other matter above; for it is a good replication for the plaintiff to ſay that he required him to inquire de jure patronatus, and he refuſed; for then he is diſturber, and ſo his plea good, and the other matter is only ſurpluſage; for it is only to excuſe the biſhop when he is thereof accuſed. Nota, per judicium—It was agreed that the jure patronatus *ſhall be ſued at the coſts of the party or his clerk*, and the biſhop is not bound to be at the coſts, for he is judge in this caſe; but where the court writes to the biſhop to certify baſtardy or matrimony, or the like, there he ſhall do it at his own coſts; for there he is a miniſter. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 6. 11. 38. & 35 H. 6. 18.——S. P. Br. Coſts, pl. 2. cites 34 H. 6. 38.

[8. If the ordinary *be required* when the church is litigious, *to award* a jure patronatus, he ought to award it, otherwiſe he is a diſturber. 34 H. 6. 40. per two.]

Br. Nugation, pl. 3. cites 33 H. 6. 13.—Br. Quare Impedit, pl. 12. cites 34 H. 6. 11. 38. and 35 H. 6. 18.——Watſ. Comp. Inc. 8vo. 191. cap. 12. cites 34 H. 6. 40.

[9. 22 H. 6. 30. It is ſaid that the party, at whoſe ſuit this writ is awarded, *ſhall name the commiſſioners*; but there the judges ſay that is marvellous that he ſhall aſſign his judges.]

[10. If *one only preſents*, yet the biſhop may award a jure patronatus. 21 H. 6. 44. 34 H. 6. 40.]

[11. If one only preſents, a jure patronatus may be awarded. 21 H. 6. 44.]

See the notes on pl. 2. S. P. Per Hobart Ch. J. That though *but one preſents, yet *if the biſhop makes doubt of his title*, as in many caſes he may juſtly, being a ſtranger to it, he may require ſatisfaction by jure patronatus; for, a notatione nominis, it doth not imply diverſe parties, as a juris utrum doth, but is like a quo jure. And therefore take the caſe to be, that a parſon is deprived by the ordinary, or reads not his artcles, in which caſes the church is void, and yet notice muſt be given to the very patron for that time, or elſe the lapſe incurs not (which is inconvenient for the church, and a prejudice to the ordinary) how ſhall he now aſſure himſelf of a ſufficient notice? for if he give notice to him that is not patron, for this very turn, his notice is vain, and the patron perhaps knows not of the deprivation, or if he knows it, needs not preſent without notice given him. I hold, in this caſe, his way is to award a jure patronatus, with ſolemn premonitions quorum intereſt, and then inquiry being made who is patron, then to give him notice; and if he preſents not within 6 months, then the ordinary may collate, though that ſhall not bind the very patron, yet it ſhall excuſe from diſturbance upon ſpecial matter ſhewed. Hob. 318. pl. 391. in caſe of Elvis v. Archbiſhop of York.

[12. *But if* 2 *preſent*, there *ought to be awarded* 2 jure patronatus's. 21 H. 6. 44.] If 2 *preſent ſeverally*, there 2 *commiſſions* de jure patronatus *ſhall be awarded*; and if the *one be found patron by the one, and the other by the other*, there the church is litigious. And if their titles are *not diſcuſſed within the* 6 *months*, the biſhop may *preſent by lapſe*. Br. Quare Impedit, pl. 80. cites 21 H. 6. 44. —— Watſ. Comp. Inc. 8vo. 406. cap. 20. cites S. C. but adds, that Sir Simon Degg makes a quære whether the biſhop in this caſe may let the church lapſe, and ſo collate? Or whether he be not bound to admit one of the clerks at his election? and cites Parſons Counſellor, 14.

[13. If the *ordinary admits the clerk of him, for whom the right is found* upon this writ, this ſhall excuſe the ordinary; for he ſhall not be a *diſturber*, though the right in a quare impedit be after found for the other. 34 H. 6. 11. b. per Priſot. 34 H. 6. 38.] Jus patronatus *binds* not the true patron in his *quare impedit*, but is final even to the true patron ſo far that he cannot impute diſturbance to the ordinary following that verdict. Hob. 317. Elvis v. Archbp. of York & al.—Watſ. Comp. Inc. 8vo. 419. cap. 21. cites ſame caſes.

[14. *And* if the *commiſſioners certify otherwiſe than is found* before them, yet if the ordinary *does according to the certificate* he is excuſed. 22 H. 6. 30. Per Newton; for the iſſue is between the ordinary and patron, which was the certificate of the commiſſioners.] Watſ. Comp. Inc. 8vo. 419. cap. 21. cites S. C.

[15. *But* if the right be *found for the patron upon this writ, and the ordinary after admits the clerk of the other* patron, it ſhall be at his peril; for † he may well enough admit him, notwithſtanding the commiſſion, and finding for the other. 34 H. 6. 11. b. For it ſeems that it is but for his better information; but ſee 22 H. 6. 30. where the ordinary alleges a certain certificate by the commiſſioners for a patron, and the plaintiff in a quare impedit, before the right tried in it, traverſes that the commiſſioners did not certify the right for the other patron. 34 H. 6. 41.] † Fol. 385.

[16. *But* when the right in this writ is found for one patron, and the ordinary admits the clerk of the other patron, if it be after *found in quare impedit, that the right appertains to the patron for whom it was found in the jure patronatus*, he ſhall be a diſturber. 34 H. 6. 11. b. by Priſot.] S. P. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12. & 32. 34 H. 6. 11. 38. & 35 H. 6. 18. per Priſot.—And though the biſhop in going againſt the verdict chances to admit the clerk of the true patron, yet this will not excuſe him from diſturbance in quare impedit by the perſon for whom the verdict was found; for it is no plea to ſay that he admitted the true patron's clerk. Watſ. Comp. Inc. 8vo. 419, 420. cap. 21.

17. *Otherwiſe* it is where it is *found for him who is preſented*, quære whether the ordinary may ſuffer lapſe to incur after it is found for one in this writ. It ſeems that he cannot; for 35 H. 6. 19. by Priſot he ſhall not have any *lapſe after it is found for one*; for he is ‡ bound to admit his clerk. 21 H. 6. 44, 45.] ‡ The ordinary is bound to admit the clerk of him that is found patron * by the inquiſition de jure patronatus, *if he preſents after the verdict*, whether he preſented before the commiſſion or not. Br. Quare Impedit, pl. 80. cites 21 H. 8. 44. per Newton, Paſton, and others.—Watſ. Comp. Inc. 8vo. 405. cap. 20.

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[18. If it be *found* in this writ for one patron, the ordinary is not bound to admit his clerk without a *new requeſt* made *by the clerk*, and it needs not for the patron to make a new requeſt or preſentation. 34 H. 6. 12. per Curiam.] Watſ. Comp. Inc. 8vo. 191. cap. 12. cites S. C.—S. P. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 6. 11 & 38. 35 H. 6. 18.——In ſuch caſe the ordinary

is not bound to admit ſuch patron's clerk if he does not preſent him, and labour to have him admitted. Br. Quare Impedit, pl. 80. cites 21 H. 6. 44. Per Newton, Paſton, and other juſtices.

Watſ. Comp. Inc. 8vo. 421, 422. cap. 21. cites S. C.—— S. P. Br. Quare Impedit, pl. 12. cites 33 H. 6. 12 & 32. 34 H. 6. 11. 38. & 35 H. 6. 18. per Priſot.

[19. If a *diſturber preſents without any other*, the biſhop may inquire by the writ. 34 H. 6. 40.]

[20. *But* if in the ſaid caſe it be *found that another ſtranger has right, if this ſtranger preſents within the* 6 *months*, the ordinary is obliged to admit his clerk; but if he does not preſent within the 6 months, then the ordinary is obliged to *admit* the clerk of the diſturber. 34 H. 6. 40.]

(P. d. 2) *Ne Admittas.* Lies for whom, when, and in what Caſes.

The courſe to ſtop ſtrangers from preſenting *pendente brevi* is, after the quare impedit is depending, to ſue a *ne admittas* to the biſhop, and if the biſhop then admits the clerk of any other pending that ſuit, and the plaintiff recovers, he ſhall have a *quare incumbravit*, and thereby remove any that comes in hanging the writ by whatſoever title he comes in, and ſhall force him, who hath right, to recover by quare impedit; but if he ſues not ſuch writ, if then the *incumbent of a ſtranger ſhould come in by good title pendente brevi*, he ſhall bar him in *ſcire facias*, and ſhall hold him out. Per Popham Ch. J. Cro. J. 93. Mich. 3 Jac. B. R. in the caſe of Lancaſter v. Lowe.—Watſ. Comp. Inc. 8vo. 428, 429. cap. 22.

1. WHERE one hath an *action* of darrein preſentment, or of quare impedit, *depending* in the common pleas, and he ſuppoſes that the biſhop will admit the clerk of the defendant pendant the plea betwixt them; he may ſue a ne admittas, directed to the biſhop. F. N. B. 37. (F).

S. P. But not *till the writ of quare impedit be returned*, and not meſne between the teſte and the return in bank; for no plea is pending. Br. Quare Impedit, pl. 124. cites 2 E. 4. 11. Per Moile J.——Watſ. Comp. Inc. 8vo. 428. cap. 28. cites S. C.

2. This writ of ne admittas lieth *for the plaintiff* in a quare impedit. F. N. B. 37. (F).

It ſeemeth that the *defendant may ſue this writ* as well as the plaintiff, if the defendant do ſuppoſe that the biſhop will admit the clerk of the plaintiff pendant the writ. F. N. B. 37. (H).

Watſ. Comp. Inc. 8vo. 428. cap. 28. cites S. C. & Regiſt. Orig. 31. b.

3. Ne admittas ought to be *ſued within the ſix months after the avoidance*; for after the 6 months he ſhall not have this writ, becauſe then the biſhop may preſent for lapſe; and therefore it is in vain then for to ſue this writ, becauſe the title to preſent is then devolved unto the biſhop; but the *king may ſue this writ after* the 6 months, where he hath a quare impedit depending, or aſſize de darrein preſentment, becauſe that nullum occurrit regi; but there is a rule in the Regiſter, thus, notandum eſt, quando rex præſentat ut in jure coronæ, tunc incurrit ei tempus. But this is not law at this day. F. N. B. 37. (F).

[488] †S. P. Watſ. Comp. Inc. 8vo. 428. cap. 22. cites S. C.

4. Ne admittas does not lie, if the *plea* be *not depending in the king's court* by quare impedit, or aſſiſe of darrein preſentment; and therefore there is a † writ in the Regiſter directed into the Chief Juſtice of the Common Pleas, to certify the king in the chancery, if there be any pleas depending before him and his companions by writ betwixt ſuch and ſuch perſons, &c. and therefore

fore it ſeemeth the writ of *ne admittas* ſhall *not* be *granted before the king be certified in the chancery, that ſuch pleas of quare impedit or darrein preſentment be there depending in the common pleas; but* yet the writ of ne admittas *may be granted* out of the chancery *directed unto the biſhop, that he do not admit, &c. before the king be certified in the chancery*, that ſuch plea of quare impedit or darrein preſentment is depending in the common pleas, and then the party grieved may require the Ch. J. to certify the king in his chancery, that no ſuch plea is depending there, and thereupon the party grieved ſhall have ſuch writ. F. N. B. 37. (H).

(Q. d) * *Writ to the Biſhop. At what Time* it ſhall be *granted.*

* Writ to the biſhop to admit a clerk is a judicial latitat. 12 Rep. 59. cites Dyer.

[1. IN a quare impedit againſt the patron and incumbent, if a writ to the biſhop be *adjudged againſt the incumbent upon his plea*, yet writ *ſhall not iſſue till the plea between the plaintiff and patron be determined.* 25 E. 3. 34. b. adjudged twice.] Watſ. Comp. Inc. 8vo. 524. cap. 27. cites S. C. that the plaintiff ſhall not have writ to the biſhop until and unleſs it be alſo adjudged againſt the patron.

[2. In quare impedit *againſt two*, if *judgment* be given *againſt the one upon nient dedire*, no writ to the biſhop ſhall be granted againſt the other, till the *plea of the other* be *determined*; for he may foreclose him of the writ. 17 E. 3. 58.] Watſ. Comp. Inc. 8vo. 525. cap. 27. cites S. C.— If two defendants plead *ſeveral bars* in quare impedit, and the one is found againſt the plaintiff, and the other with the plaintiff, the plaintiff ſhall not have any writ to the biſhop. Though the plea of one be tried firſt, and found for the plaintiff, no writ to the biſhop ſhall be awarded till after the other iſſue be tried. Jenk. 93. pl. 85. —Watſ. Comp. Inc. 8vo. 525. cap. 27. cites S. C.

[3. If the *king recovers* in quare impedit *againſt J. S. by nient dedire, having another quare impedit pending at the ſame time againſt the ſaid J. S. and W. N.* he ſhall have writ to the biſhop immediately, againſt J. S. upon the recovery before the plea in the other writ determined, becauſe thoſe are *ſeveral orivinals.* 17 E. 3. 58.]

[4. *But* if the king recovers *againſt an incumbent of a provendary, becauſe he claims of the collation of the biſhop of the diocеſs*, yet if the king *has another quare impedit againſt the biſhop alone of the ſame provendary*, no writ to the biſhop ſhall be granted againſt the incumbent till the plea be determined between him and the biſhop, though thoſe are *ſeveral originals.* 25 E. 3. 47. adjudged.] Watſ. Comp. Inc. 8vo. 525. cap. 27. cites S. C.

5. *Before writ iſſues to the biſhop, writ ſhall be awarded to the biſhop to inquire if the church be void, and* alſo of the *value of the church, and if the 6 months were paſſed*, or not. Br. Quare Impedit, pl. 49. cites 7 H. 4. 34. 36.

6. In quare impedit *againſt* 2, *proceſs continued to the diſtreſs*, at which day the *one appeared*, and the *other made default*, and writ to the biſhop was awarded againſt the one, and the other compelled to anſwer by the opinion of the court. Br. Quare Impedit, pl. 89. cites 14 H. 7. 19. Quare impedit *againſt* 3, the *plaintiff recovered by default againſt the one*; and judgment was that he have writ to the biſhop and damages for half a year, et ceſſet executio till it

it be tried againſt the other defendant; for otherwiſe this execution againſt the one alone ſhall abate the writ againſt the others; for he cannot recover the preſentation againſt the others, when he has the preſentation by the firſt judgment; as in treſpaſs againſt two, and it is found againſt the one, and he takes execution againſt him, the writ ſhall abate againſt the other. Br. Quare Impedit, pl. 137. cites 20 E. 4. 1. and 10 E. 4. 11. 13.

S. P. Watſ. Comp. Inc. 8vo. 520. cap. 27. cites 12 R. 2. Brief al. Eveſque, 16.

7. A man *ſued divers quare impedits* againſt the biſhop, and he was *nonſuit in all but one* writ; the defendant had not a writ to the biſhop until that writ was determined. F. N. B. 38. (R).

Watſ. Comp. Inc. 8vo. 526. cap. 27. cites S. C.

8. A. recovered in a quare impedit againſt B. and C. and had judgment to have a writ to the biſhop. And a writ of inquiry of damages iſſued. Now the defendants brought error. And by the Court that writ ſhall abate, becauſe judgment is not given upon the entire record, and that a writ to the biſhop ſhall not iſſue *till the writ of inquiry of the value be returned*, unleſs the plaintiff releaſe the damages; and that by the Court and all the clerks. Noy, 66. Mich. 39, 40 Eliz. C. B. the Biſhop of Glouceſter & al. v. Veal.

Fol. 386.

(R. d) Writ to the Biſhop. *What Court may award it.*

[1. THEY who *hold plea in a franchiſe*, cannot award a writ to the biſhop. 11 H. 6. 3.]

A writ was awarded to the archbiſhop of Canterbury, becauſe the Biſhop of St. David's was party; and it was aſſigned for error for that the juſtices of the *grand ſeſſions* have no power to write to him, they having no power to puniſh him if he does not obey. And the court doubted of that point; but it ſeems prima facie, that they well may write to him; for it *is now a court of the king's*, and a quare non admiſit lies, if he does not admit. But when they were the marches in Wales, they had no ſuch power; and for that reaſon a quare impedit did lie in the adjoining counties, but not ſo at this day. But they would adviſe. Cro. C. 342. Cort v. Bp. of St. David's, Owen and Pritchard.——Watſ. Comp. Inc. 8vo. 549. cap. 28. cites S. C.——Jo. 332. S. C. judgment was affirmed per tot. Cur.—Sid. 92. at the end of WINN's caſe, the reporter ſays it ſeems that the grand ſeſſions of North Wales cannot write to the biſhop; and that this is the reaſon that quare impedit does not lie there.

[2. *In Wales* a writ cannot be awarded to the biſhop *by the juſtices there*. 11 H. 6. 3.]

(S. d) Writ to the Biſhop. *Who ſhall have it.*

S. P. Watſ. Comp. Inc. 8vo. 505. cap. 26.

[1. IN quare impedit *the defendant* ſhall have writ to the biſhop, *if it be found for him*; for he is actor as well as the other. 9 H. 6. 31. 18 E. 3. 15. b.]

Watſ. Comp. Inc. 8vo. 520. cap. 27. cites S. C.—S. P. F. N. B. 39. (A) and there in the new notes (a) cites S. C.

[2. In a quare impedit, if the *defendant makes title to himſelf and a ſtranger* to the church, and after the *plaintiff is nonſuited*, yet the writ to the biſhop ſhall be awarded only for the defendant, and not for the ſtranger alſo, becauſe he is *not named in the writ*. 13 E. 3. Brief al. Eveſque, 20. 25.]

And ſays, ſee alſo for this 11 H. 6. 8. where A. B. and C. parceners brought a quare impedit againſt C. who ſevered, and afterwards A. and B. were nonſuited; C. ſhall not have a writ to the biſhop without title ſhewn, and yet on the title ſhewn the title would appear for the plaintiff. See 13 E. 3. pl. 20 & 25.

3. *Baron*

3. *Baron and feme brought quare impedit*, aud the *feme died pending the writ*, yet the writ remained good, and the baron had writ to the biſhop *as tenant by the curteſy*. Br. Quare Impedit, pl. 67. [490] cites 38 E. 3. 35.

4. The *incumbent* ſhall not have a writ to the biſhop where his *plea* is *found* for him, if the *patron makes default*, and will not plead. Br. Encumbent, pl. 9. cites 7 H. 6. 36. Br. Brief, pl. 158. cites 7 H. 6. 34. S. C.

(T. d) Writ to the Biſhop for a third Perſon not Party. *In what Caſes* the Writ ſhall be awarded *for a third Perſon not Party* to the Writ.

[1. IN an *aſſiſe of darrein preſentment* between two men, if [it be] found that neither the one nor the other has right to preſent, but a 3d perſon not party to the writ, the writ ſhall be awarded for him. 17 E. 3. 23. Wilby ſaid that it had been ſo ſeen.] Watſ. Comp. Inc. 8vo. 528. cap. 27. —— S. P. F. N. B. 31. (F) in the note in the marg. cites 7 E. 2. Darrein Preſentment, 26 E. 3. 41. And adds, that therefore one cannot make title to a preſentment in time of war. —— F. N. B. 39. (C). becauſe the writ is quis advocationi ultimo præſentavit perſonam, &c. And in the new notes there (d) ſays, ſee Bracton 248. accordingly, where the aſſiſe is *taken per modum aſſiſæ*, and *not per modum juratæ*. And ſays, ſee alſo 13 E. 3. Brev. al. Eveſque, 20. by Aldred, and 17 E. 3. 22. by Wilby.

(U. d) In what Caſes the *King* ſhall have a Writ to the Biſhop, [*though* he be] *not Party* to the Writ, [*or though* the *Iſſue be not found for him.*]

[1. IN quare impedit by the king, if the *iſſue* be, *whether the king has all the advowſon* or not, and the jury *finds*, *that he has only a 3d part, but that now it is his turn to preſent*; though the iſſue is found againſt the king, yet becauſe it appears that the king has title, the writ ſhall be awarded for him. Mich. 14 Ja. B. adjudged between the KING and the BISHOP OF ROCHESTER. Hobart's Reports, 165. Same caſe. For this matter, which is found, is not out of the iſſue.] Watſ. Comp. Inc. 8vo. 529. cap. 27. cites S. C. — Hob. 118, 119. pl. 149. S. C. reports, that the jury *found* that the advowſon in fee was preſentable by the king *by 2 turns contiguous*, and *by the biſhop for the 3d* turn; and that the king's firſt turn was ſatisfied by preſenting his clerk, now dead, and *that this is the king's 2d turn*, and concluded, if upon the whole matter the court doth judge, that the king was ſeiſed of the advowſon aforeſaid, ut de uno groſſo per ſe ut de feodo & jure, then the jury found ſo; if not, then contrary. And though this verdict did not find the iſſue for the king, (for the iſſue was to be underſtood of the whole advowſon,) yet becauſe it did clearly appear to the court by the verdict, and that not out of the iſſue, that this preſentation did of right belong to the king, therefore the court did award a writ to the biſhop for the king, and to remove the clerk of the biſhop; and to this alſo the biſhop aſſented, which was ſo entered in the record of the judgment. Brownl. 164. S. C.

[2. In quare impedit *by the univerſity upon the ſtatute*, becauſe J. S. was a *recuſant*, if *defendant pleads* in bar, *that J. S. was convicted* for a recuſant, *and that the manor, to which* this advowſon is appendant, *was ſeiſed for the king*, for his part of the recuſancy, and after the *king granted to him the manor with the appurtenances*, &c. upon which the univerſity comes and acknowledges the plea to be true. In this caſe a writ ſhall be awarded to the biſhop for Watſ. Comp. Inc. 8vo. 527, 528. cap. 27. cites S. C. Mo. 872. Trin 13 Jac. S. C. by name of the Univerſity

of Cambridge v. the Biſhop of Norwich. For where the title to the king appears *upon the record*, there the Court will award a writ to the biſhop for the king; but not where the title to the king appears *upon evidence*.

the king, becauſe nothing paſſed out of the king by the grant without naming the advowſon, and ſo the right remains in the king. Mich. * 14 Ja. B. Adjudged. The Univerſity of CAMBRIDGE and YAKESLEY's caſe. Hobart's Reports, 169. S. C.]

* [491]

So in quare impedit *between common perſons*, if it *appears* by their title, *that the king has right* to preſent, he ſhall have writ to the biſhop without other matter ſhewn. 21 E. 4. 3. b. pl. 5. Per Chock.

3. If an *abbot brings* aſſiſe of *darrein preſentment*, and it is found for the abbot, and in inquiring of the colluſion the *colluſion is found*, the king upon this matter ſhall have writ to the biſhop without other preſentment. 21 E. 4. 3. b. pl. 5. per Chock.

Ibid. in the new notes (a) ſays, ſee Accordant, 21 E. 4. 3. b. Per Choke.

4. In a *quare impedit* † *betwixt* 2 *ſtrangers*, if there doth appear to the Court a title for the king, they ſhall award a writ unto the biſhop for the king. ‡ F. N. B. 38. (E).

‖ 11 H. 4. 71. Per Hankf. And ſo it ſhall iſſue if it be found againſt the king in a quare impedit; and yet if the right appears for the king on a ſpecial verdict, he ſhall not have a writ to the biſhop. Rex verſus Epiſc. Roffen. See 4 Eliz. 243. 16 H. 7. 12. F. Brief al. Eveſque, 13. Bro. 86 44 E. 3. 10. Stamf. 95. a.—— ‖ Br. Brief al. Eveſque, pl. 8. cites S. C. & P. per Hank. and Hill. But Culpeper contra. And Brooke makes a quære.

† S. C. cited by Walmſley. Le. 63, 64. pl. 84. in caſe of BEVERLY v. CORNWALL. Mich. 29 El. and ſaid, that the judges ſhall in no caſe reſpect the title of the king being a ſtranger to the writ, but where a title appears for him upon the § pleading or otherwiſe within the record, and ſo is 11 H. 4. 224. [71. b.] by Hankford. But if a clear title for the king be confeſſed by the parties upon pleading, a writ to the biſhop ſhall iſſue for the king. So if ſuch matter appears in evidence, &c. the land is ſeiſable into the hands of the king.—§ S. P. per Doderidge J. Mo. 901. cites 33 H. 6. 34. 16 H. 7. 12. 11 H. 4. 71. b. pl. 7. F. N. B. 38. (E).

Hobart Ch. J. ſaid, that the king has a prerogative, that where clear title appears for him, writ to the biſhop ſhall be awarded for the king. But he ſaid, this is to be intended where his title appears by the confeſſion of the parties, or by title without difficulty or queſtion; for upon nihil dicit writ ſhall not iſſue for the king, nor upon title appearing by evidence to the jury, as was held in the caſe of the UNIVERSITY OF CAMBRIDGE v. WALGRAVE and YAXLEY. But if it appears upon the record of the pleading, or by the confeſſion of the parties, the writ ſhall iſſue for the king; otherwiſe, not. Mo. 904. in the caſe of Colt and Glover v. the Biſhop of Coventry and Litchfield.

‡ S. C. & P. Arg. and cites 21 E. 3. 30. and 12 H. 7. 12. But where the title appearing was only matter of fact ſuggeſted by plea of the Attorney-General in a writ of error brought of a judgment, the court held, that the plea ought to be rejected for that reaſon of its being matter of fact only, and eſpecially in this writ of error, the judgment being given in C. B. and execution for the damages being given in the caſe, and increaſed by the ſtatute of 3 H. 7. which is not to be eſtopped, or the parties to be delayed by ſuch bare ſurmiſes, not being grounded upon any matter of record. And after further argument by counſel all the court ſeriatim delivered their opinions, that the pleading is merely void, it being upon a ſurmiſe, and without any record ſhewn. And that there *ought to be a clear right and title appear for the king, and confeſſed by the parties in pleading, or otherwiſe fully apparent*; for if not, the Court ought not to award a writ ex officio for the king. Cro. C. 192. pl. 4. Mich. 16 Car. B. R. Reſolved by all the juſtices of B. R. in the caſe of Yates v. Sir John Dryden et al.——The caſe was this; a quare impedit was brought by A. B. and C. againſt Y. and the Biſhop of P. in which Y. the *incumbent pleaded*, that *he was parſon imparſonee of the preſentment of the king*, to whom he derived a title as ſeiſed in fee of an advowſon in groſs. Upon iſſue joined, a *verdict was found for the plaintiffs, which likewiſe found the ſeveral points of the writ*. The plaintiffs had *judgment to recover*, and a *writ* awarded *to the biſhop* to remove the incumbent, and admit the clerk of the plaintiffs; *and likewiſe judgment of damages* for half a year amounting to 100l. The *defendant brought* a writ of *error*; and *pending that* writ, the *king brought a writ of right of advowſon*; and by motion to the Court, the *proceedings upon the writ of error were ſtayed until the writ of right ſhould be tried*. Thereupon a *ſpecial verdict was found contrary to the verdict in the quare impedit*. After this verdict *one of the tenants died*. The counſel for the king inſiſted ſtrongly, that the verdict in the writ of right of advowſon (being a writ of the higheſt nature) ſhould control the verdict in the quare impedit; and the verdict in the quare impedit found, that James Ellis, who was alleged by the defendant in the quare impedit to have been admitted, inſtituted, and inducted ad eccleſiam prædictam ad præſentationem dictæ nuper reginæ Elizabethæ modo & forma prout the defendant had alleged, was not ſo admitted, &c. and the ſpecial verdict in the writ of right found, that the ſaid James Ellis was ſo admitted, &c. ad eccleſiam prædictam ex præſentatione dictæ

dictæ nuper reginæ, which being a more high action, and expreſsly contrary to the former verdict in the quare impedit, deſtroys the plaintiff's title; for the queen had gained right againſt all by that preſentation, but him who had the very right; and though the laſt jury had found, that the queen had minus jus habendi præſentationem, yet foraſmuch as the queen preſented ſhe had gained the poſſeſſion; and then had majus jus than he who had not any title; and it appears not that the plaintiffs have any title, and therefore prayed a writ to the biſhop. The Court held, that the verdict in the writ of right being but a ſpecial verdict it does not appear (if the writ had not abated by death) whether judgment ſhould have been for the king or for the defendants, as this caſe is; and no clear title appears; for by the death of one of the tenants the writ of right abated, * and the 2d verdict not in force; and that there is no ſuch contrariety appears by the verdict; for the 2d verdict, if it had been in force, is no concluding record, but only an evidence, which may well be contradicted. But they all reſolved, that though the verdict had been in force, and had been to the contrary, yet being in this Court by writ of error, which was only to affirm or reverſe the judgment in C. B. they would affirm the judgment, and that there was not any error therein; which they did, and awarded a writ to the biſhop. Cro. C. 585. Trin. 16 Car. Dryden & al. v. Yates & al. And ibid. 589. Mich. 16 Car. B. R. Yates v. Dryden & al.

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5. In a quare impedit the iſſue was, if the advowſon was appendant to the manor of D. or in groſs; and the jury found, that it was appendant; and further found, that the queen had right and title to preſent, for ſhe had preſented at the two laſt avoidances. And per Anderſon and Periam J. if it *appears unto the Court upon the pleading*, that the king had title to preſent, the Court ſhall award a writ to the biſhop for the king; but here appeareth no title for the queen upon the pleading, but only *upon the verdict*, ſo as the one part or the other may anſwer to it; and becauſe the jury found for the plaintiff, the title found for the queen ſhall not be reſpected, but as mere nugation and ſurpluſage; for the ſame was out of their iſſue and their charge; and it is no more than if one comes into the Court, and informs us of any title for the queen, there the Court ought not to regard it. 1 Le. 323. pl. 455. Trin. 31 Eliz. C. B. Norwood v. Dennis.

6. If in quare impedit by the king, the king and party are at iſſue, which is *found againſt the king*, and *title appears for the king by nient dedire of the party*, yet the Court ſhall not adjudge for the king. Otherwiſe it is where *the party confeſſeth the king's title*. Cro. J. 216. Hill. 6 Jac. B. R. The 3d reſolution in the caſe of Cumber v. the Biſhop of Chicheſter and Green.

(X. d) Writ to the Biſhop *without Title*. In what Caſes.

See (Y. d) Fol. 387.

[1. IN a quare impedit, if the writ *abates by pleading* of *miſnoſmer of the plaintiff*, the defendant ſhall not have any writ to the biſhop. 31 H. 6. 15.]

S. P. Br. Brief al. Eveſque, pl. 26. cites S. C.——

Watſ. Comp. Inc. 8vo. 522. cap. 27. cites S. C.—— S. P. 7 Rep. 27. b. cites F. N. B. 38. (M).

[2. So if *defendant pleads miſnoſmer of himſelf* he ſhall not have any writ to the biſhop. 31 H. 6. 15.]

S. P. Br. Brief al. Eveſque, pl. 26. cites S. C.—— F. N. B. 38. (M).—— S. P. Watſ. Comp. Inc. 8vo. 522. cap. 27. cites S. C.

[3. So if the writ *abates for inſufficiency*, the defendant ſhall not have any writ to the biſhop.]

S. P. Br. Brief al. Eveque, pl. 26. cites 31 H. 6. 15.—— F. N. B. 38. (M).—— If it abates for *falſe Latin*, or for *want of form*;

as *nominare* for *præſentare*, &c. the defendant ſhall not have writ to the biſhop. Br. Brief al. Eveſque, pl. 10. cites 14 H. 4. 11. Per Hank. clearly.——S. P. But the plaintiff may have a new writ of quare impedit. Watſ. Comp. Inc. 8vo. 451, 452. cap. 27. cites 3 H. 6. 3. 31 H. 6. 15. F. N. B. 38. b. 38 Aſſ. 9. 7 Rep 27. Sir Hugh Portman's caſe.

But if the defendant *pleads in abatement of the writ by matter in fact*, he ſhall not have writ to the biſhop, if he does not make title. Br. Brief al. Eveſque, pl. 9. cites 12 H. 4. 11. Per Hull clearly.

S P. Br. Brief al. Eveſque, pl. 26. cites S. C.——Watſ. Comp. Inc. 8vo. 519. cap. 27. cites S. C.

[4. But if the writ abates *for default in the count*, the defendant ſhall have writ to the biſhop. 31 H. 6. 15.]

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Watſ. Comp. Inc. 8vo. 521. cap. 27. cites S. C.

[5. In a quare impedit *againſt diverſe patrons*, if the writ *abates becauſe one of the defendants was dead before the writ purchaſed*, the defendants ſhall have a writ to the biſhop. 11 H. 6. 53.]

F. N. B. 38. (H) S. P. and there in marg. cites 7 H. 6. 15. Per Cur. e contra if

[6. In a quare impedit againſt patron and incumbent, if the *patron makes default, and the plaintiff and incumbent are at iſſue upon plea in abatement* of the writ, (ſcil.) *whether the plaintiff was made knight after the laſt continuance*, and found for the defendant, the writ ſhall abate, but defendant ſhall not have writ to the biſhop. * 7 H. 6. 37. b. Adjudged.]

the patron had appeared and the incumbent made default, [and ſays] in 7 H. 6. 37. 14 H. 4. 16. upon pleas of the incumbent a writ was awarded to the biſhop.—* Br. Brief al. Eveſque, pl. 30. cites S. C. that the plaintiff and incumbent were at iſſue, but takes no notice what the iſſue was.——Watſ. Comp. Inc. 8vo. 521. cap 27. cites S C.—S. P. Br. Brief al. Eveſque, pl. 13. cites 7 H. 6. 15. where the writ was abated without writ to the biſhop by advice of the Juſtices of both benches.

Watſ. Comp. Inc. 8vo. 521. cap. 27. cites S. C.

[7. *But* if ſuch plea had been *found for the patron* he ſhould have writ to the biſhop. Brook Brief al. Eveſque, 30.]

Fr. Quare Impedit, pl. 77. cites S. C.—— Watſ. Comp.

[8. In quare impedit for the church of D. if *defendant ſaith, no ſuch church within the ſame county*, the plaintiff ſhall have a writ to the biſhop. 8 H. 6. 37. 9 H. 6. 17. Curia. Contra 45 E. 3. 6.]

Inc. 8vo. 520. cap. 27. cites S. C. For this can be no damage to the defendant; for the writ muſt be to the church named in the declaration; and if there be no ſuch church the plaintiff can have no fruit or advantage by this writ; and if there be ſuch a church the defendant has no prejudice; for he is ſo far from claiming title to that church that he knows nothing of it. Quære. Br. Brief al. Eveſque, pl. 1. S. P. cites 9 H. 6. 16.

Watſ. Comp. Inc. 8vo. 523. cap. 27. cites S. C.— Ibid. 526, 527. cites S. C.

[9. If *one tenant in common* brings quare impedit *againſt the other*, and this *appears in the count*, and the defendant demands judgment of the count, becauſe it appears thereby that they are tenants in common, whereupon the court *abates* it, yet the defendant ſhall not have any writ to the biſhop, becauſe he has not made title; for though it appears by the count, that the defendant has right to the advowſon, yet this is in common with the plaintiff, and ſo both ought to have the writ. 20 E. 3. Quare Impedit, 63. Adjudged.]

Watſ Comp. Inc. 8vo. 519. cap. 27. cites S. C.— Ibid. 524. cap. 27. cites S. C.

[10. But in qua. imp. if the plaintiff counts, and *defendant demurs upon the count*, and it is adjudged againſt the plaintiff upon the count, upon the matter, a writ ſhall be granted to the defendant without making of any title, becauſe upon the count the title to the defendant appears. D. in 28 H. 8. 24. f. 153. is cited a judgment in Mich. 1 H. 8. Rot. 537.]

[11. In

[11. In a qua. imp. if the *defendant makes default at the grand diſtreſs*, the plaintiff ought to make title to the patronage. D. 7 El. 241. 48. ſo done.] See (Y. d) pl. 6. and the notes there. F. N. B. 38. (N).——If the *defendant comes not at the diſtreſs returned* in quare impedit, the plaintiff ſhall have writ to the biſhop without title made, and this by the ſtatute; quod nota. Br. Brief al. Eveſque, pl. 2. cites 33 H. 6. 1.——But Hob. 163. in caſe of COLT AND GLOVER v. THE BISHOP OF COVENTRY, &c. ſays, that in a quare impedit both plaintiff and defendants are actors one againſt the other, and therefore the *defendant* ſhall have a writ to the biſhop as well as the plaintiff, *but not without a title* appearing to the Court; and therefore if the defendant never appears, yet the plaintiff muſt make out a title *for form ſake*, and ſo muſt the defendant if the plaintiff be nonſuit.

12. He who *pleads to the writ* in quare impedit, *and does not make title*, ſhall not have writ to the biſhop; quod curia conceſſit. Br. Quare Impedit, pl. 31. cites 43 E. 3. 24. S. P. Br. Quare Impedit, pl. 54. cites 12 H. 4. 11. per Hill.——S. P. Ibid. pl. 150. cites 10 H. 6. 4.——S. P. Br. Double, pl. 23. cites 43 E. 3. 25.——F. N. B. 38. in the new notes there (W. W) cites S. C.

13. Where *plaintiff in quare impedit is eſſoigned*, which is adjourned, and *at the day it is found that he had attorney in court not eſſoigned*, the defendant ſhall have writ to the biſhop. Br. Quare Impedit, pl. 58. cites 14 H. 4. 12, 13. [494] S. P. Br. Brief al. Eveſque, pl. 11. cites S. C.——Br. Eſſoign, pl. 46. cites S. C.—F. N. B. 38. (L) in the new notes there (h) cites S. C.

14. In quare impedit, the *ſheriff returned nihil to the ſummons, attachment, and diſtreſs*; writ to the biſhop ſhall iſſue *though no writ be ſerved*. Br. Brief al. Eveſque, pl. 15. cites 21 H. 6. 56. So in caſe of the king plaintiff, per 5 Juſtices, contra per Martin and Strange J. Ibid. pl. 24. cites 11 H. 6. 3.

15. In quare impedit the plaintiff was nonſuited, and the *defendant by advice of the court made title de bene eſſe before he could have writ to the biſhop*. Br. Brief al. Eveſque, pl. 2. cites 33 H. 6. 1. *But* it is ſaid, *if the defendant had made title in his bar, and the plaintiff after this had been nonſuit*, there the defendant ſhall have writ to the biſhop without other title. Br. Brief al. Eveſque, pl 2. cites 33 H. 6. 1.——If the plaintiff is *nonſuited after appearance and before count* made, yet if the defendant will make title to himſelf, he ſhall have writ to the biſhop. Br. Brief al. Eveſque, pl. 21. cites 14 E. 4. 9.

16. Quare impedit *againſt two*, the *one is eſſoigned*, the *plaintiff made default*, and the *other* defendant *made title*, and prayed writ to the biſhop; he ſhall have it. Contra it ſeems if he will not make title. Br. Brief al. Eveſque, pl. 19. cites 38 H. 6. 14.

17. Quare impedit *againſt two; proceſs continued till the diſtreſs*, at which day the *one appeared*, and the *other made default*; and by the opinion of the court, writ to the biſhop ſhall iſſue againſt him who made default; and the other ſhall be compelled to anſwer. Br. Brief al. Eveſque, pl. 17. cites 14 H. 7. 19. If quare impedit is brought againſt two, and *one makes default* at the grand diſtreſs, and the *other pleads in bar*, writ to the biſhop ſhall be awarded for the plaintiff by the ſtatute of *Marlbridge, cap.* 12. without title made; and if the bar pleaded by the other defendant be found for him, he alſo ſhall have writ to the biſhop; and theſe two perſons being upon theſe two writs admitted, inſtituted, and inducted, ſhall try their right in aſſiſe or treſpaſs. Jenk. 95. pl. 85.——Watſ. Comp. Inc. 8vo. 525. cap. 27. cites S. C——Watſ. Comp. Inc. 8vo. 526. cap. 27. cites S. C.——Watſ. Comp. Inc. 8vo. 492. cap. 26. cites S. C.

18. In quare impedit, the *plaintiff recovered by default*, and the *plaintiff appeared by attorney, who had no warrant*, and after the Br. Error, pl. 136. cites S. C.

judgment was reverſed in B. R. by writ of error for this cauſe; by which the defendant prayed writ to the biſhop, and could not have it without making title. Br. Brief al. Eveſque, pl. 20. cites 1 H. 7. 13.

19. If the *ſheriff returns* upon a quare impedit, *quod querens non invenit plegios*, then the plaintiff may find pledges in the common pleas, and ſhall have a new quare impedit in the common pleas; *and if* the ſheriff return upon that writ *tarde*, and the defendant appear, and the *plaintiff* be *called* and *appeareth not*, the defendant ſhall not have a writ to the biſhop, becauſe that no writ is ſerved againſt the defendant. F. N. B. 38. (O).

See (X. d). (Y. d) Writ to the Biſhop *upon Title made.* Upon what Plea.

Watſ. Comp. Inc. 8vo. 521. cap. 27. cites S. C. *[495] † Fol. 388. Br. Quare Impedit, pl. 56. cites 4 H. 4. 10, 11. per Hanke.——S. P. F. N. B. 38. [H].

[1. IF the defendant *abates* a qua. imp. *becauſe the church was full of the preſentment of the plaintiff himſelf before writ purchaſed*, *he ſhall not have writ to the biſhop upon title made. 13 H. 4. 7.]

[2. If the defendant *abates* the writ for *falſe Latin*, he ſhall not have writ to the † biſhop upon title made. Co. 7. Sir H. Portman, 27. b. Contra 13 H. 4. 7.]

Br. Quare Impedit, pl. 84. cites 22 H. 6. 44, 45. —Br. Brief al. Eveſque, pl. 16. cites S. C.——*So* if the plaintiff *diſcontinue* his ſuit. 7 Rep. 27. b. cites Hob. 138.——‡ Though it be *before any count* made, yet if the defendant will make title he ſhall have writ to the biſhop. Br. Quare Impedit, pl. 136. cites 19 E. 4. 9.

[(2.) If the plaintiff be *nonſuited* ‡ *after appearance*, the defendant ſhall have writ to the biſhop upon title made; for this is peremptory to the plaintiff. Co. 7. Sir Hugh Portman, 27. b. though it be within the 6 months.]

Watſ Comp. Inc. 8vo. 519. cap. 27. cites S. C. S. P. Arg. Litt. R. 226. in the Earl of Pembroke's caſe. ——Br. Quare Impedit, pl. 84. cites 22 H. 6. 44, 45.—— Br. Brief al. Eveſque, pl. 16. cites S. C.—F. N. B. 38. [K].

[3. [*So*] if the plaintiff be nonſuited in a quare impedit, *after the defendant has pleaded in bar*, the defendant ſhall have a writ to the biſhop. 38 E. 3. 8. b.]

[4. If the plaintiff be *nonſuited* in a qua. imp. the defendant ſhall not have writ to the biſhop without title made. 9 H. 6. 4. b. 11 H. 6. 8. 2 H. 5. 6. per Curiam.]

§ Orig. is (defendants.) —Br. Brief al. Eveſque, pl. 33. cites S. C. and there it is, though he be one of the (plaintiffs). Though one of the defendants be one of the parties; for it was brought *by* 3 *againſt* 2, becauſe they *held in coparcenary*, ſo that if he ſhould make title, it would be contrary to his action, and yet the opinion of the Court was as above. Br. Brief al. Eveſque, pl. 25. cites S. C. And Brooke ſays, Quare, if he may not *make title by a ſtrange name*, and then it aids the whole matter.

[5. So upon *nonſuit*, defendant ſhall not have writ to the biſhop without title made, though he *cannot make title*, becauſe one of the § patrons is plaintiff; becauſe he held in *coparcenary*, ſo that if he ſhould make title it ſhould be contrary to the action, which ſhall not be ſuffered. 11 H. 6. 8. Adjudged.]

[6. If

[6. If *at the diſtreſs returned defendant makes default*, the plaintiff ſhall not have writ to the biſhop without title made. 10 H. 6. 4. b.]

But F. N. B. 38. (N) ſays, that if the *defendant* does not *appear at the diſtreſs returned* againſt him, the plaintiff ſhall have a writ to the biſhop, without making title. ——— But ibid. in the new notes (b) ſays, that if *he appears* at the grand diſtreſs, *and after makes default*, a diſtringas ſhall iſſue, and then a writ to the biſhop. 13 E. 3. Brief al. Eveſque, 19. and although *nihil* be *returned on every part of the proceſs*, viz. on the ſummons, attachment, and diſtreſs, yet the plaintiff ſhall have writ to the biſhop. 12 H. 4. 4. 21 H. 6. 56. 11 H. 6. 3.

In quare impedit the *defendant pleaded to iſſue*, and after *made default*, and a writ was awarded unto the biſhop for the plaintiff. F. N. B. 38. (S).

If *at the diſtringas* returned againſt the *defendant*, he comes, and *has day by the prayer of the parties*, and afterwards *makes default*; the plaintiff ſhall not have a writ to the biſhop, but a new diſtringas. F. N. B. 38. (T). ——— Note, The defendant *came* at the grand diſtreſs, *and pleaded to the inqueſt*. Contra, where he comes not at the pone per vadios, &c. F. N. B. 38. (T). in the new notes there (e) cites 16 E. 3. Brief al. Eveſque, 18. See 8 E. 2. Quare Impedit, 168. 16 E. 3. pl. 17. 13 E. 3. pl. 19. Brief al. Eveſque, 19. See 2 H. 4. 1. accordant to the diverſity.

He that will have writ to the biſhop for default ſhall make title. And nota, that the plaintiff *cannot releaſe his damages* in quare impedit *before they are taxed*; but it *was recorded that the plaintiff would not have damages*, and upon this he had writ to the biſhop. Br. Brief al. Eveſque, pl. 32. cites S. C.

[7. If 3 bring qua. imp. and after 2 *of them are nonſuited*, yet the defendant ſhall not have any writ to the biſhop; for peradventure the 3d has the right. 12 R. 2. Brief al. Eveſque, 16.]

Watſ. Comp. Inc. 8vo. 520. cap. 27. cites S. C.

[8. If *a man brings* 2 *writs* of qua. imp. and after *is nonſuited in one*, yet the defendant ſhall not have any writ to the biſhop upon this though he makes title. 12 R. 2. Brief al. Eveſque, 16.]

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Watſ. Comp. Inc. 8vo. 520. cap. 27. cites S. C.

9. Quare impedit *by the king againſt the prioreſs of D. and A. B. the king made title by voidance during the temporalties in his hands*; the *prioreſs ſaid*, that *ne voida pas tempore vacationis, priſt*; and the other e contra, *and A. B. ſaid, that he is in as parſon imparſonee of the preſentment of the old prioreſs; judgment, if writ lies* againſt him, by which the king ſhall have writ to the biſhop againſt him, and *ceſſet executio* quouſque the iſſue be tried between the others. Br. Brief al. Eveſque, pl. 31. 24 E. 3. 34.

10. In quare impedit *againſt* 2, the one as *incumbent, and* the other as *patron*, the *incumbent entitled the king by a ward, and the church voided, and the king preſented him*, and the *defendant made other title, and* the *plaintiff was demanded, and did not come*, and therefore, per Hank. Hill, and Culpepper, the defendant who has made title, to which the plaintiff has not anſwered, ſhall have writ to the biſhop. Br. Quare Impedit, pl. 59. cites 14 H. 4. 15, 16.

But where the *incumbent ſays, that the king has another quare impedit againſt the ſame plaintiff of this voidance*, and prays writ to the biſhop, that he may be admitted notwithſtanding reclamation of the plaintiff, this ſhall not be granted; for the *plea of the incumbent is not to have writ to the biſhop, but only to excuſe himſelf of the tort*. Brooke ſays, And ſo ſee to what purpoſe the plea of the incumbent is which is given to him by the ſtatute, and who ſhall have writ to the biſhop. Br. Quare Impedit, pl. 59. cites 14 H. 4. 15, 16.

11. Where the defendant pleads an *inſufficient plea*, the plaintiff ſhall have writ to the biſhop. Br. Brief al. Eveſque, pl. 1. cites 9 H. 6. 16.

If the defendant *pleads to the writ* in quare impedit, he ought to make title; for otherwiſe he ſhall not have writ to the biſhop, per tot. Cur. quod nota. Br. Brief al. Eveſque, pl. 3. cites 43 E. 3. 25.

(Z. d) *What* ſhall be ſaid a *ſufficient Title.*

Watſ. Comp. Inc. 8vo. 520. cap. 27. cites S. C.

[1. IN quare impedit *againſt* 2, *one pleads that he does not claim*, &c. *but conveys a title to the king, who preſented him*, and *the other makes title.* If the plaintiff be afterwards *nonſuited*, the preſentee ſhall not have a writ to the biſhop; for what he pleads was but in excuſe of the tort, and not to have writ to the biſhop, but the other ſhall have the writ. 14 H. 4. 16.]

F. N. B. 38. (J) cites S. C. Br. Brief al. Eveſque, pl. 23. cites S. C.——

[2. In a quare impedit *againſt the biſhop and others*, if the *others make default, and the biſhop appears*, though the plaintiff ſhall not have writ to the biſhop againſt the others, who make default without title, yet if he *counts againſt the biſhop*, this ſhall be a ſufficient title againſt the others. 10 H. 6. 5.]

The plaintiff cannot have writ to the biſhop without making title, but the *title in the declaration is ſufficient.* Br. Quare Impedit, pl. 150. cites 10 H. 6. 4.

[497] (A. e) Writ to the Biſhop. *Upon what Plea* it ſhall be granted.

Watſ. Comp. Inc. 8vo. 520. cap. 27. cites S. C.——S. P. Br. Brief al. Eveſque, pl. 14. cites 21 H. 6. 45.——pl. 22. cites 21 E. 4. 65.——S. P. Where the king was plaintiff. Br. Quare Impedit, pl. 48. cites 7 H. 4. 32. And Brooke ſays, that ſo it ſeems that this plea will only ſave the defendant his damages.——S. P. Br. Brief al. Eveſque, pl. 4. cites S. C.——Some held, that though the patron pleads this plea of ne diſturba pas, *yet this ſhall not conclude the biſhop, but that he ſhall ſay, that he preſented, and his title was found by jure patronatus, and he preſented his clerk.* Br. Quare Impedit, pl. 80. cites 21 H. 6. 44.

[1. IN quare impedit, if the *defendant ſaith, that ne diſturba pas*, the defendant ſhall have writ to the biſhop. 17 E. 3. 71.]

In quare impedit, the *plaintiff made title by the iſſue of the youngeſt daughter*, the *defendant made title as tenant by the curteſy by marriage of the eldeſt daughter*; to which the plaintiff ſaid, *that ne diſturba pas*, by which the defendant had writ to the biſhop, inaſmuch as the plaintiff relinquiſhed his title. Br. Brief al. Evaſque, pl. 29. cites 5 H. 5. 10.—— Br. Quare Impedit, pl. 62. cites S. C.

Ne diſturba pas, *is, in effect, the general iſſue in a quare impedit*, and every defendant may plead it without more; becauſe it is only a defence of the wrong with which he ſtands charged, and leaves the plaintiff's title not controverted, but in effect confeſſed, and therefore upon that plea the plaintiff may preſently pray a writ to the biſhop, or (at his choice) maintain the diſturbance for damages. Hob. 162. in the caſe of Colt and Glover v. Biſhop of Coventry and Litchfield.

Watſ. Comp. Inc. 8vo. 521. cap. 27. cites S. C.

2. In a quare impedit, if the *defendant ſaith, that pending the writ the preſentee of the plaintiff is admitted, inſtituted, and inducted* by the biſhop, the plaintiff ſhall have a writ to the biſhop, becauſe he does not deny the diſturbance, nor the right of the patron. 11 R. 2. Quare Impedit, 144. Adjudged.]

Watſ. Comp. Inc. 8vo. 524. cap. 27. cites S. C.—

3. In quare impedit againſt the ordinary and others, if the *ordinary ſaith that he claims nothing but as ordinary*, the plaintiff ſhall have judgment againſt the ordinary preſently, to have writ to the biſhop, but *ceſſet executio, &c.* 17 H. 7. Kell. 43.]

Upon ſuch plea of the ordinary, the plaintiff ſhall recover this preſentment, per Paſton; but per Markham he ſhall not have writ to the biſhop; for the preſentation to the ordinary ſhall be ſeiſin to the party; quod curia conceſſit. Br. Quare Impedit, pl. 80. cites 22 H. 6. 28, 29.

4. Quare impedit by the *queen*, and *counted that the manor to which*, &c. *was held of one S. in her ward, and entitled herſelf as by*

by ward for cauſe of ward; the defendant ſaid, that the anceſtor of the infant held of N. who held over of S. abſque hoc, that he held of S. immediately, and a good plea; for there the queen had title. Br. Quare Impedit, pl. 96. cites 24 E. 3. 54. ——And the ſame year, fol. 75. it was found for the plaintiff, and damages, &c. and that the church was full, and this ſeems to be by lapſe, and the plaintiff refuſed the damages, and prayed only writ to the biſhop, and had it at his peril without damages, and this was to have advantage to ouſt the incumbent. Br. Quare Impedit, pl. 96. cites 24 E. 3. 54.

5. Quare impedit by the prior againſt the biſhop of C. and others, *one pleaded grant de proxima advocatione*, to J. N. by the prior and convent, who granted it to the defendant, and ſo it belonged to him to preſent, and prayed writ to the biſhop, and after writ to the biſhop was awarded for him who had the grant. Br. Quare Impedit, pl. 49. cites 7 H. 4. 34. 36.

6. Between common perſons, the *defendant may traverſe the title of the plaintiff, without entitling of himſelf*, but *then he ſhall not have writ to the biſhop*. Br. Quare Impedit, pl. 138. cites 21 E. 4. 1. 3.

(B. e) Writ to the Biſhop. *In what Caſes* it ſhall be *granted.*

[498]

Fol. 389.

[1. IN a qua. imp. againſt patron and incumbent, if the *incumbent pleads that he is parſon imparſonee*, as that he is preſented, inſtituted, and inducted, *and pleads a good bar, and the patron alſo pleads his title, but does not acknowledge any plenarty* of the preſentee, and judgment is given againſt the plaintiff, the patron ſhall have a writ to the biſhop; for *the falſe plea of the incumbent* ſhall not conclude the patron, becauſe the patron could not contradict the plea of the incumbent in this point. Hobart's Reports, 262. Puleſton's caſe.]

See Rege Inconſulto (E) pl. 2. Watſ. Comp. Inc. 8vo. 509, 510. cap. 26. cites S. C. —— Where the *defendant claims* the advowſon *as parſon imparſonee*, although it be found for the defendant, he ſhall not have a writ to the biſhop. F. N. B. 38. (L).

[2. If a quare impedit be brought againſt the *incumbent of the king*, and he *pleads that he is parſon imparſonee, and pleads a good bar* againſt the plaintiff, ſhewing *title to the king to preſent by reaſon of ſimony*, upon which the *plaintiff demurs, and* it is *adjudged againſt him*. Though in this caſe the defendant has pleaded that he is inſtituted and inducted, yet the *king may ſuggeſt* to the Court, *that he is not inſtituted and inducted*, contrary to the plea of his preſentee, becauſe title appears for the king, who is a 3d perſon always preſent in Court, and ſhall not be bound by the plea of his preſentee, and upon this ſuggeſtion entered he ſhall have a writ to the biſhop. M. 15 Ja. B. between BENEDICT AND WINCHCOMB, AND PULESTON, adjudged per Curiam, except Hutton, who ſeemed e contra. Hobart's Reports, 261. ſame caſe.]

Watſ. Comp. Inc. 8vo. 510. cap. 26. cites S. C.

[3. *But* it ſeems, that *without this ſuggeſtion* the king ſhall not have any writ to the biſhop. M. 15 Ja. B. In the ſaid caſe the Court was divided.]

Watſ. Comp. Inc. 8vo. 510. cap. 26. cites S. C.

4. In quare impedit the plaintiff ſhall recover, and ſhall have a writ to the biſhop, and damages *upon the default of the defendant after appearance*, quære if it had been after a continuance. Br. Damages, pl. 192. cites 2 H. 4. 1.

So if the plaintiff in quare impedit be *non-ſuited after appearance*, the *defendant ſhall make title*, and have writ to the biſhop, though it be before count; and ſo ſee that it is peremptory. Br. Nonſuit, pl. 62. cites 19 E. 4. 9. and 33 H. 6. 1.

5. The king ſhall have writ to a biſhop *to induct* one *into a prebend* which the king has given unto him, and to give him a ſeat in the quire, and a place in the chapter-houſe. F. N. B. 34. (E).

6. And a man ſhall have a quare impedit *of an hermitage*, and a writ to put him into corporal poſſeſſion. F. N. B. 34. (E).

7. F. N. B. 38. (C) the note in the marg. ſays, that if *in a quare impedit* the *defendant diſclaims*, there the plaintiff ſhall have a writ to the biſhop; *contra* in diſclaimer *in a writ of right of advowſon*. 6 E. 3. 7. Error, 78. The reaſon is, becauſe he cannot remove his clerk after the 6 months paſt.

Ibid. in the new notes (c) ſays, ſee accordant 13 E. 3. Brief al. Eveſque, 21. Lib. Entry Quare Impedit in Judgment, 4. fol. 507. But a ceſſet executio quoad breve, &c. quouſque. Vide contra 7 E. 3. 4. (expreſsly) in a writ againſt the biſhop and others. Where the *biſhop diſclaims*, the plaintiff ſhall have a writ to the biſhop; ſed *ceſſet executio* quouſque placitum, &c. See 17 E. 3. Brev. al. Eveſque, 58. If the king brings a *quare impedit againſt B.* and *another* quare impedit *againſt* * *B. and C.* and *B. comes* in, & non poteſt dedicere, the 1ſt writ to the biſhop ſhall proceed for the king notwithſtanding; for it is an original.

8. *At the diſtreſs returned againſt two, one appears*, and the *other makes default*, the plaintiff ſhall have a writ to the biſhop againſt him who made default, and yet it may be that the other defendant may bar the plaintiff; and it is ſo uſed at this day; but the contrary was adjudged. H. 7 E. 3. for the cauſe before ſaid. F. N. B. 39. (B).

* [499]

Plaintiff recovered in quare impedit after the 6 months, but it was found, that the *church was full of the collation of the metropolitan*, it was doubted if in this caſe the plaintiff ſhould have a writ to the biſhop; for the court cannot adjudge whether the metropolitan has done wrong or not, but this ſhall come in trial in quare non admiſit. Br Quare Impedit, pl. 53. cites 11 H. 4. 80——If a man *recovers an advowſon*, and the 6 *months paſs*, yet if the *church is void*, the patron may pray a writ unto the biſhop, and ſhall have it; and if the church be void when the writ comes to the biſhop, the biſhop is bound to admit his clerk. F. N. B. 38. (F).——Where the plaintiff *recovers by verdict* in a quare impedit, and it is *found* by the ſame verdict, *that the* 6 *months are paſt, and that* the *metropolitan has preſented*, whereas the ordinary ought to have preſented, &c. and that the *year is now paſt*, &c. yet the plaintiff ſhall have a writ to the biſhop. F. N. B. 38. (P) cites 38 E. 3. 12.

9. Upon a *recovery within 6 months againſt the incumbent* in quare impedit the recoveror may preſent his clerk to the biſhop *without any writ to the biſhop*; per Coke, Doderidge, and Haughton. Roll. R. 213. Trin. 13 Jac. Harris v. Auſtin.

10. In a *quare impedit againſt A. and B. and the biſhop B. made title*, and the *biſhop* pleaded that he *claimed nothing but as ordinary*. The *biſhop died*; A. *ſuggeſted this on the roll*, and prayed that the plaintiff might reply; and for *want of a replication*, the entry was made quod prædict. querens licet ſolemniter exactus non venit nec eſt proſecutus breve ſuum, ideo conſideratum eſt, &c. Et breve epiſcopo. Upon this a writ of error was brought, and the judgment was affirmed; becauſe it is a *nonſuit* after appearance, which in a quare impedit is peremptory. 2 Salk. 559. Mich. 3 W. & M. B. R. Rot. 569. Berkley v. Hanſard.

(C. e) Writ to the Biſhop. *To whom* it may be granted, [or *awarded.*]

See Trial, (U) pl. 16, 17.

[1. IF in a quare impedit againſt the biſhop and others the *biſhop be found a diſturber*, the writ ought to be granted *to the metropolitan* upon prayer of the recoveror. Time of E. 1. 83. put for a rule, Contra, 30.]

Watſ. Comp. Inc. 8vo. 546. cap. 28. cites S. C.

[2. In qua. imp. againſt the incumbent and ordinary, if the *incumbent claims in by the ordinary by lapſe, and a writ* awarded *againſt him as a diſturber*, though the ordinary ſays, that he claims nothing but as ordinary by lapſe, yet upon prayer of the plaintiff the writ ſhall be awarded to the metropolitan. 19 E. 3. Quare Impedit, 153. 5 H. 7. 22. Quære. 8 H. 4. 22. b.]

Watſ. Comp. Inc. 8vo. 546. cap. 28. cites S. C.

——Error was aſſigned in quare impedit brought *againſt the biſhop of W. and* 3 *others*; *the biſhop pleaded that he claimed nothing but inſtitution and induction as ordinary*, judgment if, without ſpecial diſturbance alleged, this action againſt him ought he to maintain; and thereupon *writ was awarded to the metropolitan*, and the *other pleaded in bar*; upon which the *plaintiff took iſſue*, which is *found for him, and that the church was full of the collation of the biſhop infra tempus ſemeſtre, and writ awarded to the metropolitan againſt them*; and it was *aſſigned for error, becauſe the writ was awarded to the metropolitan where no default was in the biſhop. Alſo* it was aſſigned for error, *that they inquired if the church was full of the collation of the biſhop*, &c. *and awarded writ to the metropolitan where the biſhop was out of Court by the firſt judgment*; and per Gaſcoign, it is not error; for the biſhop remains party after the writ awarded ut ſupra, &c. the plaintiff may aſſign ſpecial diſturbance, and proceſs ſhall be continued againſt him; and if diſturbance be found, the plaintiff ſhall recover damages againſt him; but Hill and Norton ſaid, that it was error; et adjornatur. Br. Brief al. Eveſque, pl. 6. cites 8 H. 4. 22.

[3. In a qua. imp. againſt patron and ordinary, if the *biſhop claims nothing but as ordinary*, whereupon judgment is given againſt him with a *ceſſet executio*, and *after judgment is alſo given againſt* * *the patron*, and a writ to the biſhop granted againſt him, this may be directed to the ſame ordinary, though he be party to the writ; becauſe he is *not found a diſturber*. Co. 6. BOSWELL, 49. New Entries, 494. to the *guardian of the ſpiritualties of the ſame ordinary.*]

Watſ. Comp. Inc. 8vo. 545. cap. 28. cites S. C.

—— *So* in quare impedit *againſt the biſhop and another*, the *biſhop was aſſigned*, the *plaintiff made default*, and the other *defendant made title*, and prayed writ *to the ſame biſhop*, upon the default of the plaintiff, and had it; quod nota, *after the title made*, and not before. Br. Quare Impedit, pl. 110. cites 38 H. 6. 14.

* [500]

[4. *And* in the ſaid caſe the writ to the biſhop *may be* awarded *to the metropolitan*, becauſe the ordinary is party to the writ. 8 H. 4. 22. b. Adjudged in B. and this aſſigned for error in writ of error; but there it was *found that the biſhop had collated by lapſe* to the church. Contra 5 H. 7. 22. But quære.]

Watſ. Comp. Inc. 8vo. 545. cap. 28. cites S. C.

[5. In a qua. imp. for a *church within the juriſdiction of York*, if the writ to the biſhop be *awarded to the archbiſhop of Canterbury*, this is not void, but only erroneous. Tr. 3 Ja. B. per Curiam.]

Fol. 390.

Watſ. Comp. Inc. 8vo. 549. cap. 28. cites S. C.

[6. In a quare impedit, if the *archbiſhop of York* be *found a diſturber*, the writ ſhall be awarded *to the archbiſhop of Canterbury*. Tr. 3 J. B. ſaid to be the uſual courſe. D. 16 El. 327. 7. Adjudged. Coke's Entries, 496. c. a.]

Watſ. Comp. Inc. 8vo. 547. cap. 28. cites S. C. S. P. F. N. B. 38. in the new notes there (M. H) cites D. 327, 328. & D. 76, 77. 19 E. 3. Quare Impedit, 153.

Though he was not party to the firſt writ. Noy, 148. S. C. —cites 22 E. 3. 13.— Watſ. Comp. Inc. 8vo. 548. cap. 28. cites S. C.

[7. If a quare impedit be brought *againſt patron incumbent, and* the archbiſhop of Canterbury, *guardian of the ſpiritualties of Chicheſter,* ſede vacante of the biſhop, and *after a biſhop is created, and* after *judgment upon non ſum informatus* is given for plaintiff, the writ ſhall be awarded to the biſhop of Chicheſter, becauſe he is immediate ordinary and officer to the Court. M. 5 Ja. B. Sir THOMAS PELHAM, per Curiam.]

——In a quare impedit the plaintiff recoverd, and had a writ to admit his clerk, directed *to the dean and chapter, guardian of the ſpiritualties, ſede vacante* of the biſhopric, which is not returnable, and *before the writ was executed, a biſhop was created*; it was doubted whether the authority to execute the writ be ceaſed in the dean and chapter (guardians of the ſpiritualties); and it ſeemed, that upon a ſuggeſtion made to the Court, eo quod nihil actum fuit in breve prædicto, another writ might be awarded to the biſhop, and may be made returnable, if the party pleaſe. D. 350. pl. 19. Paſch. 18 Eliz. Anon.——Watſ. Comp. Inc. 8vo. 548. cap 28. cites S. C.

Watſ. Comp. Inc. 8vo. 548. cap. 28. cites S. C. —Br. Quare Impedit, pl. 49. cites 7 H. 4. 34. 36. per Hails.

[8. When the *inferior ordinary* is *found a diſturber ſede vacante of the archbiſhopric,* the writ ſhall be awarded to the *guardian of the ſpiritualties* of the archbiſhopric. Time of E. 1. 83. put for a rule.]

S. P. Nor to the biſhop's vicar, if the biſhop be out of the realm; but in that caſe he has a ſicut alias to the metropolitan; and yet the biſhop was never found a diſturber. F. N. B. 38. (Q) in the new notes there (d) cites S. C.——Watſ. Comp. Inc. 8vo. 546. cap. 28. cites S. C.

9. In quare impedit if the plaintiff recovers, and has *writ to the metropolitan,* there *he cannot have writ to the biſhop after*; per Thorp. Br. Brief al. Eveſque, pl. 12. cites 38 E. 3. 12. 22.

Br. Proceſs, pl. 50. cites S. C.—— F. N. B. 38. (Q) in the new notes there (d) cites S. C.— Watſ. Comp. Inc. 8vo. 546. cap. 28. cites S. C.

10. The *metropolitan had certified, that it is out of his juriſdiction, and that the biſhop is out of the realm, and has made a vicar his lieutenant to* * *do all things for him,* and prayed writ to him. Per Thorp, we are not appriſed, whether he has made ſuch lieutenant, and till *we are certified that he has done ſo, we will not write to any but to him who is immediate officer,* which is the biſhop. B. Brief al. Eveſque, pl. 12. cites 38 E. 3. 12. 22.

* [501]

11. Quare impedit lies in Durham, and writ ſhall be awarded *to the biſhop there; contrary in Wales, Guernſey,* and the like. Br. Quare Impedit, pl. 152. cites 11 H. 6. 3. per Danby and Marten.

S. P. or to the vicar general, if the biſhop be out of the realm. F. N. B. 38. (Q).——Ibid. in the new notes (d) ſays, ſee 16 E. 3. Quare non admiſit, 3.— F. N. B. 38. (B) the note in the margin, cites 7 H. 8. 32. 8 H. 4. 22.—A writ ſhall iſſue to the metropolitan, if the biſhop be party; quære, for the *biſhop* did *diſclaim* as patron in 8 H. 4. F. N. B. 38. (B) the note in the margin.

12. If a man recovers his preſentation *in C. B. againſt the biſhop,* then he may have a writ to the ſame biſhop to admit his clerk, or to the metropolitan. F. N. B. 38. (B).

Roll. Rep. 363. 397. S. C.—— Jenk. 324. pl. 36. S. C. & P. ——

13. Quare impedit was brought *againſt the archbiſhop, the biſhop, and* 3 *defendants*; the archbiſhop pleaded, that he claimed nothing but as metropolitan; the biſhop pleaded, that he claimed nothing but as ordinary; the defendants made a title; judgment was given

given for the plaintiff; it was, among other things, aſſigned for error, that the *writ was awarded to the archbiſhop*, where it ſhould have been to the biſhop. All the Court *agreed*, that all the books are, that *he may have his writ to the one or the other*, where the ordinary is a diſturber. And Coke Ch. J. ſaid, he had always obſerved this, if he be party to the ſuit or not, it is in the party's election to have his writ to the biſhop, or the metropolitan. 3 Bulſ. 174. Paſch. 14 Jac. Grange v. Dennis.

Watſ. Comp. Inc. 8vo. 545. cap. 28. cites S. C.

(C. e. 2) Writ to the Biſhop. *Proceedings, Pleadings*, &c.

1. IN quare impedit *againſt the biſhop*, the *plaintiff recovered*, and had *writ to the biſhop to diſincumber the church*, viz. *diſtringas* epiſcopum; [the ſheriff] returned in iſſues 20 s. and [the plaintiff] prayed another diſtreſs, and had it. Br. Quare Impedit, pl. 72. cites 21 E. 3. 30.

2. If the *ſheriff returns nihil at the ſummons in quare impedit*, and *the like at the attachment*, and *the like at the diſtreſs*, yet writ to the biſhop ſhall be awarded. Br. Quare Impedit, pl. 81. cites 21 H. 6. per Ardern, & P. 15 E. 3. by him.

3. The plaintiff had *writ to the biſhop, which was returned not ſerved, & alias & pluries awarded*. Br. Quare Impedit, pl. 123. cites 5 E. 4. 115.

S. P. And there ſhall be an attachment againſt the biſhop, if need be. F. N. B. 38. (C).——Note, on this writ there lies an *alias, pluries & attachment*, and thereon the parties ſhall plead as in a non admiſit. (F) (N) 38. (E) in the new notes there (a).

4. If the *king recovers* in C. B. any *prebend*, or ſub-deanery, *or dignity againſt the biſhop, and gives the ſame by his letters patents* to another clerk, the *clerk ſhall ſhew the letters patent* in C. B. and thereupon ſhall have a writ unto the biſhop to admit him, and to induct him; and if the *clerk dies before he is* admitted and *inducted*, and the *king gives the ſame by other letters patent unto another* clerk, that *clerk ſhall have a writ* out of the chancery, directed *unto the juſtices* of C. B. *reciting* the recovery, and how that the other clerk died before he was admitted, and that he has now granted the ſame to this clerk by his letters patent, *commanding the juſtices, that they ſend another writ* to the biſhop, that he admit his clerk, notwithſtanding the king's collation before made to the other clerk. F. N. B. 38. (D). [502]

5. Note; this *writ* is expreſsly judicial, and therefore *ſhall iſſue out of the place where the record is*. If judgment be given at the niſi prius the juſtices of niſi prius ſhall award the writ to the biſhop (yet it ſeems the writ is not returnable); and when it appears that the record is ſent into C. B. it ſhall iſſue from thence. F. N. B. 38. in the new notes there (M. H.) cites Dyer, 194.

6. Where judgment is given in C. B. in a quare impedit, and a *writ of error* is brought, the Court of C. B. may award a ſuperſedeas to the writ which had been awarded there to the biſhop, before the writ, was delivered, and the King's Bench may award the like. Jenk. 206, pl. 36.

See (A. b. 2) pl. 5.

(D. e) Writ to the Biſhop. *Return* by the Biſhop.

The biſhop is not eſtopped to make ſuch return, inaſmuch as he is not privy to the verdict, or any plea that confeſſes the plenarty of the church; *but if the matter which he returns for his excuſe* of not ſerving 2 writs be *falſe*, the plaintiff may have his quare non admiſit, and alſo ſcire facias againſt the firſt and new incumbent, to have execution accordingly. D. 260. a. pl. 21. Paſch. 9 Eliz. Baſſet's.—Watſ. Comp. Inc. 8vo. 555. cap. 28. cites S. C. And the doctor ſays, he ſuppoſes that in this caſe the firſt clerk was not inducted, and ſo the church remained open to the king's preſentee, elſe his inſtitution, &c. muſt be void.

[1. UPON a writ to the biſhop, for the plaintiff awarded in a ſuit of quare impedit between common perſons, if the ordinary *returns, that* pending the quare impedit, and before judgment *it was found by* commiſſion of *melius inquirendum*, that the ſaid advowſon, with other lands of the plaintiff, which were *held of the queen in capite, deſcended to the plaintiff from his father, and that the plaintiff was, and yet is, within age and the lands ſeiſed into the hands of the queen, by which the queen preſented* to him one B. clerk, the church being then void, and for 3 months before the delivery of the writ to him, whom he admitted, &c. and ſo the church is *now full*, whereby he cannot execute this writ, D. 9 El. 260. 21. by the better opinion of the Court, the ordinary is not eſtopped to make this return of the title of the queen, and the plenarty of the church of his incumbent by any thing contained in the record.]

And the *plaintiff was not permitted to relinquiſh the ſcire facias, and tender averment* againſt the biſhop *that he did not reſign*; for the biſhop is only an officer to the Court, and has made his return, and has no day in Court; *but he may have* his *quare non admiſit* againſt the biſhop. Ibid.

2. A man had proximam præſentationem by grant; the church voided, a *ſtranger preſented*, and the *grantee brought quare impedit, and recovered, and had writ to the biſhop*, who *returned that the preſentee of the diſturber reſigned, and another is in*; and upon this the plaintiff had *ſcire facias to have execution*, notwithſtanding that it be a ſecond avoidance now, *becauſe he recovered the firſt avoidance*, and the covin of the defendant ſhall not prejudice the plaintiff. Br. Preſentation, pl. 33. cites 21 H. 7. 8.

Goldſb. 3. pl. 7. and 24. pl. 4. —S. C. Watſ. Comp. Inc. 8vo. 549, 550. cites S. C.

3. In quare impedit it was found for the plaintiff, and a *writ* iſſued to the biſhop, which was *not returned; upon an alias* brought, the *biſhop returned that after judgment* given *in the quare impedit, the ſame* * *incumbent, againſt whom the action was brought, was preſented*, inſtituted, *and inducted* into the ſame church; *and ſo the church is full.* The queſtion was if this was a good return, and it was often debated. It was adjudged that the return of the biſhop was not good, and he was fined 10 l. and a *ſicut alias awarded*, upon pain of 100 l. 3 Le. 138. pl. 188. Mich. 28 Eliz. Moor v. Biſhop of Norwich.

* [503]

Watſ. Comp. Inc. 8vo. 550. cap. 28. cites S. C.

4. In quare impedit judgment was given for the plaintiff, who was preſented to a church void by ſimony; whereupon a writ was awarded to the biſhop of Wincheſter, who returned, *that before the writ received*, viz. ſuch a day (which was after the judgment) *the church was full by preſentation out of the court of wards, becauſe a livery was not ſued.* It was ſaid theſe returns of the church being

being full before the receipt of the writs, are always ruled to be inſufficient; for the biſhop ought to execute the writ when it comes to him; and cites 9 Eliz. Dyer, [160. pl. 2. Baſſet's caſe] and 18 E. 4. 7. but ſays the difference here is that the king preſented. And Harvey J. being only preſent, agreed that the judgment ought to be executed. Whereupon it was agreed, that the biſhop ſhould have day to *amend his return*, not that a new writ ſhould be taken. Het. 130. Mich. 4 Car. C. B. Sir John Hall's caſe. And it being moved again in the term following, it was held by Yelverton and Richardſon, that the biſhop ought to obey the king's writ. Het. 131. S. C.

5. If a *common perſon recovers*, and has a writ to the biſhop, and the ordinary *returns that it is full before of his own preſentment*, it is good; as if one recovers, he may enter, if he will, without a writ of execution to the ſheriff. Het. 130. in Sir John Hall's caſe.

(E. e) Writ to the Biſhop to remove. *Who* ſhall be *removed.* [*In what Caſes by Judgment without Writ.*]

[1. IF a man *recovers againſt the patron, leaving out the incumbent*, he ſhall not ouſt the incumbent, becauſe he was not party to the ſuit; for he ſhall not be ouſted without anſwer. *9 H. 6. 56. b. Dub. † 19 H. 6. 68. b.]

S. P. 6 Rep. 51. b. in Boſwell's caſe.—— S. P. Cro. J. 93. in caſe of Lancaſter v. Lowe.—— S. P. Jenk. 281. pl. 7. ſays it was agreed by the juſtices of both benches.—— S. P. Jenk. 234. pl. 36.—— Incumbent that it is a *ſtranger*, ſhall not be ouſted by writ to the biſhop *without ſcire facias*. Sid. 93. Hall v. Broad.—S. P. Br. Quare Impedit, pl. 49. cites 7 H. 4. 34. 36. Per Huls, and if the incumbent be ouſted, he ſhall *recover by the ſpiritual law*.—— * Br. Ibid. pl. 6. cites S. C.—— † Br. Quare Impedit, pl. 79. cites S. C. and P.

Brooke ſays, that it ſeems that where one *recovers in quare impedit againſt the patron alone, without naming the incumbent*, that this recovery will hold him in poſſeſſion, though the incumbent ſhall not be removed, becauſe he recovers the preſentation; quod ſufficit. Br. Quare Impedit, pl. 39. cites 47 E. 3. 4.

[2. *But* if a man *recovers againſt the patron*, he ſhall ouſt the incumbent *preſented by the ſame patron pending the writ*, becauſe the recoveror could not name him in the writ. 19 H. 6. 68. b. Co. 6. BOSWELL, 51. b.]

Br. Quare Impedit, pl. 79. cites S. C.—S. P. Jenk. 281. pl. 7. ſays it was agreed by the juſtices of both benches.—S. P. Jenk. 234. pl. 36.—2 Inſt. 257.—Contra per Twiſden J. who ſaid, and it was not denied by any, that a writ ſhall not go without a *ſcire facias* againſt the incumbent; for *res inter alios acta* alteri nocere non debet, and to ſtrip one of his poſſeſſion without action would be inconvenient; for he has no day in court, and it would encourage vexatious actions; and he ſaid that BOSWELL's caſe had been often denied; and he knew that writ of error was brought to reverſe it, and error in law aſſigned, but the writ abated; and Lord Coke in the end of the caſe ſeems to confute the principal judgment. Sid. 93, 94. in caſe of Hall v. Broad.—Watſ. Comp. Inc. 8vo. 535. cap. 28.

[3. If a *ſtranger uſurps by preſentment pending the writ of quare impedit*, his clerk ſhall be removed by the judgment in the quare impedit.] [504]

If the incumbent be preſented by the defendant pendente brevi, he ſhall be removed, but not if he be preſented by a ſtranger, without *ſcire facias*. Cro. J. 94. Mich. 3 Jac. in caſe of Lancaſter v. Lowe.

[4. *So* if the *king preſents without title*, pending a quare impedit againſt another diſturber, and the *clerk of the king is inſtituted and inducted*, yet he ſhall be removed by judgment in the quare impedit. Co. 6. Boswell, 51. Reſolved.]

Eol. 191. Watſ. Comp. Inc. 8vo. 533. cap. 28. cites S. C. Cro. E. 44, 45. S. C. by name of Beverly v. Cornwall.—Goldſb. 103 to 105. pl. 9. S. C.—And. 179. pl. 215. S. C.

[5. *So* the *king preſents* to my church, and the *clerk is inſtituted*, whereupon I bring *quare impedit againſt the incumbent only* (as I ought) and *pending this the king preſents another* clerk *(the firſt not being inducted) who is inducted*, yet this clerk ſhall be removed by the judgment in the quare impedit. Co. 6. Boswell, 51.]

[6. If *pending a quare impedit* againſt J. S. the *plaintiff be outlawed*, by which the *king preſents, and his clerk inſtituted and inducted*, and after the *outlawry is reverſed, and the plaintiff recovers* in the quare impedit, he ſhall remove the incumbent of the king; for now by the reverſal of the outlawry the preſentment of the king was without title. 30 El. B. R. Cornwall's caſe. Adjudged. Cited M. 3 Ja. B. R.]

Watſ. Comp. Inc. 8vo. 533. cap. 28. cites S. C.

Watſ. Comp. Inc. 8vo. 531 cap. 28. cites S. C. Mo. 571. pl. 784. S. C. Adjudged accordingly.

[7. If *two patrons preſent*, and the *biſhop refuſes both their clerks, the one* patron *brings quare impedit, and pending the writ the other ſues a duplex querela* in the arches againſt the biſhop, upon which proceſs is made, and upon default of the biſhop the *archbiſhop receives the clerk* of this patron, and he is inſtituted and *inducted, and in by ſix months, and after the plaintiff in the quare impedit recovers*, he by writ to the biſhop ſhall remove the incumbent of the other patron who comes in pending the writ. Tr. 41 El. B. R. between Bennet and Edwards adjudged. M. 3 Ja. B. R. cited.]

In this caſe Anderſon and Widdham, ſerjeants of the queen, ſerjeant Barber, Gerard attorney general, and Fromevy ſolicitor were of opinion, that he is not removeable by this judgment, becauſe he was not party nor privy thereto, nor to the writ; but Lord Dyer ſays it ſeems that this opinion is not law, though there were 20 incumbents ſucceſſively, pendente lite, &c. 2 D. 364. pl. 28.—S. C. cited by Coke, who ſaid that he had known it to be adjudged according to the opinion of Dyer. Roll. R. 213. Trin. 13 Jac. B. R. in caſe of Harris v. Auſten.

[8. If the *king uſurps upon me, and his clerk* is inſtituted and *inducted*, againſt whom I bring a quare impedit, and *pending the writ the incumbent reſigns, and the king preſents another*, who is alſo inſtituted and *inducted*, and then I recover after ſix months; in this caſe, upon a writ to the biſhop for me, the laſt incumbent of the king, though he has been in by 6 months, ſhall be removed, becauſe he comes in pendente lite. Contra D. 21 El. 364. 28.]

Quare impedit againſt parſon, patron, and ordinary, and *pending quare impedit the parſon reſigned*, and the ordinary gave notice to the patron, and afterwards the *ordinary by lapſe preſented the ſame incumbent* that reſigned; and afterwards the plaintiff had judgment; it was held that becauſe the ſame incumbent is in by a *new title*, viz. by lapſe, and the ſame perſon againſt whom the recovery was had, and that appeared to the Court, he ſhould be removed. Per Windham. 3 Le. 138. pl. 188. in the caſe of Moor v. Biſhop of Norwich, cites Lo. 5 E. 4. 115, 116. and refers to 9 Eliz. D. 260. & 21 Eliz. D. 364.——Watſ. Comp. Inc. 8vo. 531. cap. 28. cites S. C.—Watſ. Comp. Inc. 8vo. 556. cap. 28. cites S. C.

Cro. J. 93. S. C. by name of Lancaſter v. Lowe.——Watſ. Comp. Inc. 8vo. 531. cap. 28. cites S. C.—

[9. *Pending a quare impedit* againſt J. S. if a *ſtranger preſents a ſtranger upon good title, and his clerk*, admitted, inſtituted, and *inducted*, and after the *plaintiff recovers*, yet he ſhall not remove this incumbent. M. 3 Ja. B. R. Boswell's caſe. P. 1 Ja. B. dubitatur 18 H. 7. Kell. 49. per Curiam, becauſe he is a ſtranger to the recovery.]

A. brings quare impedit againſt B. and then the *clerk of C. who has the right is admitted pending the quare*

quare impedit againſt B. If *A. recovers*, his clerk ſhall be admitted alſo, and the clerk of A. and of C. ſhall try their right in ejectment, treſpaſs, or aſſiſe. Jenk. 281. pl. 7.

[10. *So* if the *ſtranger preſents the ſame defendant upon good title pending the writ*, yet he ſhall not be removed, though he be adjudged a diſturber upon the firſt preſentment upon which the quare impedit is brought. M. 3 Ja. B. R. BOSWELL's caſe contra.] Watſ. Comp. Inc. 8vo. 534. cap. 28. cites S. C.

[11. If *A. ſeiſed of a manor to which* an advowſon is appendant, be *outlawed in a perſonal action*, and *after the church voids, and A. preſents* his clerk, and the biſhop upon a diſturbance made by B. who pretends ſome title thereto, refuſes to admit, whereupon *A. brings his quare impedit againſt the biſhop and B.* and declares therein, and *after the king preſents B. upon the outlawry* of A. upon which preſentment B is admitted, inſtituted, and *inducted*, and after the *outlawry is reverſed*, and all this appears upon pleading; in this caſe A. ſhall have judgment againſt B. becauſe he comes in, pending the writ, upon a title which is avoided alſo pending the writ; and alſo becauſe B. was not incumbent at the time of the writ purchaſed, and ſo could not plead to the title. Mich. 16 Car. B. between RISBY AND POWLE. Adjudged per Curiam.] Watſ. Comp. Inc. 8vo. 533. cap. 28. cites S. C.

[12. In a quare impedit againſt B. if the plaintiff be *nonſuited*, whereupon B. *has a writ to the biſhop, who was not party to the* writ of *quare impedit*; in this caſe, though the *biſhop* had *collated before the writ ſerved*, yet inaſmuch as he had *not* collated *before the judgment for the writ* to the biſhop, which was within the 6 months, the clerk of the biſhop ſhall be removed. Co. Magna Charta, 363.]

[13. If a man *recovers* in a quare impedit *againſt patron and incumbent within the 6 months*, he ſhall remove the incumbent. 19 H. 6. 68. b.] Fo. 392.

In this caſe the incumbent is removed *by the judgment* without any removal by writ to the biſhop. Roll. R. 212. in the caſe of Harris v. Auſtin.

[14. *So* if a man brings *quare impedit againſt patron and incumbent within the 6 months, and recovers after the 6 months* paſt, yet he ſhall remove the incumbent. 39 E. 3. 15. Adjudged.] Watſ. Comp. Inc. 8vo. 530. cap. 28. cites S. C.

But if the quare impedit be *brought after the 6 months*, the incumbent ſhall not be removed. Roll. R. 211. Harris v. Auſtin.

[15. In an aſſiſe of *darrein preſentment or quare impedit againſt patron and incumbent brought after the 6 months* paſt, if the *defendants do not plead*, ſcilicet, *the plenarty by 6 months before the action* brought, but pleads other matter in bar, upon which iſſue is joined and a verdict for the plaintiff, the incumbent ſhall be removed upon the judgment upon this *verdict*; becauſe the incumbent was party to the writ, and might have pleaded it, and did not do it. H. 9 Car. B. R. between the Biſhop of St. DAVID and LORTE. Adjudged in writ of error upon a judgment in an aſſiſe of darrein preſentment in Wales; and the firſt judgment affirmed, in which it was *not inquired when the church became void, but quod tempus ſemeſtre modo tranſivit*, and yet for the reaſon aforeſaid not material to be inquired; and alſo becauſe when the jury found quod tem- Cro. C. 341, 348. Cort v. Biſhop of St. David, Owen and Pritchard. Adjudged — Jo. 330. 332. Lort v. the Biſhop of St. David. Adjudged — Watſ. Comp. Inc. 8vo. 532. cap. 28. cites S. C.

pus ſemeſtre modo tranſivit and damages to half a year, it *ſhall be intended that the 6 months paſſed pending the writ*, and not before the action brought. H. 8 Car. B. Rot. 454.]

[16. If a man brings a *quare impedit*, *the church being full of his own preſentment*, and the title is *found for the defendant*, yet he ſhall not remove the clerk of the plaintiff; becauſe he *might have abated* [506] *the writ*, becauſe the church was full of the preſentment of the plaintiff himſelf the day of the writ purchaſed. 19 H. 6. 68. b.]

In quare impedit, the *plaintiff recovered*, and *the church was full by lapſe*; and the plaintiff prayed writ to the biſhop at his peril, and had it, and refuſed the damages of 2 years. Br. Brief al. Eveſque, pl. 18. cites 24 E. 3. 35.

17. Where a man *recovers* in quare impedit, and a *clerk is in by the biſhop by lapſe*, there he ſhall not be removed; therefore it is good to name the biſhop alſo, as it ſeems, and then he ſhall not preſent by lapſe. Br. Quare Impedit, pl. 79. cites 19 H. 6. 68.

18. In quare impedit, if the *biſhop ſays, that he did not preſent by lapſe, and claims nothing but as ordinary*, the plaintiff may pray judgment, and ſhall recover the preſentment. Per Paſton. Markham ſaid, this is true, but he ſhall not have writ to the biſhop. Brook ſays, the reaſon ſeems to be, inaſmuch as he ſhall not remove the biſhop's clerk. Br. Brief al. Eveſque, pl. 14. cites 21 H. 6. 45. & 22 H. 6. 28, 29.

S. P. For lapſe ſhall not prejudice the king; for nullum tempus occurrit regi. Br. Quare Impedit, pl. 91. cites 14 H. 7. 21. 15 H. 7. 6. Per Higham.

19. *Where title is found for the king after the collation by lapſe*, there the incumbent ſhall be removed; but not without quare impedit taken, as appears there. Br. Encumbent, pl. 6. cites 14 H. 7. 21, 22.

20. Where a *patronage is gained by the preſentation*, admiſſion, and inſtitution of a clerk, the patron muſt be named with the incumbent in the quare impedit; and if the *incumbent* be *not named*, he *ſhall not be removed*. Jenk. 200. pl. 18. ſays, it was ſo reſolved.

D. 353. b. pl. 30. Mich. 18 & 19 El. S. C. That B. being under the age of 24, and a mere layman, took a benefice, whereupon a citation was ſued out of the delegates to deprive him, pending which R. W. brought quare impedit againſt the biſhop of H. and Blower, naming him clerk, and

21. *R. W. and J. P. brought* a writ of *error* againſt the biſhop of H. and Blower *upon a recovery* had *in a writ of deceit by the ſaid biſhop and Blower againſt the ſaid R. W. and J. P. for that* the ſaid *R. W. had* before *brought a quare impedit againſt* the ſaid *B. and the biſhop, and* had *recovered againſt them by default, whereupon R. W. had a writ to the metropolitan to admit his clerk, and in the writ of deceit judgment was given for the plaintiffs*; for it was found that the ſummons was the Friday to appear the Tueſday after, and ſo an *inſufficient ſummons*; and in that writ of deceit the defendants W. and P. pleaded, that the incumbent was deprived of his benefice in the court of audience, which ſentence was affirmed upon appeal before the delegates; and notwithſtanding that plea, judgment was given againſt W. and P. defendants in the ſaid writ of deceit; and upon that judgment this writ of error was brought; and among other things it was *aſſigned for error, that upon ſuggeſtion* made *after verdict, that B. was incumbent and in, of the preſentment of the Lord Stafford, and that he was removed, and that Griffin was in by the recovery* in the quare impedit *by default, a writ to the biſhop was awarded without any ſcire facias againſt Griffin*;

ſin; for he is poſſeſſor, and ſo the ſtatute of 25 E. 3. calls him, and gives him authority to plead againſt the king, and every releaſe or confirmation made to him is good. But to this it was anſwered, that as to the ſcire facias there needs none here againſt the *new incumbent*, for he comes in *pendant the writ*, and that appears by the record; but if he had been in before the writ brought, then a ſcire facias would lie, and cited 9 H. 6. it was adjourned. Le. 293, 294, 295. pl. 402. Hill. 27 Eliz. B. R. Williams v. Blower.

recovered by default at the grand diſtreſs, and writ to the metropolitan to remove B. and admit the clerk of R. W.

whereupon one Griffin was admitted, inſtituted, and inducted. The biſhop and B. brought a writ of deceit in C. B. againſt R. W. and the ſheriff, and ſummoners for non ſummons; R. W. and the ſummoners appear, but not the ſheriff. The ſummoners being examined, denied that there was any ſufficient ſummons, by reaſon of the ſhortneſs of the time and the diſtance of the place, the benefice lying in Wales. R. W. pleaded in bar of this writ of deceit, this diſability of B. and ſentence of deprivation by the delegates, ſuppoſing thereby that he cannot be reſtored to his firſt title and intereſt in the church, &c. The biſhop and B. demurred. And note, this was pleaded in bar as well againſt the biſhop as againſt B. and ſo not good; whereupon judgment was given, that the firſt judgment be ſet aſide, and the plaintiffs reſtored to all which they loſt, &c. For the *incumbency is not in queſtion, but the diſturbance of the plaintiff in the quare impedit* to preſent to the church, which was void by the ſuppoſal of the writ; and the matter of *the deprivation and removal of B. from the church is not in queſtion by this recovery in quare impedit by the defendant, by which* * *the plaintiffs in this writ of deceit were damnified*. &c. And upon this judgment R. W. brought writ of error, and the judgment was reverſed; but not for any matter in law. D. 353. b. 354. a. pl 30, 31. Mich. 18 & 19 Eliz. Blower v. Williams. ——Ibid. Marg. 354. a. pl. 31. ſays, ſo note, that he was *not reſtored to the incumbency* again *in the writ of deceit, becauſe he did not loſe it by the ſuppoſal of the writ of quare impedit, which ſuppoſed the church to be void.*

*[507]

22. If the clerk *comes in under the title of the plaintiff, and ſince the ſame*, he ſhall be removed; but if he come in *by title paramount*, he ſhall not be removed. And for that the clerk comes in *hanging the writ*, it ſeems that he ſhall be removed. Per Anderſon Ch. J. quod Periam J. conceſſit. Goldſb. 105. in the caſe of Beverly v. Cornwall.

Whatever perſon is *preſented and admitted after the action brought*, unleſs where the *title of the patron* is *paramount the title of the plaintiff*, ſuch preſentee ſhall be removed upon a recovery by the plaintiff. Per Anderſon Ch. J. 3 Le. 139. pl. 188. Mich. 28 Eliz. C. B. in the caſe of Moore v. the Biſhop of Norwich.——S. C. & P. by Anderſon. Goldſb. 3. pl. 7.

23. If the *king recovers* his preſentment unto a church, *and has a writ* to the biſhop, &c. *to remove the other's incumbent*, for which the *incumbent ſueth an appeal* in the Archbiſhop's Court, &c. by reaſon whereof the *archbiſhop ſendeth a prohibition* that he do not admit the king's clerk *pendant the appeal*, &c. then the *king ſhall have a writ* directed *to the archbiſhop* and his officers *to take off his inhibition*, and that they do nothing, nor ſuffer any thing to be done by others, in derogation of the crown or of the king's right; *and* ſhall have *another* writ *againſt the incumbent*, that he do not proſecute ſuch appeals, provocations, or other proceſs or impediments. *And* alſo the king may have an *attachment* directed unto the ſheriff *againſt ſuch incumbent, if he go on* there after ſuch prohibition directed unto him. F. N. B. 43. (A).

And it appeareth by the Regiſter, that another *common perſon* who recovereth his preſentment, or hath title to preſent, *ſhall have ſuch writs* of prohibition unto the ſpiritual judges or the party, that they ſhall not proceed, or proſecute ſuch, &c. and alſo attachment againſt them if they do, &c. F. N. B. 43. (B).

24. *Lecturer* was removed *for not officiating in perſon as the foundation required.* MS. Tab. &c. cites 1720. Philips v. Walter.

For more of **Preſentation** in general, ſee **Advowſon, Collation, Simony,** and other proper titles.

(A) Presumption.

1. IF the *eldeſt ſon be beyound ſea at the death of the anceſtor*, and the *youngeſt enters into the land*, he is not accounted in law *a diſſeiſor*; becauſe the law preſumes, that he preſerves the poſſeſſion for his brother; but if upon his brother's return he keeps him out of poſſeſſion, then the law looks upon him as a diſſeiſor. Per Doderidge. Lat. 68. Paſch. 1 Car. in Mayow's caſe.

2. *Caſual* and accidental things are not to be preſumed, unleſs alleged. Arg. Hard. 81. Mich. 1656. in the caſe of the Attorney General v. Buckeridge.

3. Powel Juſtice ſays, he does not know any caſe where a man ſhall be made a *tortfeaſor* by preſumption only. 2 Lutw. 1568. Mich. 4 W. & M. in caſe of Gwin v. Pole.

4. Where the *law intruſts perſons* as (juſtices of peace) *with the execution of a power*, the Court ought to give credit to them in the execution of that power; though if they make a falſe return
[508] whereby the party and juſtice are abuſed, they may be puniſhed. 10 Mod. 382. Hill. 3 Geo. B. R. the Queen v. Simpſon.

5. *Odioſa & inhoneſta non ſunt in lege præſumenda & in facto quod ſe habet ad bonum & malum magis de bono quam de malo præſumendum eſt.* See Maxims.

6. *Semper præſumitur pro ſententia & pro legitimatione puerorum.* See Maxims.

7. *Stabit præſumptio donec probetur in contrarium.* See Maxims.

For more of Preſumption in general, ſee Length of Time, Trial, Evidence, and other proper titles.

Privilege.

(A) Of Officers in Courts [from *Offices and Duties*].

So of a clerk of B. R. Palm. 372. Paſch. 21 Jac. Stamp's caſe.

[1. IF an *attorney of B. R.* be *made a churchwarden* of a pariſh, he ſhall have a writ of privilege out of B. R. ſhewing his privilege to be diſcharged thereof for his attendance in the ſaid Court. P. 14 Car. B. R. FELIX WILSON being an attorney of B. R.

B. R. was made churchwarden of Hanwell, and refuſed it, and he was ſued in the ſpiritual court to execute the ſaid office, and prohibition granted.]

[2. Tr. 15 Car. B. R. Mr. BARKER's caſe being elected churchwarden of Aldermary in London, and ſuch writ granted.] S. P. of a clerk of the court; and it was agreed by the whole Court, that for all offices which require his perſonal and continual attendance, as churchwarden, conſtable, and the like, he may have his privilege; but for offices which may be executed by deputy, and do not require attendance, as recorder and the like, (from which the juſtices themſelves ſhall not be exempt,) for ſuch he ſhall not have his privilege. Mar. 30. pl. 65. Trin. 15 Car. Anon.

[3. *Clerks of the king's courts* are not privileged *from watch and ward*, for they may find others to do it for them, and there needs not any perſonal attendance. Tr. 15 Car. B. R in the ſaid caſe of BARKER, ſaid by Juſtice Jones.]

4. An *attorney* of B. R. was elected *tythingman* of Taunton, in which town a *cuſtom* is pretended, *that every one ſhould be* conſtable or tythingman *in his turn*, *according to their ſeveral houſes*, and he having *purchaſed two houſes* in the town was choſen tythingman at the leet there; he brought his writ of privilege to be diſcharged; becauſe he is to be attendant in B. R. It was moved, that it might not be allowed, becauſe here was a ſpecial cuſtom, and ſhould an attorney purchaſe many houſes, there might not be perſons enough to do the ſervice, as here he has actually purchaſed ſeven. But all the Court held, that this cannot be a good cuſtom; for then a woman, being an inhabitant in one of the ſaid houſes, it might come to her courſe to be conſtable, which the law will not allow. It was ordered, that he be diſcharged. Cro. C. 389. Mich. 10 Car. B. R. Prouſe's caſe. See Noy, 112. CORNER's CASE; but it ſeems ſtrangely reported.

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5. S. an *attorney* of B. R. having land within the manor of H. in the county of Middleſex, ratione tenuræ, ought to ſerve *as reeve* when elected, and he being now elected, prayed a writ of privilege that he ſhould *not* be *compelled to gather the rents of the lord*, and to ſerve in that office; per Keiling Ch. J. this writ lies here, and is a ſtronger caſe than PROUSE's caſe. Cro. Car. 389. Twiſden J. ſaid, a tenure may be created to ſuch intent to collect the rents of the lord; et adjornatur. Raym. 179. Paſch. 21 Car. 2. Stone's caſe. Though it was objected, that he was a copyholder, and by cuſtom [ought] to ſerve, as a thing incident to his eſtate created by the ſame cuſtom, and though it was alſo ſaid, that he might execute this by deputy, yet the Court granted the writ; for to the 1ſt, it was ſaid, that the privilege of this Court is as ancient as the cuſtom of any manor; and to the 2d, he is reſponſible for his deputy. Lev. 265. S. C. ——— Vent. 10. & 29. S. C.

6. Such as have privilege of Chancery ſometimes have a ſuperſedeas of privilege granted them as a protection; the moſt extenſive of which ſort contains both an *injunction and ſuperſedeas*, directed to all and ſingular juſtices, judges, ſheriffs, &c. enjoining them *not to moleſt or vex a clerk* of one of the ſix clerks of this Court in his privileges, and (among other things) not to put, *or cauſe him into any office of collector*, *churchwarden*, or other common troubleſome office; and if any diſtreſs has been made upon him on that account, without delay to releaſe it. P. R. C. 287, 288. Curſ. Canc. 295. cap. 18. S. C.

(A. 2) Of other Perſons.

1. SIR W. H. was ſeiſed of the manor of R. in Eſſex, in which he preſcribed to have a leet. A. an *alderman of London lived within the precincts thereof, and was preſented* by the homage *to be conſtable*, and this preſentment was removed by certiorari into B. R. and the alderman was diſcharged; becauſe he was obliged as alderman to be preſent at London for the government of the city. Jo. 462. pl. 4. Trin. 16 Car. Br. Alderman Abdy's caſe.

And though it was ſaid, that he might execute it by deputy, and his perſonal attendance is not requiſite by the cuſtom of the manor, yet non allocatur; and thereupon a writ was awarded to be directed to the lord of the manor to diſcharge him. Cro. C. 585. pl. 3. 16 Car. B. R. S. C.

Lev. 233. S. C.

2. *Captain of the guards* is not privileged from being *reeve* of a manor. Sid. 355. Hill. 19 & 20 Car. 2. Sir Walter Vane's caſe.

3. A *doctor of phyſic* was *choſe conſtable*, and the Court thought perſons of quality ſhould be privileged againſt ſuch offices, and therefore made a rule that he ſhould be diſcharged of the ſaid office niſi, &c. Sid. 431. Mich. 21 Car. 2. B. R. The King v. Pordich.

Vent. 105. S. C. by the name of Dr. Lee's caſe. ——S. C. Mod. 282. ſays it was objected, that the archdeacon's *predeceſſors did execute this office*; and the Court ordered, that notice ſhould be given, and cauſe ſhewn why the doctor ſhould not do the like; but afterwards the ſaid two judges ruled, that he ſhould be privileged; and it is there ſaid, that the land being in leaſe, it ſeems that the tenant, if any, ought to do the office. And the writ was granted. ——S. C. cited 6 Mod. 140. Paſch. 3 Ann. B. R.

4. A writ of privilege was prayed to excuſe one from the *office of expenditor in the level* of Romney-marſh; 1ſt, For that he was an *eccleſiaſtical perſon*. 2dly, Becauſe all the land he has in the marſh is in leaſe for 99 years. The writ was granted by Rainsford and Moreton J. they only being in court; Moreton for the firſt reaſon, and Rainsford for the ſecond. Lev. 303. Mich. 22 Car. 2. B. R. The Archdeacon of Rocheſter's caſe. Dr. Lee's caſe.

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5. *High conſtable* was diſcharged from ſerving the office of *overſeer of the poor*, during his high-conſtableſhip. 2 Jon. 46. Paſch. 28 Car. 2. High-conſtable of Wanſtead's caſe.

6. The *king's officers*, though they may execute the ſame by deputy, are privileged from pariſh offices, though they drive trades in the ſame pariſh, and ſuch privilege is *grantable out of Chancery* as well as the Exchequer. 2 Chan. Rep. 196. 32 Car. 2. Raymond v. Pariſh of St. Botolph's Aldgate.

7. Note, a writ of privilege was moved for to have a *clergyman*, who appeared to have *no cure of ſouls*, privileged from the office of *overſeer of the poor*. And though Holt Ch. J. ſeemed againſt it, becauſe he thought their privilege of exemption was only extendible to their ſpiritual revenues, and if in any caſe they were perſonal, it was only from common law offices, and ſpecially if they were without cure, as here; yet the other three juſtices were ſtrongly againſt him; but however, for his lordſhip's ſatisfaction, deſired it ſhould be ſtirred again. 6 Mod. 140. Paſch. 3 Ann. B. R. Anon.

(B) Privilege. *For what Cauſes.*

[1. IF a man be *arreſted coming to Weſtminſter to anſwer an action* there, he ſhall have the privilege. 2 H. 7. 2. b. 9 H. 6. 44.] But if he was not coming to the Court at Weſtminſter it is otherwiſe; for if he comes to London in the vacation meſne between the being ſued in bank and the arreſt in London, he ſhall not have the privilege. Br. Privilege, pl. 34. cites 2 H. 7. 2.—— One that was coming to the Court of B. R. to attend upon his cauſe, was arreſted as he was coming, and was forced to put in bail; but upon a motion, and making it ſo appear to the Court, he and his bail were both diſcharged. Hill. 22 Car And the party that arreſted him had been alſo puniſhed, had he not pretended that he knew not that the party came about his buſineſs depending in the Court; for the doing of this was an affront to the Court, as well as an injury to the party arreſted. L. P. R. 2 Vol. 369.——But to have the protection of the Court, the party muſt appear in perſon, that the Court may examine him, and that they may be ſatisfied upon his *oath, that he was either proſecuting or defending ſome ſuit* pending *in that Court* when he was arreſted. Gilb. Hiſt. of C. B. 167.

[2. *So* if he be arreſted *returning from* the Court, he ſhall have the privilege. 2 H. 7. 2. b.]

[3. If a man be *ſued in Bank*, and he *goes to another place by leave of the Court to inquire for evidences concerning this matter* which he has there, he ſhall have the privilege if he be arreſted there. 13 H. 4. 1. b.] S. P. Gilb. Hiſt. of C.B. 167. cites Fitzh. Corpus cum Cauſa, 151. S. C.

[4. *But* in this caſe, if he has *not leave of the Court* to go there, he ſhall not have the privilege. 13 H. 4. 1. b.] S. P. Gilb. Hiſt. of C.B. 167.

[5. If the defendant, in a writ of treſpaſs, be arreſted *in another Court, in coming at the return to anſwer the plaintiff*, he ſhall have his privilege. 4 H. 6. 8.] Br. Privilege, pl. 21. cites S. C. & P. but ſays, that he was diſmiſſed till they were adviſed, quod nota, but that by 2 H. 5. cap. 2. it is enacted, that he ſhall be remanded where he ſhall remain, and ſhall not be diſmiſſed.

[6. If a man be arreſted upon a writ returned in Bank, if he *goes* 40 *miles out of his way* to another place *to buy a horſe to come to London*, and he is there arreſted, yet he ſhall have his privilege. 9 H. 6. 7. b.] In ſuch caſe he ſhall have his privilege if arreſted in a town corporate at ſuch diſtance; for it may be that he went thither to buy a horſe, or other things neceſſary for his journey. Br. Privilege, pl. 4. cites S. C.

[7. If I have an *action pending in B. and my goods are arreſted in London, which ought not to have privilege*, if I *render my body voluntarily to free my goods*, I ſhall not have the privilege, becauſe it was my own act to render myſelf. 20 H. 6. 3. b. Adjudged.] [511] Br. Privilege, pl. 6. cites S. C. If *in plaint* againſt a man in *London*, his *goods are attached by the cuſtom*, and *he renders his body to priſon to diſſolve the attachment*, yet he ſhall have the privilege of the bank, if he was impleaded there before, notwithſtanding that the render to priſon was his own act; for he was in by virtue of the plaint. Br. Privilege, pl. 29. cites 38 H. 6. 12.——S. C. cited 8 Rep. 143. b. in Dr Drury's caſe.—See pl. 23.

[8. If a man be arreſted *in going to London*, though he has an * *action pending in Bank*, yet if he was *not coming to this Court*, he ſhall not have the privilege. 2 H. 7. 2.] See pl. 1. Fol. 273.

[9. If

A. impleaded B. in C. B. and *bad day to appear*, and the *defendant arrested the plaintiff coming toward the Court to profecute his fuit*, the plaintiff ſhall have privilege for his own ſuit. Br. Privilege, pl. 57. cites 11 H. 6. 27.

[9. If the *plaintiff*, in a ſuit *in Bank*, be *arreſted in London by defendant* upon a plaint there, *before the return of the writ in Bank*, he ſhall have his privilege. 11 H. 6. 22. 52.]

This ſeems miſprinted, and the Year Book is, that if the plaintiff was arreſted 2 days before, it ſhall be intended to prevent his keeping of his day, and therefore ſha l have his privilege; but if it was 2 or 3 weeks before the day it would be otherwiſe, for then it could not be intended, that his coming was to keep his day, unleſs other cauſe was ſhewn, as that he had been ſick, and that his coming ſo long before, was to refreſh himſelf, 11 H. 6. 52. a. pl. 16. but I do not obſerve the point mentioned at 11 H. 6. 3.—And ſee pl. 12, 13.

[10. If a man, *having an original* depending returnable *in Bank*, *comes to London* 3 *weeks before the return for this cauſe* and no other, and there is arreſted, he ſhall have the privilege. 11 H. 6. 3. *But* if he comes ſo long before the time, *becauſe he is ſick, to be refreſhed*, he ſhall have the privilege. 11 H. 6. 52.]

[11. *But if* a man *does not come* to London *to take a ſuit* at the common law, but is there remaining, *though he has an action pending in Bank*, yet he ſhall not have the privilege if he be arreſted there. 11 H. 6. 3.]

See pl. 10. It appeared by examination, that defendant in Bank was arreſted in London in the vacation, when he need not come about his ſuit at Weſtminſter, and therefore it was the opinion of the Court that he ſhould be remanded. Br. Privilege, pl. 31. cites 39 H. 6. 50.

[12. This is true, if he be arreſted 2 *or* 3 *weeks before return of the writ in Bank*; for then he could not be in coming to the Bank. 11 H. 6. 52.]

See pl. 10. One impleaded in Bank came to London 12 *days before the term*, and is arreſted in London; upon oath that he came ſo long before the term, *to retain counſel* in his matter in Bank, the privilege was allowed him. Br. Privilege, pl. 28. cites 38 H. 6. 4. ——In debt, *exigent* was *awarded in Trinity term returnable in Hilary term*, and meſne, viz. *in Mich. term the defendant came to London, and was arreſted, and prayed privilege*; per Brian Ch. J. he ſhall have the privilege, if he came for counſel in the ſame cauſe; and therefore the plaintiff in London took out an original in Bank againſt the defendant, and he was compelled to anſwer to it immediately, and had privilege; quod nota. Br. Privilege, pl. 45. cites 20 E. 4. 12.

[512] See the notes at pl. 17.

[13. *But if* he was arreſted there but 2 *days*, or ſuch little time before the return, he ſhall have his privilege, though he be ſtaying there; for by this arreſt he cannot keep his day in Bank. 11 H. 6. 52.]

14. A man who *dwelt in London* was *impleaded at Weſtminſter, and after* was *arreſted in London*, and was diſmiſſed by the privilege, though he dwelt in London, as well as if he had been arreſted in London coming out of the country to Weſtminſter, to have appeared at a ſuit there; but Brook ſays, it ſeems that this was *in the term*; for contra, it ſeems, if he had been arreſted in the vacation. Br. Privilege, pl. 55. cites 11 H. 6. 52.

15. A man *ſued a replevin*, and the *defendant affirmed plaint in a baſe court by covin to have the goods diſtrained to be attached, ſo that replevin ſhould not be thereof made*; and the ſheriff returned it, and the plaintiff prayed ſuperſedeas for him and his goods, becauſe the Court of *Bank has the elder ſeiſin by the replevin*, and he could not have privilege by ſuperſedeas for his goods, but only for his body; but per Laicon he ſhall have it for both; but by ſeveral, the plaintiff

tiff may have certiorari for all if he will, and ſee elſewhere, that the attachment ſhall not diſſolve the diſtreſs taken before. Br. Privilege, pl. 51. cites 16 E. 4. 8.

16. Where *matter is continued for a year*, by reaſon that it is in *arbitrement*, a man ſhall have privilege. Per Brian Ch. J. Br. Privilege, pl. 45. cites 20 E. 4. 12.

The plaintiff *coming up to follow his ſuit after his year after his bill exhibited*, was arreſted in London, and had his privilege. Toth. 218. cites 1588. Marſhal v. Moor. —— S. C. cited P. R. C. 285. it appearing, that he came up only for the following his ſuit. —— Curſ. Canc. 496. S. C.

17. A man brought *corpus cum cauſa, to be removed out of London*, becauſe he is *indicted of treſpaſs in B. R.* And by the beſt opinion he ſhall have the privilege. Br. Privilege, pl. 47. cites 2 R. 3. 16.

And per Sulliarde, if a man *claims the privilege by action brought by himſelf*, he ſhall be *examined whether it be brought by covin*. Ibid. —— Where the action is brought *in the ſame term*, he ſhall be examined of the covin; but if it be in a former term, the record ſhall be credited, and the principal caſe was put off, &c. therefore quære. Ibid.

18. He who *has attorney, and comes to commune with him*, and is arreſted in London, ſhall have privilege. Br. Privilege, pl. 34. cites 2 H. 7. 2. Per Townſend.

19. *And* he who *comes to a vill to merchandiſe*, and after has notice that *pluries capias is iſſued againſt him*, and it is returned, and that if he does not appear exigent ſhall iſſue, there if he would appear, and in the mean time he is arreſted, he ſhall have the privilege. Per Townſend; quære. Br. Privilege, pl. 34. cites 2 H. 7. 2.

20. Note, that where *ceſty que uſe* comes to Weſtminſter to maintain the ſuit of his feoffee in uſe, and he is arreſted, he ſhall have the privilege. Br. Privilege, pl. 1. cites 27 H. 8. 20.

So of a ſervant or farmer, who comes to bring money to his leſſor, who is in ſuit, to maintain the ſuit. Ibid.

21. If the *baron alone* be *impleaded in C. B.* and in coming to defend the ſuit *he and his feme are both arreſted*, they ſhall both have the privilege. D. 377. Trin. 23 Eliz. Anon.

So in debt againſt baron and feme, ſuperſedeas of chancery was *caſt for the baron*; and becauſe the feme cannot anſwer without her baron, and they are one perſon in law; therefore per Cur. it ſhall ſerve for both. Br. Privilege, pl. 17. cites 22 H. 6. 38.

22. The defendant, *coming to execute a commiſſion*, was arreſted, and had a corpus cum cauſa to ſet him at liberty. Toth. 218. cites Trin. 23 Eliz. Jackſon v. Vaughan.

P. R. C. 289. —— Curſ. Canc. 496. cap. 18.

23. Action of *battery* was brought *in C. B.* and upon not guilty pleaded, the parties were at iſſue; and when the *jury went* out *to conſider of their verdict*, the *defendant cauſed the plaintiff to be arreſted* by proceſs out of B. R. *for a battery done* to him *before* by the plaintiff. The Court being informed of this, would have diſcharged the plaintiff, but that he having *put in bail*, they ſaid they could not, but commanded the plaintiff in this new action to releaſe his arreſt, which he did; and they ſet a fine on him, which he immediately paid in court. And they ſaid, that the ſuitors ought ſafely to come and go by the privilege of the Court, without vexation elſewhere. Goldſb. 33. pl. 8. Mich. 29 Eliz. Lea's caſe.

24. A defendant *coming* up *upon an attachment* would have had his privilege *againſt a citation in the arches*, and could not; becauſe a citation is no ſtay of his perſon. Toth. 218. cites Paſch. 30 Eliz. Cook v. Dix.

P. R. C. 289.—Curſ. Canc. 496. cap. 18.

25. The plaintiff was arreſted when he *came up to examine witneſſes*, and was diſcharged by ſuperſedeas of privilege. Toth. 218. cites Trin. 1591. or 32 Eliz. fol. 738. Barnardiſton v. Bawd.

26. The plaintiff was releaſed out of priſon, though detained at other men's ſuit, becauſe he was *arreſted* when he was *going about his* buſineſs or *ſuit in Chancery*. Toth. 211. cites 8 Car. Smith v. Garby.

27. When a perſon complains to the Court of B. R. of a miſdemeanor, and it is adjudged that his *complaint is vexatious*; this Court will not allow the privilege of protecting him in his return. 11 Mod. 79. pl. 13. Paſch. 5 Ann. Anon.

(C) *For what Things. And in what Action.*

[1. IF a man was *condemned in London, and taken before the writ purchaſed in Bank*, he ſhall not have his privilege, but ſhall be remanded. 10 H. 6. 10. b.]

* If after his being impleaded in Bank, he is arreſted in London upon a plaint, he ſhall have the privilege, though the plaintiff be *nonſuited or eſſoigned*, or will not appear, ſo that the writ be returned, and the teſte of the writ prior to the plaint upon which he is arreſted; but if the writ be not returned, he ſhall not have the privilege; for the Court has not any record; but upon *plaint affirmed before the teſte of his writ*, he ſhall not have privilege. Br. Privilege, pl. 5. cites S. C.

[2. If a man, who *comes* to London *to anſwer an original* againſt him returnable *in Bank*, be, *before the return, arreſted upon a plaint in London prior to the date of the writ*, he ſhall not have the privilege. * 9 H. 6. 54. b. 10 H. 6. 10. b. For he ſhall not be diſcharged.]

[3. *So* if the *plaint was the 4th day of October, and the writ* bore date *the 1ſt day*, yet if it be found upon examination that the writ was *delivered the 8th day*, he ſhall not have the privilege. 9 H. 6. 54. b.]

If a man has a ſuit depending in B. R. and be coming to town to proſecute or defend it here, he cannot be ſued elſewhere; per Twiſden. Mod. 66. Mich. 22 Car. 2. B. R. Anon.

[4. If a man, *coming to anſwer an original*, be *arreſted upon a plaint in London ſubſequent to the date of the writ, but before* the *return*, if the *original be after returned*, he ſhall have his privilege, though the plaintiff in the original has not yet done any thing in the writ; for by the return of the writ the original was pending from the date, ab initio. 9 H. 6. 54. b. Curia. 10 H. 6. 10. b.]

[5. *So* ſhall it be though the *plaintiff in the original* be *outlawed at the return*. 9 H. 6. 55. b. Curia.]

[6. *But* if a man *ſues an original* againſt me, *but does not deliver the writ to the ſheriff, nor any writ is returned*; and I ſuppoſing the writ to be returned, *come to anſwer it, and in coming am arreſted*, I ſhall not have the privilege; for here no writ is depending againſt me. 9 H. 6. 54. b.]

[7. If

[7. If I am arreſted *in an inferior court coming to anſwer a capias* ſued againſt me in Bank, I ſhall have the privilege, though the writ be *returned non eſt inventus*. 20 H. 6. 4.]

[8. A man who is *coming to proſecute a ſuit* ſhall have the *privilege for all his goods neceſſary* * *for the journey*. 20 H. 6. 4.] [514] Br. Privilege, pl. 55.

cites S. C.—pl. 24. cites 9 E. 4. 47. That it was touched there, that he ſhould have privilege there for his horſe and *ſervant* who comes with him.—Ibid. pl. 27. cites 21 H. 7. 39. That he ſhall have privilege for his horſe and other goods.——It was ſaid by Aſcough and Fulthorp, when a man comes to London about his ſuit, he and his horſes and his goods neceſſary to his journey ſhall be privileged. And by Newton, he ſhall have the privilege for all his goods brought with him, though he brings ſurpluſage, and ſo of all his other goods, quære inde; and ſo after he was remitted as before. Br. Privilege, pl. 6. cites 20 H. 6. 4.

* S. P. And alſo for his *expences*. Br. Privilege, pl. 29. cites 38 H. 6. 12.

[9. *So* if he brings with him *more* goods *than are neceſſary*, (yet if he brings them with him *for defence of the ſuit*), he ſhall have the privilege for them.] Br. Privilege, pl. 55. cites S.C.—pl. 8. cites 34 H. 6.

Per Priſot. Quod non negatur. [And ſee the notes at pl. 8. Per Newton.]

[10. *But* he ſhall not have privilege for *ſuch* goods as he carries with him *to merchandiſe*. 20 H. 6. 4.] Br. Privilege, pl. 55. cites S.C.—

Ibid. pl. 6. cites S. C.——pl. 8. cites 34 H. 6. 15. Per Priſot.——Br. Privilege, pl. 29. cites 38 H. 6. 12.——S. P. Gilb. Hiſt. of C. B. 198.

[11. If *defendant* in an action of debt *in bank* be *arreſted in London for the ſame debt by the ſame plaintiff*, he ſhall have the privilege; and when he comes into bank upon the *habeas corpus*, though the plaintiff be *nonſuited*, yet he ſhall be diſmiſed. 12 H. 4. 21.] Fol. 274. Br. Privilege, pl. 11. cites S.C.—

Br. Nonſuit, pl. 13. cites S. C.——Gilb. Hiſt. C. B. 168. cites S. C. If it appears to the Court, that it is the ſame plaintiff, defendant, and action, the defendant ſhall be diſcharged; becauſe at the time of ſuing out the 2d action, they were legally attached in the ſuperior court.

12. He who *rides with his maſter* to London, *to bring back his horſe*, ſhall have the privilege. Br. Privilege, pl. 40. cites 10 E. 4. 4.

13. If a man comes to *ſue original*, and is arreſted before he can ſue it, he ſhall be examined, and ſhall have the privilege, though no plea be pending. Br. Privilege, pl. 1. cites 27 H. 8. 20.

14. A *clerk of B. R. was ſued*, after the ſtatute of 21 Jac. cap. 23. *in an inferior court*, for a ſum *under* 5 *l.* And per Jones and the Chief Juſtice, a writ of privilege ſhall be allowed; for the ſtatute being general, never intended to take away the privilege of the clerks of this court. And it was ruled accordingly. Palm. 403. Paſch. 1 Car. B. R. Armington's caſe.

15. A Serjeant at Law was plaintiff in the Admiralty, and the defendant there moved for a prohibition in B. R. The Court doubted, whether privilege ſhould be granted *in prohibition*, ideo quære. Sid. 65. pl. 38. Mich. 13 Car. 2. B. R. Serjeant Morton's caſe.

16. If a man comes to B. R. *as a witneſs*, he is protected *eundo & redeundo*. Per Twiſden. Mod. 66. Mich. 22 Car. 2. B. R. pl. 13. Anon. Gilb. Hiſt. of C. B. 168., S. P. For ſince they are obliged by the proceſs of the Court to appear, they will not ſuffer any one to be moleſted while he is paying obedience to their writ.

A wit-

A witneſs was arreſted as he was attending the Court to give teſtimony in a cauſe. Roll Ch. J. bid them take a ſuperſedeas, and ordered the parties to ſhew cauſe why an attachment ſhould not go againſt them who arreſted him. Sty. 395. Mich. 1653. Anon.

If a witneſs coming to teſtify in a cauſe in Middleſex be arreſted in London by one knowing the cauſe, he has no remedy but by habeas corpus to examine and deliver him thereby; but if there be any contempt by the officer, &c. an attachment may afterwards be awarded againſt him; for they are as well to have privilege as the parties. Keb. 220. Hill. 13 Car. 2. Vandeveide v. Luellin.

S. C. 3 Lev. 308. Adjudged that the writ ſhall abate. ——Lutw. 193. S.C.— S. P. 1 Salk. 30. Trin. 7 W. 3. B. R. Kirkham v. Wheeley.

17. In debt, upon a penal ſtatute, qui tam, &c. againſt an *attorney* in C. B. the queſtion was, if he ſhall have his privilege or no? and ruled upon demurrer, that he ſhall have his privilege in a *debt qui tam*, * &c. becauſe it *is only the ſuit of the party*; though *in information* he ſhall *not* have his privilege. And it was ſaid to be the ſuit of the party, 1ſt, Becauſe he may be nonſuit, the which he cannot be in an information. 2dly, He may pray a tales without warrant of the Attorney General. 3dly, This ſhall not be determined by the demiſe of the king. And cited Cr. Car. 10. *[515] FARRINGTON'S caſe, there adjudged to be merely the ſuit of the party. Skin. 549. Trin 6 W. & M. B. R. Baker v. Duncomb.

(D) *What Perſons* ſhall have the Privilege.

[1. THE *farmer of the chief clerk of B. R.* ſhall not have the privilege of the Court, becauſe he is not any *neceſſary attendant* upon it. P. 1 Ja. B.]

Defendant moved to be diſcharged out of execution, being *ſteward of the houſhold to Baron Bourk, a foreign envoy*, and obtained a rule to ſhew cauſe, which was afterwards diſcharged on hearing counſel on both ſides, it appearing that the defendant *was a trader*, that he *reſided at his own houſe* in the old Palace Yard Weſtminſter, *and* that *the envoy was at Hanover at the time of the arreſt*. Notes in C. B. 281. Hill. 9 Geo. 2. Cain v. Molineux.

[2. The *ſteward of his lands* ſhall have the privilege. 20 H. 6. 26. b.]

Br. Privilege, pl. 54. cites S.C.— No *ſervants* ſhall have privilege but thoſe who are *attendants at the office, or upon their maſter*, as cook, butler, &c. Per Littleton. Br. Privilege, pl. 8. cites 34 H. 6. 15. —— *Servant* of the Chancery ſhall have the privilege, contra of *ſervant of the ſervant*. Br. Privilege, pl. 9. cites 34 H. 6. 29. —— *But* per Priſot, *ſervant of a gentleman, who is ſervant of the Chancery*, ſhall have the privilege, but this is as ſervant of the chancery, and not as ſervant of the ſervant. Quære. Ibid.

[3. If a man be *not retained with a clerk in Chancery, but is his ſervant to do his commands only at this time of the ſuit*, yet he ſhall have the privilege. 11 H. 6. 8. b. Quære.]

4. Bill lies againſt *filazer* of the Court. Br. Bill, pl. 5. cites 7 H. 6. 36.

5. Debt againſt H. S. who caſt ſuperſedeas of the Exchequer as *ſervant of the* Lord Cromwell, *Chamberlain of the Exchequer*; Pole ſaid, that the privilege extends to thoſe who are *accomptants in the Exchequer, and to the treaſurer of England, and other aſſiſtants of the Court, and their familiar ſervants who are about the offices and buſineſſes of the account in the Exchequer, and to their menial ſervants dwelling in their houſe, and to no others*, and that the defendant is deputy to the ſaid Ld. Cromwell at Hull, and is accountable there and not in the Exchequer, and that he is not a houſhold ſervant of the ſaid Ld. Cromwell, which Newton agreed; for the privilege

lege *does not extend to the ſhepherd nor carter, but to the ſervants who are about his perſon, or attendant at the Court;* and they demurred upon the ſuperſedeas, becauſe the king recorded by the writ, that he is continual ſervant to the Chamberlain, and day given over to the next term, and there he caſt another ſuperſedeas, rehearſing him to be menial ſervant. Per Newton, *by the day given over*, the juriſdiction is affirmed but for the firſt ſuperſedeas only. Per Portington, he who pleads a plea to the juriſdiction of the Court, ſhall not plead other plea to the juriſdiction after; but here is no plea pleaded, but day given over upon the ſuperſedeas; therefore the laſt writ may well ſerve. Br. Privilege, pl. 16. cites 22 H. 6. 19.

6. If the *ſheriff's bailiff* of H. *who comes to bring the writs to Court, and to receive others*, &c. be arreſted, he ſhall have the privilege; per Littleton. Br. Privilege, pl. 24. cites 9 E. 4. 47.

7. In debt, *cook, butler of officers of the Court*, &c. ſhall have privilege, and yet bill does not lie againſt them; for they are not bound to be attendant in the Court as officers and attorneys are. Br. Privilege, pl. 42. cites 11 E. 4. 3. per Littleton J. [516]

8. *And a mainpernor* ſhall have privilege; per Choke J. and yet bill does not lie againſt him. Br. Privilege, pl. 42. cites 11 E. 4. 3.

So of a priſoner of the Court, he ſhall have privilege, and yet bill does not lie againſt him. Ibid.

9. Bill by *attorney of B. R.* was rejected and abated; for no attorney is there of record, nor his attendance neceſſary; but otherwiſe it is in *C. B.* for there he, who is attorney of record, ſhall have the privilege to plead by bill. Br. Bill, pl. 24. cites 1 H. 7. 12.

Br. Attorney, pl. 67. cites S. C.

10. G. brought *debt againſt T. Warden of the Fleet, by bill of privilege*, and he would not appear, and the Court was in great doubt what remedy the plaintiff had to compel the defendant to appear; for he cannot be forejudged the Court, becauſe he has an inheritance in his office. And after it was ſurmiſed to the Court, that the ſaid *T. had made a leaſe of his* ſaid *office* to another for three years, and then the *Court was clear* of opinion, that the ſaid *T. ſhould not have* the *privilege*; for now during the leaſe he is not officer, but the leſſee. 2 Le. 173. Trin. 29 Eliz. C. B. Gittinſon v. Tyrrel.

11. A writ of privilege was ſigned by all the Juſtices of the Court of C. B. for G. V. a *clerk under the cuſtos brevium, to free him from being a ſoldier*, reciting, that it is the cuſtom and privilege of that Court, time whereof, &c. that neither the attornies nor clerks ſhall be preſſed for ſoldiers, nor choſe into any office ſine voluntate ſua, but ought to attend the ſervice of the Court. Cro. Car. 11. pl. 2. Trin. 1 Car. C. B. George Venable's caſe.

12. Debt on bond of 100 l. defendant pleaded *to the juriſdiction*, that none of the Privy Chamber ought to be ſued in any other Court, at the ſuit of any perſon, without ſpecial licence of the Lord Chamberlain of the Houſhold, and *that he is one of the Privy Chamber*. Plaintiff demurred, and a reſpondeas ouſter awarded; for the plea is ill; and the Court ſeemed to be offended with the ſaid

Keb. 137. pl. 70. S. C. that the Court conceived the plea naught and without any colour,

and inquired who the counſel was that ſet his hand to the plea, in order to puniſh him.

ſaid plea. Raym. 34. Mich. 13 Car. 2. B. R. Barrington v. Venables.

S. C. Freem. Rep. 399. pl. 501. accordingly; but by Twiſden J. if upon examination the joining appears to be by covin, he ſhall have his privilege.—— 2 Mod. 296. S. C. by name of RAMBLETON v. SCROGGS & AL. in the Exchequer Chamber, and there North Ch. J. ſaid, that he always took it to be an uncontroverted point, that a ſerjeant at law ſhould be ſued only in C. B. by bill; that he is bound by his oath to be there, and when he brings a writ of privilege, it is always out of that Court and no other. Paſch. 30 Car. 2. Curia adviſare vult.——An action was brought by bill againſt a ſerjeant at law for work done, the defendant pleads in abatement that he ought to be ſued by original, and not by bill; on this a demurrer was joined; and after many arguments and caſes cited, the Court ſaid, the caſe of *a ſerjeant and a prothonotary's clerk are upon the ſame foot, neither* of them *being bound to perſonal attendance*, as prothonotaries and attornies are, ſo that he ought to have been ſued by original; and therefore the Court gave judgment for the defendant, that the bill ſhould * abate. Rep. of Pract. in C. B. 104, 105. Trin. 7 & 8 Geo. 2. Swain v. Girdler, Serjeant at Law. ——Notes of caſes in C. B. 280. S. C.

13. In aſſault and *battery againſt A. and B.* A. pleaded ſon aſſault demeſne, *B pleaded his privilege as a ſerjeant at law*, to be ſued only in C. B. The *plaintiff demurred, becauſe* he is not the ſole defendant, but *joined with another*; and it was ſaid, that though, where the action is joint and cannot be ſevered, he ſhall loſe his privilege if he be ſued with another; but otherwiſe where the action is ſeverable. But per Cur. a ſerjeant at law *has no privilege againſt any Court at Weſtminſter*; for he may practice in any Court there, and ſo is not confined to C. B. *But if* he be *ſued* in any Court *elſewhere* than at Weſtminſter, *he may then plead his privilege.* Whereupon a reſpondeas ouſter was awarded. 2 Lev. 129. Hill. 26 & 27 Car. 2. B. R. Deakins v. Sir William Scroggs & al.

*[517]

But the clerk of the clerk of the Pells ſhall have privilege. Cumb. 482. Hill. 10 W. 3. Toms v. Loyd.

14. The *clerk of the clerk of the Crown Office* is not privileged. 2 Show. 287. Paſch. 35 Car. 2. B. R. Ward v. Lawrence.

15. It was adjudged, that an *attorney's clerk* has no privilege. Comb. 12. Hill. 1 & 2 Jac. 2. Gardner v. Strode.

16. An action was brought againſt a *prothonotary's clerk* by original. He pleaded, that he ought to be ſued by bill; to which plaintiff demurred. And the Court gave judgment, that the defendant ſhould anſwer over. Notes in C. B. 280. Trin. 7 & 8 Geo. 2. in the caſe of Swain v. Girdler, Serjeant at law. Cites it as Mich. 10 Geo. C. B. Rot. 360. Baker v. Swindale.

17. That the defendant is an *attorney*, or a *clerk in the Courts of Chancery* or *Exchequer*, &c. may be pleaded in abatement. R. S. L. 6.

(E) *Againſt whom* he ſhall have the Privilege.

[1. IF a man be *coming to a Court*, yet if he be *arreſted in another Court at the ſuit of the king*, he ſhall not have his privilege. 9 H. 6. 44. Curia.]

Br. Bill, pl. 2. cites S. C. —S. P. In C. B. And if the baron has the privilege of *Chancery*, this ſhall not ſerve for his feme, Br. Bill, pl. 39. cites 35 H. 6. 30.

2. Bill of privilege lies not *againſt attorney and his feme*; for the feme is not privileged. Per Littleton and Priſot. Br. Privilege, pl. 9. cites 34 H. 6. 25.

(F) *What Court* ſhall have the Privilege, and *againſt what.*

[1. IF a man *coming to anſwer an action in Bank be arreſted in the Marſhalſea*, he ſhall have the privilege of the Bank; yet the other is an ancient court. 4 H. 6. 8.]

[2. *So* a man ſhall have the privilege of the *Bank if* he be *arreſted in London.* 4 H. 6. 8. b.] A man was *impleaded in Bank*, and *at the exigent was ſued in London by action of debt upon the cuſtom* of L. upon a conceſſit ſolvere, and had writ of privilege, and was diſmiſſed, notwithſtanding that it was alleged that it was a cuſtomary action which does not lie at common law; for after this action determined in Bank, he may have new action in London; for he cannot be attendant at two courts ſimul et ſemel, and *he who dwells in London and is arreſted there*, where he is impleaded in Bank, ſhall have the privilege. Br. Privilege, pl. 30. cites 38 H. 6. 29.

If a man be *impleaded in* any *court at Weſtminſter*, and after is *arreſted and condemned in London*, where he ought to have the privilege of Weſtminſter, he ſhall be diſmiſſed. Brook ſays *quære* inde; for the plaintiff cannot have action at another time, if he was in execution. Br. Privilege, pl. 44. cites 26 E. 4. 5.

[3. If a *clerk of B. R.* be *ſued by bill there for land in a corporation, of which the corporation has conuſance of pleas*, yet they ſhall not have conuſance of this plea, but the defendant ſhall have his privilege of B. R. for otherwiſe he ſhall be drawn to the attendance in inferior courts. Tr. 4 Ja. B. R. BUTT's caſe by Popham.] [518]

[4. If an *attorney of Bank brings a bill of debt againſt the marſhal of the King's Bench in Bank*, the attorney ſhall have the privilege. and not the marſhal; for though the Court of B. R. is more high than the Court of B. yet both are equal in antiquity, viz. time whereof memory; and therefore they being *in equali jure*, the Court of Bank being firſt ſeiſed, ſhall have the privilege; for the preſence of the attorney is as neceſſary in Bank as of the marſhal in the King's Bench. Trin. 7 Ja. B. between GUY AND SIR GEO. REYNELL. Adjudged.] 2 Brownl. 266. S.C.—Hard. 117. in caſe of Baker v. Lenthal, cites S.C. by name of Gay v. Reynolds.—— *So* where P. an *attorney of B. R. brought* an action of *treſpaſs againſt the warden of the Fleet*, who came into C. B and deſired the advice of the Court, he being an officer thereof, and therefore ought not to be impleaded elſewhere. The Court ſaid that becauſe the plaintiff has alſo his privilege in B. R. as well as the defendant hath in C. B. this equality ſhall render the parties at liberty, and he ſhall have the benefit of his privilege who firſt begins the ſuit. And ſo the warden was adviſed to anſwer. 2 Le. 41. pl. 56. Mich. 30 Eliz. Povey's caſe.

The plaintiff being an accountant in the Court of Exchequer by bill there, prayed to be relieved againſt a bond put in ſuit by defendant in the petty bag, by reaſon of his privilege as uſher of the Chancery, the defendant pleaded his privilege as an officer of the Court of Chancery. The Court agreed, that when *both parties* are *privileged, his privilege ſhall take place who ſues firſt.* And that in this caſe the ſuit in equity to be relieved againſt the penalty of the bond is firſt attached here, and it is not the ſame ſuit with that at common law, but diſtinct from it. *And* it was further ſaid, that *if* both are privileged perſons, and *the attendance of the one is more requiſite than of the other* (as in the principal caſe it is the plaintiff here being an accountant in this court, and entered into his account, as by his bill is alleged, which cannot be completed by deputy or attorney) in ſuch caſe *his privilege ſhall be allowed who has moſt cauſe* of privilege; et adjornatur. But at another day the plea was overruled, and an injunction granted till anſwer. Hard. 117. pl. 2. Trin. 1658. Baker v. Lenthal.

If a *miniſter of C. B.* brings action there *againſt a miniſter of B. R.* he ſhall not have privilege of B. R. for C. B. has the eldeſt ſeiſin by their miniſter. Br. Privilege, pl. 40. cites 10 E. 4. 4.—— S. C. cited 2 Brownl. 267. in caſe of Guy v. Sir George Reynel.—— A man *ſued plaint in London*, and after the *defendant brought* writ of *debt in Bank*, and had privilege, and becauſe the plaint was elder than the writ, therefore he was remanded, and had procedendo; quod nota. Br. Privilege, pl. 39. cites 8 E. 4. 17.

5. If a *priſoner* remains *in the Fleet by the command of the barons of the Exchequer*, and action is brought againſt him in *C. B.* the Court *may command the warden of the Fleet to bring him into Bank to anſwer*. Br. Judges, pl. 29. cites 18 E. 3. and Fitzh. Office of Court, 16.

6. *Treſpaſs* was brought by A. againſt B. who was *returned nihil*, and the *plaintiff came to London to ſue other capias*, and the *defendant arreſted him in L.* and the plaint returned in Bank by writ of privilege, and other plaints and ſurety of peace, and attachment of the Chancery were returned; and he prayed to be diſmiſſed; and he who demanded the peace was demanded and came not, by which he was diſmiſſed of the ſurety of the peace, and of all the plaints, and not of the attachment, and the defendant made no fine. Br. Privilege, pl. 38. cites 4 E. 4. 15.

See (G) pl. 9.

7. *Privilege of C. B.* ſhall ſerve *in B. R.* Br. Privilege, pl. 22. cites 9 E. 3. 35.

And if he be impleaded *in B. R.* thoſe of the Exchequer *will ſhew the record of account*, &c. For they cannot make ſuperſedeas to the king; for there the pleas are held coram rege, and not coram juſticiariis; and he ſhall be diſmiſſed. Ibid.

8. If an *accountant in the Exchequer* be *impleaded in C. B.* the Exchequer may ſend ſuperſedeas to them to ſurceaſe. Br. Superſedeas, pl. 38. cites 9 E. 4. 57.

One who was *receiver general of the revenues* of the crown in the counties of W. L. &c. being ſued in C. B. brought a writ of privilege out of the Exchequer; but it was not allowed. D. 328. pl. 9. Mich. 15 & 16 Eliz. Hunt's caſe.

Where the ſheriff returns quod ante adventum brevis, the defendant was *taken by warrant of the juſtices of the peace*, there the *defendant ſhall anſwer and ſhall make attorney*, and ſhall be remitted to the juſtices of peace; quod nota. Br. Privilege, pl. 41. cites S. C.

9. A man was *taken in the country by ſurety of peace, by warrant of a juſtice of peace*, and after was arreſted by capias out of C. B. Per Brian, the common courſe is that a man ſo arreſted ſhall have the privilege, and ought to be diſmiſſed out of C. B. which Townſend denied; and ſo it ſeems that *ſeſſions of the peace* ſhall grant privilege to a man arreſted. Br. Privilege, pl. 35. cites 2 H. 7. 4.

* [519]

10. One S. was *impleaded in C. B.* at the ſuit of a widow in an action of debt, and now came an injunction or writ of privilege out of the Exchequer, reciting the ſaid S. to be *one of the grooms of the queen's privy chamber, and keeper of the privy purſe*, and ſo accountable to the queen; and that they do not hold plea of the ſaid action, but that the plaintiff ſue in the Exchequer; but the writ was utterly diſallowed by the Court. 3 Le. 223. pl. 300. Hill. 30. in C. B. Seckford's caſe.

11. Diggs being committed by the *Court of Requeſts* for not anſwering a bill there for the ſame matter for which he had a bill here in *Chancery*, had a corpus cum cauſa. Toth. 219. cites 36 Eliz. Lib. A. fo. 539.

12. In *treſpaſs* in B. R. the treſpaſs was laid *in Cornwall*, the *defendant* pleaded in abatement, and *ſet forth the charter* of king Edw. 1. granted *to the Stannery-Court*, thereby enabling the ſtannery-workers to plead and be impleaded in the Stannery Court; and ſo prayed the privilege of its being tried there; upon demurrer the Court agreed, that if *one* be here *in cuſtodia mareſchalli*, he

is not to be fetched away, and if he be in cuſtodia mareſchalli, he ſhould not anſwer here, none then could have remedy againſt him; and therefore he was inforced to anſwer. 2 Bulſt. 122, 123. Mich. 11 Jac. Parke v. Lock.

13. One that is privileged *in Cheſter*, has cauſe of action *againſt A. who inhabits in Cheſter and againſt B. who inhabits in London.* He cannot ſue in the Exchequer in Cheſter, though he is privileged there; for by ſuch means he might bring one from Dover to anſwer to a ſuit in Cheſter. Hutt. 59. Grigg's caſe.

14. There are *three ſorts of privilege in the Exchequer.* 1ſt, as *debtor;* 2dly, As *accountant;* 3dly, As *officer* of the court. Againſt the firſt of theſe any man who hath a ſpecial privilege in another court, as an officer of the court, or an attorney ſhall have his privilege; becauſe the privilege of a man as debtor is only a general privilege; but if an accountant begin his ſuit here, no privilege ſhall be allowed elſewhere; becauſe he has a ſpecial privilege, by reaſon of his attendance, to paſs his account, in which the king hath a particular concern; the ſame holds in an officer of the court, if he commences a ſuit here, no privilege in another court ſhall prevail againſt him; becauſe his attendance here is requiſite, and his privilege here is attached firſt by commencing his ſuit. But where the accountant has finiſhed his account, and reduced it to a certainty, ſo that it is become a debt, then he hath only a privilege as a general debtor has; ſo a ſervant to an officer, or miniſter of the court, has no privilege againſt a privileged perſon elſewhere. Per Cur. Hard. 365. Paſch. 16 Car. 2. in the Exchequer, Clapham v. Sir J. Lenthall.

15. *A member of the* univerſity of *Oxford* ſued in the Exchequer, and pleaded his privilege, but it was not allowed. Hard. 188. Paſch. 13 Car. 2. Wilkins v. Shaleroft.

16. *Lattitat* was *ſued out of B. R. againſt* the defendants being *commiſſioners of the treaſury*, thereupon Sir John May *puiſne baron of the Exchequer* came into B. R. and *ſhewed the red book, which is* an ancient book, and *reckoned a record* in their court, wherein it was ſaid, that the treaſurer ſhould have the privilege of being ſued only in that court, and the patent under the great ſeal, which conſtituted the defendants, &c. and granted to them office of treaſurer of England, was produced, and thereupon they demanded their privilege might be allowed, and after ſome debate, it was granted; and though it was urged, that there ought to have been a writ of privilege brought, and the ſheriff would have returned ſomewhat of it, &c. yet the Court ſaid there was a record to judge upon, and accordingly allowed the privilege. [520] 2 Show. 299. Paſch. 35 Car. 2. B. R. Lampen v. Sir Edward Deering & al.

17. The caſes wherein *attorneys, officers*, &c. ſhall have their privilege, if ſued in another court, are to be underſtood, *when the plaintiff can have the ſame remedy* againſt the officer, &c. *in his own court as in that where he ſues him.* G. Hiſt. of C. B. 169.

Attorney of C. B. was indebted to B. in 3*l.* who was indebted to D. in 40*l.* D. according to the cuſtom of London, *attached the money in the hands of L. who was B's attorney.* L. brought a writ of privilege, which was allowed by all the Court, except Harper J. becauſe the attorney was not indebted to D. but only by cuſtom; and the privilege of the Courts at Weſtminſter ought not to be

be impeached by any cuſtom, and the prothonotaries cited one UNDERHILL'S CASE, where ſuch privilege was allowed. 2 Le. 156. pl. 190. 20 Eliz. C. B. Lodge's caſe.

T. an *attorney of B. R. covenanted to pay Neviſon* 200 l. *when he ſhould make him a good title of certain lands* purchaſed of him. *N. made a conveyance* to T. but there being *ſome incumbrances not diſcharged.* Some *creditors of N.* hearing of this covenant *attached the money* (according to the cuſtom of foreign attachments) in T's hands as a debt owing by him to N. whereupon T. ſued his writ of privilege, and the Court was moved in behalf of the creditors, that this writ of privilege would not lie in B. R. becauſe the plaintiffs in the ſheriff's court, who were *creditors of N. could have no remedy againſt T. in B. R. or elſewere, out of the ſheriffs court*, becauſe this was a cuſtomary way of proceeding there, not warranted by the common law; nor can any action at common law be brought in ſuch manner; and for thoſe reaſons the privilege was diſallowed. 1 Saund. 67. Paſch. 19 Car. 2. Turbill's caſe.——S. P. Gilb. Hiſt. of C. B. 169. and it ſeems to intend S. C.—Sid. 362. S. C. by name of WATKINS v. HEWS, alias Turbill's caſe accordingly, and that if ſuch privilege ſhould be allowed, a debtor, by putting his eſtate into the hands of an attorney, would bar his creditors; and though LODGE'S CASE, 2 Le. 156. was inſiſted upon, yet the Court paid no regard to it, but diſallowed the privilege.

If a writ of entry or other real action be brought againſt an attorney of B. R. he cannot plead his privilege; becauſe, if this ſhould be allowed, the plaintiff would have a right without a remedy; for B. R. hath not cognizance of real actions. G. Hiſt. of C. B. 169.——So if an attorney of C. B. be ſued in an appeal, he ſhall not have his privilege, for his own court has not conuſance of this action, and by this protection he ſhould go unpuniſhed. G. Hiſt. of C. B. 196.

(G) Of the Chancery, [and of other Courts.] *In what Caſes* it ſhall be granted.

Vern. 246. Tr. 1684. Fanſhaw v. Fanſhaw. S. P. as to the privilege of the Exchequer. —— S. P.

[1. IF an *action* be brought *againſt* 2, *whereof one is clerk of the Chancery*, who ought to have the privilege, yet *if the action cannot be ſevered*, the clerk ſhall not have his privilege, becauſe the other cannot be ſued in the Chancery, and ſo the party ſhould be without remedy, if it ſhould be granted for both. 14 H. 4. 21. admitted. 20 H. 6. 32. b.]

Carey's Rep. 96. Eaſt & Scudamore v. Bittenſon & Valence.——S. P. P. R. C. 289.——S. P. Curſ. Canc. 497.

Br. Privilege, pl. 12. cites S. C. per Hall.—

[2. *As in debt* againſt 2, if the one ought to have the privilege of the Chancery, if he had been ſued alone, yet he ſhall not have it in this caſe, becauſe the duty is intire. 14 H. 4. 21. b.]

Debt againſt 2 executors, the *one appeared, and the other made default*, and writ of privilege of the Chancery was caſt after that the plaintiff had counted againſt him, and it was diſallowed, becauſe *both* the executors *cannot be ſued in the Chancery*, and yet of executors he who firſt comes by diſtreſs ſhall anſwer, and here the one came without the other, and the plaintiff counted againſt him, and yet the ſuperſedeas diſallowed. Br. Privilege, pl. 18. cites 22 H. 6. 56.

Fol. 275.

[3. The *ſame* law of a *conſpiracy againſt* 2, *whereof one* is a clerk of the Chancery. † 14 H. 4. 21. b. ‡ 20 H. 6. 32. b.]

† Br. Privilege, pl. 12. cites S. C.——‡ Br. Privilege, pl. 7. cites S. C. & P. by Markham.

Decies tantum againſt 3, & ſuperſedeas of the * Exchequer

[4. *But* if an action be brought againſt 2, and *the action may be ſevered*, there if the one be a clerk of the Chancery he ſhall have the privilege. 14 H. 4. 21.]

was iſſued forth for one. Per Newton, the ſuperſedeas ſhall be allowed; for he may ſue againſt 2 here, and againſt the 3d in the Exchequer. Browne ſaid, that in the *ſuperſedeas is exceptis quæ nos tangunt*, and therefore the king ſhall have the moiety. And per Newton, this is well ſaid, and therefore we will adviſe. Br. Privilege, pl. 14. cites 21 H. 6. 22.

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‖ All the writ ſhall abate. Br.

[5. *As* if a *treſpaſs* be brought againſt a clerk of the Chancery and another, the clerk ſhall have the privilege, for he may be ſued there,

there, and the other at the common law. || 14 H. 4. 21. Dubitatur, 20 H. 6. 32. b.] Privilege, pl. 12. cites S. C. by Hall.—Br. Brief, pl. 131. cites S. C. per Hill, that the writ ſhall abate againſt the other; but that it was held contra 34 H. 6. ¶

In treſpaſs againſt two, where the one is clerk of the Chancery, and he caſts ſuperſedeas; it ſhall not be allowed for the one nor the other. Br. Privilege, pl. 9. cites 34 H. 6. 25. ‡

Treſpaſs was brought againſt B. *an officer of* the Chancery *and* 3 *others*. B. caſts his *privilege*, and it was *diſallowed*, *becauſe* the *others are joined with him*, and they are not there pleadable. D. 377. pl. 30. Marg. cites Hill. 42 Eliz. C. B. Bacon's caſe.——*So* in *treſpaſs againſt C. and others*, *C. pleaded* his *privilege as clerk to one of the prothonotaries of C. B.* plaintiff replied, that this treſpaſs was done by them jointly, and that he had taken out an original againſt them all, and that this declaration againſt C. was upon that original, and that he ſtill proſecuted the reſt, to which the defendant demurred, and judgment was given (Twiſden and Jones only preſent) quod reſpondeat ouſter; for C. *being joined with others* in the action *ſhall have no privilege*. Vent. 298. Mich. 28 Car. 2. B. R. Molyn v. Cook & al.

[6. If *A.* be *arreſted at the ſuit of B. upon a lattitat*, and A. is detained in priſon for default of bail, and after A. *removes himſelf in B. R.* and there the *plaintiff declares againſt him in cuſtodia mareſchalli*. If A. be a clerk of the Bank he ſhall have his privilege upon his *plea*, *that he is a clerk attendant to one of the prothonotaries of B.* though he is actually in cuſtodia mareſchalli: becauſe he comes there upon this ſuit. Mich. 11 Car. B. R. between *Reeve and Jacey*. Per Curiam.]

[7. *But if a* clerk or *attorney of Bank* be in cuſtodia mareſchalli *at the ſuit of A. and after B. declares againſt him in cuſtodia mareſchalli*, he ſhall not have his privilege againſt B. becauſe he does not come there at the ſuit of B. but B. declares againſt him collaterally; for he is truly as to him in cuſtodia mareſchalli. Mich. 11 Car. B. R. in *Reeve and Jacey's* caſe. Per Curiam.] S. P. Gilb. Hiſt. of C. B. 172. cites S. C. For being once ouſted of his privilege at the ſuit of A. he can no longer attend as an attorney of the other court, but is fixed in the King's Bench, and therefore cannot by the ſuppoſition of the neceſſity of his attendance ouſt the plaintiff of his action.

If the *clerk is brought in at the ſuit of A. upon bail*, this doth not hinder him from claiming his privilege; becauſe he *had no opportunity of doing it before*, and then it is abſurd to ſay, that he ſhall not have privilege againſt B. *But if* the privilege had been *waived as to the firſt action*, it would have been waived as to the 2d alſo. 1 Salk. 2. pl. 3. Hill. 8 W. 3. B. R. Jones v. Bodiner.—— And it is a waiver in all other actions commenced in that term. Carth. 378. Bands v. Bodinner, S. C.

But if an attorney of C. B. is *brought into B. R. at the ſuit of an attorney there*, *which is an eſtoppel to defendant's privilege*, even in ſuch caſe in other actions commenced againſt him in B. R. in the ſame term, he ſhall be ouſted of his privilege; becauſe the juriſdiction of B. R. was attached upon him in the firſt action. Per Cur. Carth. 378. in the caſe of Bands alias Jones v. Bodinner.

But Paſch. 7 Ann. where an action was brought againſt an *attorney of C. B.* who *was in cuſtody of the marſhal of the King's Bench*, at the ſuit of another, and in this action they declare againſt him in cuſtodia mareſchalli, and the defendant pleaded his privilege as an attorney of C B. the Court directed that the defendant ſhould be removed by *habeas corpus* to the Common Pleas, and that an action ſhould be brought againſt him there. 11 Mod. 167, 168. Turton v. Prior.

8. Treſpaſs againſt the baron and feme, the *baron caſt writ of privilege for him and his feme*, *becauſe he was ſervant of the Chancellor*; et per tot. Cur. it was diſallowed. Br. Privilege, pl. 9. cites 34 H. 6. 25. And the ſame caſe was argued the ſame year, fol. 35.

And there it was adjourned, and after the principal caſe of the baron and feme was adjudged againſt the defendant, and he awarded to anſwer, becauſe the feme ſhall not have the privilege, and therefore baron ſhall not. Ibid.——Br. Bille, pl. 2. cites S. C.——S. P. Toth. 217. cites 32 Eliz. Berkley v. Huſſey.——S. P. For her attendance is not requiſite in his court, nor is ſhe impleadable here in the petty-bag; and beſides, where the *common law and a private cuſtom*, or privilege, encounter one another, the common law ſhall have the preference; and therefore it is, that where an action is brought againſt 2, one of them only having privilege, his privilege ſhall not be allowed him. P. R. C. 290.—— Curſ. Canc. 497. S. C.

* *So* in treſpaſs in B. R. *againſt baron and feme for treſpaſs* done *by* the *feme*, the *baron prayed* his *privilege*, being an officer *of the Exchequer*, and to this purpoſe tendered to the Court his writ of privilege; *but* it was here *diſallowed*; for the baron is only joined for conformity, and they cited the book of

of --- H. 6. --- and Lord Dyer, 307. a. accordingly; but the Court gave day to hear counſel. 2 Sid. 157. Paſch. 1659. Anon.

So in *debt againſt A. and his wife, as executrix* to the debtor, &c. the huſband comes in upon the exigent, and prays his privilege, as *ſervant to the lord keeper* of the great ſeal; but per Cur. he ſhall not have it, becauſe the wife was joined with him in this action; and ſhe cannot have any privilege. Noy, 68. Etherington v. Aſhton & Ux. —— S. P. where a *clerk in Chancery, and his wife executrix*, were ſued in C. B. the privilege was diſallowed by all the Juſtices, becauſe ſhe could not have the privilege, and therefore he could not. Godb. 10. pl. 13. Mich. 24 Eliz. Pole's caſe ——And it is there ſaid to be adjudged by the whole Court accordingly in 34 H. 6. 29. & 35 H. 6. 3.——D. 377. pl. 30. S. C. by name of Powell's caſe —S. C. cited Vent. 209. in the caſe of Molin v. Cook & al.

So where A. *clerk to a remembrancer* in the Exchequer had *married* M. widow, and *executrix of one* J. and *brought action* of debt by privilege of the Exchequer againſt one *for a debt due to* the *teſtator*, becauſe the cauſe accrued for debt due to the executrix, *no privilege* is *grantable*; per Cur. Sav. 20. pl. 49. Paſch. 24 Eliz. Lowe's caſe.

So where ſhe is *returned capi corpus*; for ſhe cannot be priſoner at two courts ſimul & ſemel. Ibid.—— *And* a man, who was *outlawed*, and *went to Calais, and came back to ſue his pardon*, and was arreſted, he had his privilege. Ibid. ——*So* of one who is outlawed, and *comes to ſue writ of error*, and is arreſted, he ſhall have the privilege of the Court where the outlawry is, viz. of C. B. and the arreſt was in B. R. and yet the privilege was allowed. Ibid.

9. In treſpaſs, *exigent* was awarded *againſt baron and feme*, and *ſhe rendered herſelf to the ſheriff, and, as ſhe was coming, ſhe was arreſted in London* upon plaint againſt her and her baron, *upon the cuſtom of feme ſole merchant*, of which the plaintiff cannot have remedy at common law; but quære thereof; and the feme notwithſtanding this was diſmiſſed; but per Choke, in ſuch caſe of the cuſtom *where the party arreſted* is in ſuch plight that he *may make attorney in the action in Bank*, he ſhall be remanded to London; but in this caſe ſhe came by reddidit ſe upon exigent, and therefore ought to have the privilege; for ſhe cannot make attorney. Br. Privilege, pl. 22. cites 9 E. 3. 4. 35.

10. A man was *arreſted in L.* and *after came a lattitat* out of B. R. *by which he was arreſted again*, and the arreſt by the lattitat was diſcharged, becauſe he was impriſoned before by the firſt arreſt, and he cannot be impriſoned in 2 courts ſimul & ſemel. Br. Privilege, pl. 24. cites 9 E. 4. 47.

11. A man brought *debt in Bank, and after* brought action of debt *in London for the ſame ſum, and* arreſted the defendant there, and he came now by habeas corpus, and prayed to be diſcharged; per Yaxley, the *plaintiff is nonſuited in* the action here in *Bank*; & per tot. Cur. this is not material, becauſe he had cauſe of privilege at the time of the action commenced in London; quod nota; but where *it appears by examination that the ſuit in Bank was by covin*, there he ſhall not have privilege; and where the plaintiff, who has ſuit in Bank, impleads the ſame defendant in any other court for this or other cauſe, he ſhall make fine; per Fineux & Reade. Br. Privilege, pl. 19. cites 24 H. 7. 6.

S. C. cited Godb. 10. pl. 13. Mich. 24 Eliz. in Pole's caſe. But Dyer ſaid, that the reaſon was, becauſe the wife came in aid of her huſband to follow his ſuit.

12. A man *brought action in Bank*, and *at the pluries* capias *he and his feme were arreſted in a baſe court coming towards Weſtminſter*; and becauſe the baron had privilege, therefore his feme ſhall be in the ſame condition, and ſo both had privilege; and yet the ſuit in the baſe court was for a *debt of the feme before the coverture*; quod nota. Br. Privilege, pl. 2. cites 27 H. 8. 20.

13. The *defendant appeared* upon a ſubpœna, *and anſwered* the plaintiff's bill, *and after attended upon the Lord Keeper for a matter in*

in controverſy between him and one Ellen Wryne; and in the mean time *was arreſted in London* at the ſuit of one Anthony Briſket, contrary to the order and privilege of this Court. It was ordered, that a ſubpœna of privilege be granted to the mayor and ſheriffs of London for the diſcharge of the ſaid arreſt. Cary's Rep. 61. [523] 2 Eliz. f. 58. Richard Dutton plaintiff v. William Alerſey defendant.

14. If any *officer, clerk, or attorney of any of the* 4 ordinary *courts,* who ought to be attendant to the Court, *be arreſted* in London, or other place, *in time of attendancy, he ſhall have* a writ of *privilege with* a poſitive *ſuperſedeas therein,* directing the plaintiff quod ſequatur in curia ubi, &c. ſi voluerit, where he may have the remedy of his ſuit as well as elſewhere; in which caſe no procedendo ſhall be awarded to the inferior court. *Otherwiſe* it is *where the party arreſted has privilege by reaſon of ſuit* depending *in* the *ſuperior court, by* him *or againſt him,* and this is the cauſe only of his privilege. Note the diverſity, by all the juſtices and prothonotaries of both Benches. D. 287. a. pl. 48. Hill. 12 El. Anon.

15. The defendant got a writ of privilege as *ſervant to the lord keeper,* and removed 2 ſeveral ſuits againſt him by the plaintiff in London; foraſmuch as the *Lord Keeper declared* in open court, that the *defendant is not now his ſervant,* therefore ordered, that the ſaid 2 ſeveral cauſes be remanded into London, and the defendant not to be allowed the privilege of this court. Cary's Rep. 146. 21 Eliz. Warner and Clerke v. Maynard. Curſ. Canc. 496. cap. 18. cites S. C.

16. An *attorney at law joined with another* in action, thereby to avoid a privileged man in Chancery; the ſuit was ſtayed, and the privilege allowed. Toth. 220. cites 28 Eliz. fol. 247. Pepwell v. Goldſmiths London.

17. P. was *arreſted by proceſs out of B. R.* and *after* the arreſt *procured himſelf to be made an attorney of C. B.* and after he *pleaded, that die impetrationis billæ, he was an attorney of C. B.* and prayed his privilege. The queſtion was, if the privilege ſhould be allowed? for a privilege which accrues pendente lite ſhall not be allowed, and here the plea is true, but there is ſpecial matter to avoid it; and Ley Ch. J. demanded if he was attorney *at the time of the bail put in,* that being the material point; for until then no writ can be put in, and by the putting in of bail he is in cuſtodia mareſchalli. 2 Roll. Rep. 432. Trin. 21 Jac. B. R. Goldſborough v. Perryman.

18. Lord D. tenant in tail of a foreſt rendering rent, reverſion to the king, exhibited an *Engliſh bill againſt a clerk to the regiſter of the Chancery, to diſcover if ſuch lands were of the foreſt.* Defendant pleaded the privilege of the Chancery and the letters patents of the king, by which he granted to the regiſter to be ſued in no other court. And it was *ruled* by all the Court, *that* in this caſe *the privilege ſhall not aid the clerk,* but that he ought to anſwer over. And their reaſon was, becauſe the reverſion being in diverſe other things ſo privileges the poſſeſſion, that it is as the poſſeſſion of the king; and alſo the privilege is granted to the regiſter himſelf, and not to his inferior clerks. Litt. R. 97. Trin. 4 Car. in Scacc. Lord Derby v. a Clerk to the Regiſter of the Chancery.

19. A ſuit in Chancery was againſt ſeveral defendants. *One of the defendants died. The ſurvivors pleaded the privilege of the Exchequer.* But becauſe this ſuit was joint at firſt againſt the deceaſed and the others, and for any thing appearing he had no privilege in the Exchequer; ſo that the Court of Chancery being lawfully poſſeſſed of the plea, his death ought not to give any more privilege to the other defendants to draw the cauſe from this court than they ſhould have had at the beginning, or while he lived; and therefore his lordſhip did adjudge the defendants plea to be inſufficient, and ordered the defendants to make a direct anſwer to the plaintiff's bill in this court. 1 Chan. R. 69, 70. 9 Car. 1. fol. 135. Lake v. Philips.

20. The defendant was arreſted at the plaintiff's ſuit as he came about *putting in his anſwer*, and impriſoned, and after ſeveral other
[524] actions charged upon him, were all *diſcharged*, it being done in the breach of the privilege of this Court. Chan. Rep. 92. 11 Car. Aliſbury v. Troughton.

21. A bill was brought, ſetting forth, that R. being arreſted and impritoned et the ſuit of C. upon mean proceſs, and after *made an eſcape, and* upon a freſh purſuit being *retaken*, is in cuſtody again; *but* the ſaid R. *making it appear* to this Court, *that he had a cauſe depending* here, *and he attending the ſame, was arreſted and detained*, contrary to the ancient privilege of this Court; whereupon this Court ordered the bailiff, who laſt took him, to be committed to the Fleet for refuſing to diſcharge him. The Court ordered Meynell and Sterling ſheriffs of Middleſex to diſcharge the ſaid R. out of cuſtody. The ſheriffs acquainting the Court, that the caſe is as aforeſaid, and that the ſaid C. threatens to bring an action of eſcape againſt the ſheriffs, the Court again ordered the ſaid bailiff to be committed cloſe priſoner, and that the ſheriffs ſhould forthwith diſcharge the ſaid R. out of cuſtody, and that a writ of privilege be awarded in that behalf; whereupon the ſheriffs diſcharged the ſaid R. and thereupon the ſaid C. brought his action againſt the ſheriffs for the eſcape, and would enforce the ſheriffs to pay the debt, and ſo conſequently invalidate and overthrow the ancient and undoubted privilege of this Court. The Court ordered that the ſaid action againſt the ſheriffs, touching the arreſt and ſetting R. at liberty, be diſcharged, unleſs C. ſhew cauſe. Whereupon C. offered ſeveral reaſons for cauſe, but the Court diſallowed the ſame, and confirmed the firſt order; and that the ſaid action be diſcharged, and all proceedings at law againſt the ſheriffs be ſtayed. But the ſaid C. inſiſted that his debt is great, and if the ſaid R. be under protection of this Court, C. is like to loſe it. The Court declared C. may, notwithſtanding the former orders, proceed againſt R. in order to the ſatisfaction of his debt, as he ſhould ſee cauſe. 1 Chan. Rep. 217, 218. 13 Car. 2. f. 677. 694. Meynel and Sterling v. Cooper.

22. The *king's attorney of the Marches in Wales brought* his *action there as executor* to another, and inſiſted to have his privilege, becauſe he was bound to give his attendance there; but the Court ſaid,

ſaid, he ſhould not have it here, becauſe he ſued as executor. Latch. 199. Ewer's caſe.

23. The privilege of Chancery belongs to the Lord Chancellor or Keeper; to all the maſters, miniſters, *officers and known clerks* of the Courts; *and to the menial ſervants* of the Chancellor or Keeper, and of the maſters, miniſters, and officers; and they may, as the caſe requires, be impleaded here, either as at common law in the petty-bag office, or in a way of equity by Engliſh bill. P. R. C. 284.

24. Perſons who have privilege of Chancery are *not to be ſued elſewhere* than in this Court, either by Latin plea in the petty-bag office, or by Engliſh bill, as the caſe requires, *ſave* in caſes *where the queen is immediately concerned.* P. R. C. 285.

25. A defendant in Chancery refuſed to anſwer, becauſe he was an *inhabitant of the county* palatine *of Lancaſter*, but was overruled, the plaintiffs being miniſters and ſervants of this Court, and as ſuch entitled to privilege here. P. R. C. 286. Curſ. Canc. 497. cites S. C.

26. The Lord Chancellor Egerton declared, that no *chequer* man is privileged againſt a ſubpœna of this Court. And ſeveral pleas by officers there, as regiſter, receiver, &c. have been overruled. P. R. C. 291. Curſ. Canc. 497. cites S. C.

27. The plaintiff as debtor to the king, and *treaſurer of the navy, exhibited his bill in the Exchequer.* The defendant *pleaded* his privilege as *one of the ſix clerks in Chancery*, under the great ſeal. Hale Ch. B. and the Court held, that a general privilege, as debtor, will not hold againſt a ſpecial privilege, but againſt a general privilege it will. But a privilege as * accountant will hold againſt a ſpecial privilege in another Court as officer of the Court, or otherwiſe, though it be not alleged that he has entered upon his account. And in this caſe the plaintiff being treaſurer to the navy, is eo ipſo an accountant. Hard. 316. Mich. 14 Car. 2. in the Exchequer, Sir Geo. Carteret v. Sir John Maſſam. *Hard. 365. Clapham v. Lenthall. [525]

28. The *warden of the Fleet* moved for a writ of privilege ſitting the parliament, alleging that he was obliged to *attend the Houſe of Lords*, and therefore ought to be privileged from ſuits, and produced precedents where writs of the like nature had been granted; and upon hearing counſel of both ſides, the Court inclined to grant this writ; but it afterwards appearing that he *was ſued for eſcapes*; and conſidering the ill conſequences that might happen, and thinking that it was in their diſcretion whether to grant the privilege upon motion, or not, (for they could not judicially take notice of this privilege of parliament,) the Court ſaid he might plead it if he would, but they would not grant it upon motion; or otherwiſe, if he thought his privilege infringed by any proſecution againſt him, he might complain to the Houſe of Lords for breach of privilege. 2 Vent. 154. Paſch. 2 W. & M. C. B. The Warden of the Fleet's caſe.

(G. 2) Allowed. How.

An *attorney of C. B.* being *ſued* by bill *in B. R.* the Court will *not diſcharge him without pleading* his privilege. 2 Salk. 544. pl. 3. Hill. 8 W. 3. B. R. Lane v. Saltmarſh.

1. *IN London*, the privilege ſhall not be allowed but *upon writ* brought thereof, and *not by way of plea*; but *in Bank* he may plead it by way of plea. Br. Privilege, pl. 7. cites 20 H. 6. 30.

S. C. Cited 2 Brownl. 267. in caſe of Guy v. Sir George Reynel. —— * An *accountant* in the Exchequer to the king, was ſued in B. R. and a *baron* of the Exchequer *came into the Court, and produced his book of accountants* to the king, and that the defendant was one, *and prayed the privilege* of the Court of Exchequer, that the ſuit might be ſtayed; the Court demanded of the ſecondary what the courſe was in ſuch caſe, whether to grant it upon ſuch bare averment of the baron, or that it ought to be pleaded and prayed by the party; upon his informing the Court that it had been uſually allowed *without plea or prayer*, it was granted accordingly. But Williams J. was ſtrongly againſt it, and ſaid that there are many books wherein it was adjudged in point that it ought to be upon the party's plea and prayer; and that without this the Court cannot certainly know whether he be the ſame party for whom the privilege is prayed. 2 Bulſt. 36. Mich. 10 Jac. Anon.

2. Thomas Younge *juſtice ſued bill in the Exchequer againſt the clerk of the Hanaper upon his account*, and the *defendant* caſt ſuperſedeas of the privilege of the Chancery, becauſe he was *clerk of the Chancery*; and by all the juſtices in the Exchequer Chamber, the ſuperſedeas ſhall not be allowed; for every one who is *accountant ought to be attendant* and preſent, and there he ſhall be ſued; for it is an advantage to the king that he ſhall attend, and ſhall account; and accountant may have bill againſt his debtor, and this is for the king's advantage, quod citius ſolvat regi; *and if* accountant be *ſued in C. B.* they ſhall ſend ſuperſedeas to ſurceaſe; *and if he* be *ſued in B. R.* thoſe of the Exchequer ſhall ſhew the * record that he is accountant, &c. and *ſhall not have ſuperſedeas to the king*; for the pleas there are coram rege, &c. and he ſhall be diſmiſſed, and ſhall be ſued in the Exchequer. Br. Privilege, pl. 25. cites 9 E. 4. 53.

3. A *ſerjeant at law* was *plaintiff in the Admiralty*, and the *defendant* there *moved for a prohibition in B. R.* It was prayed that B. R. would not grant it, but would allow the ſerjeant his privilege of its being moved for in C. B. But the Court doubted if privilege ſhould be granted in prohibition; but ex aſſenſu partium it was ordered that the plaintiff here ſue his prohibition in C. B. for the ſpeed of the poor plaintiff. But upon moving it there,
[526] the C. B. refuſed to grant prohibition, and ſo it was moved again in B. R. And all the Court held that prohibitions are grantable ex debito juſtitiæ. Sid. 65. pl. 38. Mich. 13 Car. 2. Serjeant Morton's caſe.

4. An *attorney of C. B.* was *arreſted in the Palace-yard* not far from the Hall-gate, *ſitting the Court, at the ſuit of an attorney of B. R.* and both the officer and the priſoner were brought into the Court of C. B. and the officer was committed to the Fleet, and the other was ſent up to B. R. who being informed of the caſe, viz. that the attorney arreſted was indebted to him in 200 l. the Court of B. R. diſcharged the other upon common bail. 2 Mod. 181. Hill. 28 & 29 Car. 2. Long's caſe.

5. Clerks

5. Clerks of the Court muſt have a *certificate from the Maſter of the Rolls, or office where they write*, before a writ of privilege be granted them. P. R. C. 285.

6. H. *came to confeſs an indictment*; and the Court held that he had no privilege eundo & redeundo, becauſe there *was no proceſs againſt him*. 2 Salk. 544. pl. 6. Hill. 2 Ann. B. R. Anon.

7. Menial ſervants of a maſter, miniſter, or officer of the Court, *muſt make firſt affidavit* that he is ſo: the *writ* for him muſt firſt be preſented unto and *ſigned by the Lord Keeper, and* the *affidavit* muſt be at the ſame time *annexed* to it. And ſuch writ ſhall continue in force no longer than he continues menial ſervant. P. R. C. 285.

8. If a *neceſſary officer*, ſuch as the Chancery cannot be without, as a *Regiſter*, Maſter in Chancery, or ſuch like, be *in priſon upon meſne proceſs*, the Lord Chancellor may enlarge him: *but if* he be *in execution* for debt or damages, he ſhall have no privilege; for the plaintiff would be without remedy if the party be once ſet at liberty. But this is to be underſtood with ſome limitation; for where, by order of this Court, one was diſcharged by ſuperſedeas, and the plaintiff brought an action of eſcape againſt the ſheriff, this Court ordered him to diſcharge the action, and that he ſhould ſtay all proceedings againſt the ſheriff. P. R. C. 286, 287.

(H) *In what Actions* the Privilege ſhall be granted. Of the Chancery. [*And other Courts.*]

[1. THE officers and miniſters of the Chancery ſhall *not be impleaded out of the Chancery* in any plea, *unleſs it be in plaint of land, or* of *treaſon or felony*; and if they are, they ſhall have their privilege. 3 H. 6. 30.]

A clerk of Chancery ſhall not have his privilege, unleſs he *brings writ to B. R.* becauſe B. R. is the ſuperior Court, and if *B. R. be firſt poſſeſſed of the action*, the privilege is not grantable. Per tot. Cur. Mo. 753. pl. 1038. Mich. 2 Jac. Anon.

[2. An attorney of *Bank being an adminiſtrator*, cannot ſue another as adminiſtrator by writ of privilege, becauſe he ſues *en auter droit*, but ought to ſue by writ original. Hobart's Reports, 239. Cage's caſe adjudged.]

Hob. 177. pl. 201. Gage's caſe. —— Gilb. Hiſt. C. B. 170. cites.

S. C. For in ſuch caſe executors and adminiſtrators repreſent common perſons who have not that privilege.

[3. *So* an attorney being an executor or adminiſtrator, *cannot be ſued as executor or adminiſtrator by bill*, as attornies are uſed to be ſued, but ought to be ſued by original writ. Hobart's Reports, 139.]

Indebitatus aſſumpſit for 100 l. againſt the defendant as executor, he pleaded in abatement that he was an attorney of C. B. and prayed his privilege, but was ruled to anſwer over; for his privilege extends only to actions brought againſt him in his own right. * 1 Salk. 2. pl. 4. Mich. 11 W. 3. B. R. Newton v. Rowland. —— 12 Mod. 316. S. C. And there it was urged on demurrer, that the reaſon of privilege in the caſe of an attorney, is by reaſon of his perſonal attendance, which is all one whether ſued in his own, or in auter droit. But per Holt, the authorities are of the other ſide in this caſe, and the plaintiff had judgment niſi. —— S. P. Where attorney was ſued as adminiſtrator. 1 Salk. 7. pl. 18. Hill. 4 Ann. B. R. Lawrence v. Martin.

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4. It was doubted if privilege ſhould be granted *in prohibitions*. Sid. 65. pl. 38. Mich. 13 Car. 2. in Serjeant Morton's caſe.

(I) *At what Time* they ſhall pray their Privilege. [*And what ſhall be an admitting the Juriſdiction of a Court.*]

Privilege of B. R. as cuſtos brevium

[1. IF the party *has affirmed the juriſdiction of the Court where* the ſuit is, he ſhall not have his privilege after. 11 H. 4. 68. b.] there, was pleaded *after bail put in*; and reſolved per tot. Cur. that the putting in bail is no *ſubmiſſion to the juriſdiction of the Court*, be it general or ſpecial; for till bail put in, he is not in Court to plead any thing, nor is the plaintiff obliged to declare againſt him. And ſo his plea of privilege was allowed. 3 Lev. 333. Daſhwood v. Fowlkes.

A man was *found guilty in London in treſpaſs*, and before judgment he *demanded th. privilege, becauſe his maſter was ſued in appeal of murder before he was arreſted in London*, and by award he had the privilege; quod mirum! For after anſwer given, without demanding the privilege, he ought to be ouſted thereof. Br. Privilege, pl. 27. cites 21 H. 7. 39.

[2. If privilege be prayed by ſervant of the Chancery *after verdict, and before judgment*, it ſhall not be allowed. 11 H. 4. 68. b.]

A man was *impleaded in C. B. and* in the vacation *came to London 12 days before the term*, and *was arreſted in London and condemned*; and becauſe the other *writ of privil ge was delivered in London meſne between verdict and judgment*, and notwithſtanding this they gave judgment in L. and yet becauſe it *appeared by his oath, that he came to Lond n ſo long before the term to retain counſel* in his matter in Bank, therefore the privilege was allowed, and the priſoner diſmiſſed; quod nota, after condemnation, and the reaſon ſeems to be, inaſmuch as by the firſt writ of privilege delivered before judgment, their hands were cloſed, and ſo their judgment after this was void, and ſo ſee privilege allowed after plea pleaded. Br. Privilege, pl. 28. cites 38 H. 6. 4.——Br. Judgment, pl. 55. cites S. C.

Br. Privilege, pl. 54. cites S. C. that the privilege was allowed.—

[3. So if the *inqueſt* was † ready to paſs, it ſhall not be allowed after upon prayer. Contra 11 H. 6. 8. 11 H. 6. 8. b. where the ſuperſedeas is, that he ſhall not be ſued out of the Chancery againſt his will; for this is with his will.]

† Orig. is (priſe), but it ſeems it ſhould be (priſt).

Br. Privilege, pl. 3. cites S. C. & P. by Weſtbury.

[4. So if the party *pleads to iſſue*, yet he ſhall not have privilege *before niſi prius granted*. 11 H. 4. 68. 3 H. 6. 30.]

[5. So *after demurrer* he ſhall not have privilege. 3 H. 6. 30.]

‡ Br. Privilege, pl. 3. S. C.—But in the caſe of Trussel v. Maddin,

[6. *After defence made*, the privilege of the Chancery ſhall be granted, becauſe this is not properly a plea to the juriſdiction. ‡3 H. 6. 30. Adjudged. M. 11 Car. B. R. between Reeve and Jacey, per Curiam ruled.]

Sid. 318. pl. 8. Hill. 18 & 19 Car. 2. B. R. it was held per Cur. that *after a full defence* he ſhall never be allowed to ouſt the Court of its juriſdiction.—S. C. cited Lev. 54. in the caſe of Neave v. Nelson, as adjudged. Mich. 18 Car. 2. B. R. in the caſe of Truſſel v. Maddox. S. C. cited Arg. Freem. Rep. 134. in caſe of Bone v. Andrews in C. B.

The imparlance was *ſalvis omnibus allegationibus & exceptionibus omnimodis tam ad breve quam ad narrationem*,

[7. *After imparlance to another term, in the other term* he ſhall not have the privilege of the Chancery by writ. 20 H. 6. 33.]

and at the day the defendant caſt ſuperſedeas of the privilege of Chancery, but it was not allowed; becauſe the imparlance * ‖ affirmed the juriſdiction of the Court; quod nota by award. Br. Privilege, pl. 15. cites S. C.—Gilb. Hiſt. of C. B. 170. cites 22 H. 6. 71. [But (71) ſeems to be miſ-printed for (7)] and ſays, that the true reaſon ſeems to be, that by this imparlance the defendant had confined himſelf to take advantage only of the default in the writ and count; but had he obtained from the Court a general ſpecial imparlance, viz. *ſalvis omnibus & omnimodis advantagiis & exceptionibus*, he might then have pleaded his privilege; for that is not to ouſt the Court of its juriſdiction, but is a privilege, which each Court allows to the officers of the other to be ſued in their own Court only, and the modern authorities are

expreſs, that privilege may be pleaded after a general ſpecial imparlance. ——‖ S. P. P. R. C. 286. —— Debt in B. R. againſt an attorney of C. B. who *imparled* ſpecially, *ſalvis ſibi omnibus exceptionibus*, &c. and afterwards pleaded his privilege. The plaintiff demurred; Windham and Twiſden held, that this plea was receivable upon this imparlance; but adjornatur. And the next term a reſpondeas ouſter was awarded for want of averment in the plea; but nothing further was ſaid of the ſpecial matter. Lev. 54. Hill. 13 & 14 Car. 2. B. R. Neave v. Neiſon. ——But Mich. 32 Car. 2. B. R. it was held per Cur. that plea of privilege comes too late after imparlance. 2 Show. 145. Jenkes v. Lyon. S. P. Raym. 34. Barrington v. Venables.

In debt upon bond, the defendant in propria perſona imparled, viz. ſalvis ſibi omnibus & omnimodis exceptionibus & advantagiis *tam ad juriſdictionem curiæ quam ad breve, &c.* and then pleaded his privilege as one of the clerks of the Exchequer. Exception was taken thereto, that ſuch imparlance ad juriſdictionem curiæ never was ſeen. And the Court ſaid, that ſuch imparlance ought not to have been granted by a prothonotary, and thereupon awarded a reſpondeas ouſter; but they reſolved, that if the imparlance had been as in CLAPHAM'S CASE, Hard. 365. before the plea, it had been good. Lutw. 43 to 46. Paſch. 13 W. 3. C. B. Wentworth v. Squibb.—*Treſpaſs againſt divers; all imparled except one*, and after *at the day, the one, who did not imparl, appeared by atterney and imparled*, and after ſedente curia caſt ſuperſedeas of the Chancery, becauſe he was ſervant of the Chancellor; and it was not adjudged whether he ſhall have the privilege or not, becauſe others are joined. Br. Privilege, pl. 7. cites 20 H. 6. 32.

A. ſued B. in an action of battery in *London*. B. removes it by *habeas corpus* to the King's Bench, and the term after prays an imparlance, and before the end of the term prays the privilege of the Exchequer; the puiſne baron comes *with the red book*, and ſhews, that B. is eſcheator, and ſo an accomptant to the king, and at length privilege was allowed. Noy, 40. Walrend v. Winroll.

[8. *So*, after imparlance *to another day in the ſame term*, he ſhall not have the privilege by writ. 20 H. 6. 32. b. Dubitatur.] Fol. 276.

[9. *After imparlance in B. R. by a ſervant of one of the examiners in Chancery being defendant*, if he pleads his privilege of the Chancery, he ſhall not have it. M. 1651. between FISH AND KENNEDY, per Curiam adjudged. Intratur. Tr. 1651. Rot. 1260.]

10. *At the exigent returned upon proceſs*, defendant ſhall have the privilege of the Chancery. 20 H. 6. 26.] In *treſpaſs, at the exigent* it is admitted, that the defendant may have *privilege of B. R.* at this time; *but in debt* he ſhall *not* have privilege of B. R. *for debt does not lie there*. Br. Privilege, pl. 40. cites 10 E. 4. 4.

A *clerk* of the Chancery was *ſued* in Bank, and proceſs continued *to the exigent*; the clerk *ſued a ſuperſedeas* to the ſheriff, *quia improvide*, and after *ſued a writ of privilege directed to the Juſtices of the Bank*, requiring them to ſurceaſe; and upon a long debate his privilege was diſallowed, and he driven to anſwer; for the Court was lawfully ſeiſed of the plea by the defendant's own act, inaſmuch as he had, by *the ſuperſedeas, affirmed the juriſdiction* of the Court; for every ſuperſedeas quia improvide recites an appearance in Court of the defendant by attorney, and ſhews his name; ſo that this is his own default. *But if he had not ſued ſuch writ*, notwithſtanding the exigent, the privilege ſhould have been allowed, and of this there were precedents ſhewn, and then after the writ of privilege comes to the Juſtices, they ought to make a *ſpecial ſuperſedeas* of the outlawry to the ſheriff, reciting the privilege. Et ſic nota diverſitatem bene. D. 33. pl. 18. Paſch. 28 & 29 H. 8. Anon.

[11. At the exigent returned, *and after mainprize found upon it*, defendant ſhall not have the privilege of the Chancery, becauſe by the mainpriſe he has affirmed the juriſdiction. 20 H. 6. 26. Quære.]

[12. *After iſſue when the inqueſt is ready at the bar*, if an *abſolute ſuperſedeas comes out of the Chancery*, certifying that defendant is a clerk there, and commands them to ſurceaſe, it ſhall be allowed. 11 H. 6. 8.]

13. He who is *arreſted meſne between the teſte of the original and the return* ſhall have the privilege, if the writ be returned after; for this ſhall have relation to the teſte. Br. Privilege, pl. 4. cites 9 H. 6. 7.

14. Treſpaſs againſt the baron and feme, the *baron caſt writ of privilege for him and his feme, becauſe he was ſervant to the Chancellor*; and it was alleged, that *pending the ſuit the Chancellor was removed from his office*; but this was not regarded; for if he *had once a good*

cauſe

cauſe of privilege the act of a 3d perſon ſhall not prejudice him. Br. Privilege, pl. 9. cites 34 H. 6. 29.

If a man is *condemned in London in the time of vacation, and has execution in the term,* when the defendant has cauſe of privilege, yet this ſhall not diſmiſs the execution.

15. A man was *impleaded at London long before the term,* and was arreſted, and found mainpriſe, and *at the term after an original* and ſuit *was taken againſt the defendant at Weſtminſter in C. B.* and the *plaintiff declared,* and the *defendant imparled,* and ſued writ of privilege, and had the privilege, notwithſtanding that the ſuit in L. was the prior ſuit, becauſe it was not adjudged by recovery, nor condemnation, but is pending yet in L. not diſcuſſed; but if he had been *condemned in L.* he ſhould not have the privilege; quod nota diverſity. Br. Privilege, pl. 36. cites 5 E. 4. 44.

Br. Privilege, pl. 37. cites 2 E. 4. 8.

But if the plaint and *arreſt in L.* had been *before the impriſonment here,* he ſhould have been remitted.

16. Littleton Juſtice, ſaid, that one *appeared by cepi corpus and found mainpriſe, and before the day* which he had, he *was arreſted in London, and* was *brought into B. R. by corpus cum cauſa,* at which day the *plaintiff was nonſuited,* and the defendant diſmiſſed of the ſerjeant; for the *plaint* upon which he was arreſted, *was taken after the impriſonment in Bank.* Br. Privilege, pl. 24. cites 9 E. 4. 47.

Ibid.

17. Any plea of privilege is good to a declaration againſt one *in cuſtodia mar.* if he be *there wrongfully;* as if an *attorney of C. B.* be arreſted on a lattitat, and is *in cuſtody* of the marſhal *for want of bail, or* ſuppoſe he *puts in bail,* it ſhall not hinder him of pleading his privilege; becauſe he cannot plead till he puts in bail, if he be not in actual cuſtody; and if we give judgment, it muſt be for the defendant. Per Holt Ch. J. 12 Mod. 535, 536. Trin. 13 W. 3. B. R. Wilbraham v. Lownds.

(K) Proceedings, and Pleadings.

1. BILL was brought *againſt the cuſtos brevium, becauſe the ſheriff of S. returned a capias utlagatum, which the ſaid defendant embezzled;* and exception was taken, becauſe he is *not named now cuſtos*; & non allocatur, becauſe it *appears by the return that he is yet cuſtos,* and then bill lies. And another *exception was taken, becauſe he embezzled it at D. in London, and that bill lies not but of an act done in the ſame county where the court is.* And Skrene offered to demur, becauſe the bill lies by his pretence. Br. Bille, pl. 4. cites 7 H. 4. 5.

2. Bill of debt was ſuch, viz. J. S. *petit de W. M. uno attornat de,* &c. and the bill was challenged becauſe it *ſhould be unum attornatum,* &c. and the bill awarded good. Brook ſays, quære what is intended; for it is ill reported. Br. Bill. pl. 8. cites 7 H. 6. 43.

3. In debt the defendant caſt ſuperſedeas of privilege of the Chancery, and ſaid, that the day of the writ purchaſed he was *menial ſervant of* E. Biſhop of B. *Chancellor* of England, and yet is; therefore he demanded judgment if the Court will take conuſance; and the *plaintiff ſaid,* that the *defendant was not ſervant* of the

the Chancellor the *day of the writ purchaſed, nor ever after;* and for want of defence demanded judgment; and the *defendant demanded judgment, becauſe the king recorded that he is ſervant* of the Chancellor, *ut accepimus*; and yet becauſe the plaintiff had traverſed the defence directly, to which he anſwered nothing, therefore it was awarded, that the defendant anſwer without the privilege; quod nota. Br. Privilege, pl. 13. cites 21 H. 6. 20.

4. The plaintiff ſaid, that whereas it is contained in the *writ*, [530] that he *is menial ſervant* of R. S. Burchier of the Chancery, he is *not menial ſervant, priſt*; and the other e contra. Br. Privilege, pl. 17. cites 22 H. 6. 38.

5. In treſpaſs the defendant caſt a ſuperſedeas of the privilege of the Exchequer, and *alleged the uſage, that the officers there, nor their ſervants*, &c. *have not been impleaded elſewhere* but in the Exchequer, and that he is ſervant of an officer, &c. The *plaintiff ſaid, that* the officers and their ſervants attending at the office have uſed to have ſuch privileges, and that *the defendant is ſervant in huſbandry in the country*, abſque hoc *that he is attendant*, &c. And the opinion of Priſot was, that this is a * good iſſue; which none denied but Laken, who was for the defendant, and ſo he *traverſed more than was tendered;* but quære if he ought not to traverſe *abſque that the privilege extends to all ſervants*, prout, &c. Br. Traverſe per, &c. pl. 27. cites 34 H. 6. 15.

* For per Priſot the preſcription is not alleged for all ſervants, therefore he may well ſay as here, and *ſhew that ſuch ſervants ſhall have privilege, and the others not*, and traverſe as here, *without traverſing the preſcription*. Br. Privilege, pl. 8. cites S. C.—Br. Preſcription, pl. 7. cites S. C.

6. *Bill againſt a ſheriff in the Exchequer upon his account* ſhall abate if he be *not named ſheriff*, et ratione officii ſui ſcilicet verſus J. O. quondam vicecomitem N. qui preſens hic incuria ſuper compoto ſuo, ratione officii ſui. Br. Bille, pl. 42. cites 37 H. 6. 39.

7. If *bill of debt* is brought *by an attorney* upon the privilege, the defendant may ſay, that he *is not named attorney in the bill;* judgment of the bill, and a good plea; contra, if he ſues by writ. Note the diverſity. Br. Brief, pl. 342. cites 3 E. 4. 26.

8. If one demands privilege *as warden of the Fleet*, becauſe he is officer of the court; it ſuffices if he be named warden, though he *does not ſhew how he is warden*, as in jure uxoris, or by leaſe for years, &c. but it ſuffices by name of warden only. Br. Privilege, pl. 23. cites 9 E. 4. 40. Br. Bille, pl. 16. cites S. C.—Br. Nofme, pl. 26. cites S. C.

9. In treſpaſs the defendant pleaded privilege as ſervant of a filazer, and *iſſue was taken, if the party was ſervant attendant on the filazer*, or not, at the time, &c. And ſo ſee that the iſſue is peremptory; for it is triable per pais. Br. Peremptory, pl. 48. cites 10 E. 4. 4. Br. Privilege, pl. 40. cites S. C.

10. An *attorney of C. B. brought an action* there againſt a ſtranger *by attachment of privilege*, and had a verdict; but upon a writ of error brought, the judgment was reverſed for *want of finding pledges de proſequendo*, though ſeveral precedents were ſhewn, that an attorney need not, becauſe he is ſuppoſed always preſent in Court. And the words of ſi querens fecerit te ſecurum de clamore ſuo,

ſuo, &c. were wanting in the attachment of privilege. D. 288. pl. 53. Paſch. 12 Eliz. Floteman v. Bygot.

11. It was agreed, that all *proceedings in an inferior court after a writ of privilege* delivered out of this court *are void*, & coram non judice; and if they award execution, this Court will diſcharge the party. 2 Brownl. 101. Mich. 9 Jac. Anon.

12. Error was brought of a judgment in C. B. *in debt* on an arbitration bond *by an attorney* of C. B. and *judgment* upon demurrer given for the defendant, *quod querens nil capiat per breve*; whereas the action was brought by bill of privilege, and not by an original writ; and therefore it ought to be nil capiat *per billam*. This was held a manifeſt error, becauſe it was in the judgment, which is the act of the Court, and ſo not to be accounted the miſpriſion of the clerk. Cro. C. 580. Paſch. 16 Car. B. R. Reymond v. Bembridge.

Hard. 164. S. C. by the name of Barrington's caſe. And there the plea has the word (omnes) viz. that all the barons, &c. And there exception was likewiſe taken for not averring his plea as he ought, becauſe it is iſſuable whether he is the ſame perſon who is auditor there; and to this opinion the Court ſeemed to incline; but the plaintiff's counſel ſaid, that the precedents in the Exchequer were without any ſuch averment; and they made a difference betwixt the officers or clerks of Courts, who are upon record there, and their ſervants, who are not. Et adjornatur.

13. In aſſumpſit, &c. the defendant pleaded his privilege as *auditor of the Exchequer*, in theſe words, ſc. *That the barons of the Exchequer, their clerks, nor other officers of the Exchequer, are not to be impleaded elſewhere.* The plaintiff demurred to this plea; 1ſt, Becauſe the privilege was pleaded in the negative, for it is, that they are not to be * impleaded elſewhere, without ſhewing that they have been uſed to be ſued there. 2dly, It is too general to ſay, that the barons and their clerks are not to be ſued elſewhere; for that doth not prove but that one of their clerks may be ſued elſewhere; and this was held ill according to the exception. It was inſiſted, that there was a diverſity between inferior courts and the courts of Weſtminſter; that though privilege of inferior courts muſt be pleaded preciſely, yet privilege of the Exchequer, which is one of the 4 great courts, need not, the cuſtoms of thoſe courts being laws whereof all other courts take notice without pleading them. But per Cur. plea to the juriſdiction muſt be preciſe. 2 Sid. 164. Hill. 1659. B. R. Foſter v. Barrington.

——In debt upon an obligation brought againſt the defendant, he pleaded the privilege of the Exchequer; and it was ſaid by Mr. Juſtice (John) Powel, that the defendant needed not to have pleaded it, but that it was to be *allowed upon producing the red book of the Exchequer*. Lutw. 46. Paſch. 13 W. 3. in the caſe of Wentworth v. Squibb.

The plea, that omnes attornati of C. B. ought to be impleaded there, and not elſewhere, was held ill, and a reſpondeas ouſter was awarded. Lutw. 639. Paſch. 12 W. 3. Camfield v. Warren.

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14. The *cuſtom of C. B. concerning privilege* was *certified to B. R. by the ſecondaries*, and therefore was refuſed; for it ought to be certified by the prothonotaries, Sid. 65. pl. 38. Mich. 13 Car. 2. Serjeant Morton's caſe.

But in treſpaſs againſt an attorney of C. B. he *pleaded his privilege per attornatum*. The *plaintiff demurred*,

15. An information was exhibited againſt the *cuſtos brevium* of B. R. for abuſes and miſdemeanors in his office. He refuſed at firſt to appear in perſon, but would have appeared by attorney. The opinion of the Court was, that he *cannot appear by attorney*, becauſe he is an officer of the Court, and preſumed to be always preſent. It was agreed that no proceſs ſhould iſſue againſt him, but that *upon the reading the information, if he doth not appear judg-*

ment

ment ſhall be given againſt him. Sid. 134. pl. 8. Paſch. 15 Car. 2. B. R. the King v. Paget.

because he ought to have pleaded it in propria perſona; for pleading it by attorney deſtroys the very reaſon of his privilege, which is his attending the Court in perſon; but the opinion of the Court was, that an attorney may plead his privilege by an attorney, ann no inconvenience follows it; for he may be ſick, or have buſineſs in another court, which he muſt neceſſarily attend. It is true the precedents are both ways. The plea was allowed niſi. Sty. 413. Hill. 1654. Higgs v. Harriſon.

16. In debt upon an eſcape after execution, the defendant appeared, et defendit vim & injuriam quando, &c and imparled ſpecially, ſaving to himſelf all advantages and exceptions quoad billam præd. and whether after ſuch imparlance he muſt be allowed his privilege as marſhal of B. R.? The Court held, that after ſuch defence privilege may be allowed; for it is not a full defence, nor does he go about to ouſt the Court of juriſdiction, but only claims his privilege. Likewiſe after a ſpecial imparlance of *ſalvis omnibus* advantagiis & exceptionibus, a man ſhall have his privilege; but if the imparlance be *ſpecial quoad billam breve ſeu narrationem*, it ſhall not be extended farther; and after ſuch imparlance privilege is not allowable, as appears 22 H. 6. 7. 9 E. 4. 53. But upon defendant's prayer it was adjourned. Hard. 365. Paſch. 16 Car. 2. in the Exchequer, Clapham v. Sir J. Lenthall.

17. The *privilege of Chancery was pleaded by way of preſcription*; and upon demurrer it was held ill. 1ſt, Becauſe he did *not conclude* his plea with *et hoc paratus eſt verificare*. And 2dly, *No place was alleged;* for they are † matters of fact, and triable. 1 Vent. 264. Mich. 26 Car. 2. B. R. Fawkener v. Annis.

In indebitatus the defendant pleaded cuſtom of Chancery, *that all pleas* concerning the Chancellor, and any of the clerks of the Chancery, *ought to be pleaded and determined coram Cancellario*, and not elſewhere, and avers he is a clerk of the inrolment office, unde non intendit quod * curia cognoſcere vult, but not ſaying prout patet per recordum, nor where the Chancery is; which per Curiam is ill, and as to the Chancellor, it is void; however, becauſe he cannot be judge and party, a reſpondeas ouſter was awarded, and it ſhould be only that they ought to be impleaded, without ſaying, to be determined there; for iſſues between Chancery-men are triable at common law, and the plea muſt be averred, as was adjudged in LIVINGSTONE's caſe. 3 Keb. 352. Mich. 22 Car. 2. Fawkener v. Annis.—All proceedings in the petty-bag office in Chancery, by or againſt any miniſter of this court for any matter or thing determinable at common law, are to be *pleaded to iſſue as at common law*; *and the record* thereof to be *delivered per manus Cancellarii into B. R. or C. B. at the election of the plaintiff*. And *after trial* had, the *record ſhall be remanded into this court*, and judgment ſhall be given here. P. R. C. 291.——† Per Cur. contra, that it is a matter of law, and not triable per pais, nor traverſable. 1 Salk. 30 Trin. 7 W. 3. B. R. Kirkham v. Wheeler.—2 Salk. 543. S. C. and P.

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18. In caſe againſt an attorney he pleaded his privilege thus, viz. *et prædictus A. in propria perſona ſua dicit quod ipſe eſt & prædicto tempore exhibitionis billæ ipſius Thomæ* Stephens *fuit unus clericorum Tho. Winford ar. un. pronotar. Curiæ domini regis de Banco apud Weſtm. in com. Midd. in officio ſuo quotidie intenden*, and *concluded with an averment generally, without annexing any writ of privilege* to his plea. To this the plaintiff demurred generally, and two objections were made to this plea. 1ſt, For that the defendant did *not ſay* † *venit* as well as dicit, ſo he was not in court when he pleaded. 2dly, For that he had *not laid any viſne*, ſo as the fact of his being a prothonotary's clerk might be tried; for it is a matter iſſuable, and the rather becauſe the defendant hath not ſhewed any matter of record to prove his privilege. Et per Curiam,

Skin. 582. S. C. ſays the defendant pleaded his privilege in this manner, viz. *Et prædict. def. dicit*, without ſaying *venit & dicit*, or *making any defence*; where dicit without venit might be o e tenus, &c. but non

allocatur, he being *in cuſtodia mar.* and *before another day of continuance*; but if it was at another day of

riam, both the objections were allowed, and the laſt was fatal, becauſe this is matter of fact triable by a jury; for prothonotaries clerks are not inrolled, wherefore it is neceſſary to lay a viſne in this plea. Judgment for the plaintiff, (viz.) that the defendant anſwer over. Carth. 362, 363. Mich. 7 W. 3. B. R. Stephens v. Squire.

continuance after the day of appearance, it ought to be venit & dicit; but for the want of defence the Court did not ſeem to regard it; and in the caſe of KECKWITH AND WHEELEY this term, where the defendant pleaded his privilege as attorney of C. B. and made no defence. Holt Ch. J. ſaid it was a chip in porridge. Skin. 582. Trin. 7 W. 3. B. R. Stevens and Squire.——*And* Holt Ch. J. ſaid in this caſe, that if a prothonotary or other who is a *perſon privileged by record*, pleads his privilege, and brings a *writ of privilege* atteſting it, that this is concluſive, and the plaintiff may *not traverſe it*; but otherwiſe it is of a *clerk* or ſervant *to ſuch perſon* ſo privileged. Skin. 582. S. C.

† Per Cur. venit is no part of the plea, but dicit begins the plea. The dicit alone ſhews him to be in court; and here it appears that he is in cuſtodia. 2 Salk. 544. pl. 2. Trin. 7 W. 3. B. R. Stephens v. Arthur, ſeems to be S. C.

To an *action qui tam*, &c. the defendant *pleaded* that *he is an attorney* of the Court of C. B. *and that attornies of C. B. are not ſuable elſewhere.* The plaintiff demurred; 1ſt, Becauſe this plea is only in the *negative*, and no juriſdiction is given to any other court. 2dly, Becauſe there is *no defence by venit but dicit only.* Per Cur. as to the plea being in the negative, it is well enough; for the privilege is not traverſable and triable per pais, but a matter of law of which we take notice; and venit & dicit only are ſufficient defence in this caſe. 2 Salk. 543. Trin. 7 W. 3. B. R. Kirkham v. Wheeley.

If he is actually in cuſtody, he is liable to all actions; but if he be here only upon

19. A *privileged perſon in the Common Bench* may be in *cuſtody of the marſhal*; for he may either *waive or miſplead* his privilege; and if he be actually *in cuſtody*, and it appears ſo by pleading, he cannot have his privilege. 12 Mod. 102. Mich. 8 W. 3. Duncomb v. Church.

bail, he may plead his privilege; for the ſheriff cannot take notice of his privilege, ſo that he muſt give bail. Per Holt Ch. J. Salk. 1. pl. 1. S. C.

20. *And* if *one plead an exempt juriſdiction from all the Courts of Weſtminſter*, and *not to be ſued but in ſuch particular courts and franchiſes*, there you muſt ſhew that they have a juriſdiction of the matter, and that the cauſe ariſes within their juriſdiction. Special imparlance ſhould not be allowed without the leave of the Court and conſent of the parties. 12 Mod. 102. Duncomb v. Church.

21. Defendant pleaded *that he is one of the attornies of the Court of B. R.* without ſaying *that he was at the time of the writ* purchaſed,

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and a reſpondeas ouſter was awarded. 1 Salk. 1. Mich. 8 W. 3. B. R. Peaſe v. Parſons.

7 Mod. 97. S. C.

22. Defendant pleaded that he was an *attorney* of the C. B. and ought not to be ſued elſewhere without his conſent; the plaintiff replied, that he *did conſent*, &c. *but laid no venue where*; and therefore bad. Per Cur. 1 Salk. 4. Mich. 1 Ann. B. R. Ode v. Norcliffe.

23. The defendant *pleaded privilege of C. B. in abatement, without concluding to the record.* Holt ſaid he need not do it, but he may leave plaintiff at liberty to reply, and deny his being a perſon privileged there, which plaintiff cannot do if defendant conclude to the record, and his not ſaying *prout patet* is no good cauſe of a general demurrer, and upon prout patet per recordum, there ſhall go a certiorari to certify the record; and if they produce one and

ſhew that they have privilege, the plaintiff is eſtopped. 7 Mod. 106. Mich. 1 Ann. in B. R. Cliſton and Swezeland.

24. In debt upon bond brought in B. R. the defendant *pleaded* his privilege as attorney of the Court of C. B., &c. and that there is *a cuſtom* in that Court, *that no attorney of this Court ſhall be compelled to anſwer by original writ, unleſs he is forejudged.* The plaintiff *replied, that for five years laſt paſt*, before the original filed, the *defendant had withdrawn himſelf from* the office and *practice of an attorney.* Upon a demurrer to this replication, it was objected, 1ſt, Againſt the plea, that the defendant did not ſet forth that he had any clients, whoſe ſuits he proſecuted or defended; for the reaſon why an attorney ſhould have his privilege is, that he might be attendant on the buſineſs of his clients; and when the reaſon ceaſes, the privilege ceaſes. 2dly, That he had alleged this cuſtom in fieri, and not in facto; for it is that an attorney ſhould not be compelled to anſwer, &c. whereas he ſhould have gone on and alleged, nec a tempore quo, &c. For uſage in fact is eſſential to every cuſtom, compelli conſuevit. But the opinion of the Court was, as to the firſt objection, that the plea prima facie was good, and not avoided by the replication, and that as long as the defendant is an attorney upon record, he ought to have his privilege. And as to the 2d objection, it was ſaid, the Court would take notice of the privilege of attornies of the Court, and therefore the cuſtom need not to be ſo ſtrictly alleged as other cuſtoms. And judgment was given for the defendant. 2 Lutw. 1664. Hill. 2 Ann. C. B. Routh v. Weddell.

It was moved that the defendant ſhould put in ſpecial bail, he being an attorney at large, and having diſcontinued his practice; but the Court ſaid, that *attornies at large* have the ſame privilege with the clerks of the court, and are to appear de die in diem. And they were not ſatisfied that he had diſcontinued his practice. Vent. 1. Mich. 20 Car. 2. B. R. Sir John How v. Woolley.

25. An *attorney of C. B. being ſued in B. R. pleaded his privilege.* Plaintiff demurred ſpecially, becauſe he did *not conclude with a profert hic in curia* of a writ of privilege, teſtifying his being an attorney, &c. Per Holt Ch. J. the difference is, if the privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; but if without he may, and then a certiorari ſhall be awarded to certify whether he be an attorney or not. 2 Salk. 545. Trin. 2 Ann. B. R. Dillon v. Harper.

To a plea that he was an attorney of C. B. it was objected on demurrer, that he ought to produce his writ, and conclude with a prout pater per recordum; and alſo that he laid no venue, alleging no place where he was attorney, nor where the Court of C. B. ſits. Et per Cur. viz. Holt Ch. J. to which the reſt aſſented: An attorney may plead privilege with a profert of his writ, if he will, or with an exemplification of the record of his admiſſion, or he may plead it as he does here, and it is well enough; for ſo are the precedents, and the plaintiff may reply nul tiel record. 3dly, There was no need of a venue to try where he was attorney, for it being a matter concerning his perſon, was triable where the writ is brought. As to the 3d, He wondered how that ever came to be allowed; for that this Court ſends writs to the Ch. J. of the C. B. by that name; and unleſs where this is held to be part of the deſcription of a record, it can never be neceſſary. 2 Salk. 545. Scawen v. Garret.

26. The defendant *pleaded* in abatement, that *tempore quo memoria non extat*, all the *clerks of the queen's Court of Exchequer were privileged from being ſued elſewhere* than in that Court; and *that the defendant was clerk to R. P. uno baron. de ſcaccario noſtro prædicto.* Upon demurrer the Court held, that there were *two ways of pleading privilege; one* is *to go to iſſue, and* if the party is an officer on record, *to ſhew it by producing the record;* if he is no officer of record, but attendant on one of the barons, that muſt [534]

of neceſſity be tried by a jury, becauſe the Court of Exchequer, as a Court, cannot take notice of it any more than we. The *other way is, if he be an officer on record*, then *to produce a writ of privilege at the time of the plea pleaded*, and then no iſſue can be joined upon it; but here the cuſtom is ill pleaded; for tempore quo non extat memoria is nonſenſe, and it ſhould be cujus contrarii memoria non, &c. But he having ſhewed that he is one of the clerks of a baron, the Court aſked whether they ought not to take notice that he ought to have privilege; but it being anſwered, that he did *not aver that he was clerk to one of the barons of the queen's Exchequer, but de ſcaccario noſtro*, a reſpondeas ouſter was awarded. 6 Mod. 305. Mich. 3 Ann. B. R. Phipps v. Jackſon.

27. If any who have privilege of Chancery be arreſted in a civil plea by the proceſs of any other Court, he may have a *writ of privilege*, containing an abſolute ſuperſedeas, and requiring the plaintiff, *quod ſequatur in curia ubi*, &c. *ſi voluerit*. P. R. C. 284.

28. Privileged perſons have their *writs ſealed without fees*. P. R. C. 285.

For more of Privilege in general, ſee Arreſt, Attorney, Parliament, Peers, and other proper titles.

Privity.

(A) The *ſeveral Sorts* of Privities and Privies, and *of what they may take Advantage.*

1. PRIVITY of blood ſhall *not* be *between* two of *half-blood*. Br. Entre Cong. pl. 27. cites 21 E. 3. 1. 2.

2. Treſpaſs *againſt two*, and the *one appears firſt*, and the *plaintiff counts*, and *after the other* defendant *appears*, and the *plaintiff counts of another day*, and yet *he ſhall not take advantage of the count affirmed by his companion*; contrary of plea to the writ, releaſe, diſcontinuance, &c. For *he is privy to the writ, but not to the count*. Br. Treſpaſs, pl. 56. cites 46 E. 3. 25.

3. There *is no privity* between the *incumbent of the biſhop who is collated by lapſe, and the biſhop*, as there is between the *maſter and ſervant*. Br. Incumbent, pl. 12. cites 16 H. 7. 6.

S. C. cited per Jones J. Jo. 32. in caſe of Godfrey v. Wade. — There are

4. There are three ſorts of privities, viz. privity in *eſtate*, in *blood*, and in *law*. Privies in *blood are* intended of privies in blood inheritable, and this is in three manners, viz. *inheritable as general heir*, or as *ſpecial heir*, or as *general and ſpecial* heir. Privies *in eſtate* are as jointenants, baron and feme, donor and donee, leſſor and

and leſſee, &c. Privies *in law* are when the law without blood or privity of eſtate caſts the land upon one, or makes his entry lawful, as lord by eſcheat, lord that enters for mortmain, lord of villein, &c. 8 Rep. 42. b. Hill. 45 Eliz. Whittingham's caſe.

three other ſorts of privities, viz. in reſpect of *eſtate* only, *contract* only, *eſtate and contract* together. Privity *of eſtate* is, as if the *leſſor grants over his reverſion*, (*or* if the *reverſion eſcheat*). Now between the grantee (or the lord by eſcheat) and the leſſee, * there is privity in eſtate only. So between the *leſſor and aſſignee of leſſee*; for no contract was made between them. Privity *of contract* only, is perſonal privity, and extends only to the perſon of the leſſor, and to the perſon of the leſſee, as in the principal caſe when the leſſee aſſigned over his intereſt, notwithſtanding his aſſignment the privity of the contract remained between them, though privity of the eſtate be removed by the act of the leſſee himſelf; and the reaſon of this is, firſt, becauſe the leſſee himſelf ſhall not prevent by his own act ſuch remedy which the leſſor had againſt him by his own contract; but when the leſſor granted over his reverſion, there, againſt his own grant, he cannot have remedy; becauſe he has granted the reverſion to the other, to which the rent is incident. 2dly, The leſſee may grant the term to a poor man, who ſhall not be able to manure the land, and who will by indigence, or for malice, permit it to lie freſh, and then the leſſor ſhall be without remedy, either by diſtreſs, or by action of debt, which ſhall be inconvenient, and will concern in effect every man, (becauſe for the moſt part every man is a leſſor, or a leſſee;) and for thoſe two reaſons all the caſes of entry by tort, eviction, ſuſpenſion, and apportionment of the rent are anſwered; for in ſuch caſes it is either the act of the leſſor himſelf, or the act of a ſtranger, and in none of the ſaid caſes, the ſole act of the leſſee himſelf ſhall prevent the leſſor of his remedy, and will introduce ſuch inconvenience as has been ſaid. Privity *of contract and eſtate* together, is between the leſſor and leſſee himſelf. 3 Rep. 23. Hill. 29 Eliz. in Walker's caſe.——Lat. 260. Iremonger v. Newſam. S. P.

* [535]

5. *Privies inheritable*, as heir general, *ſhall take benefit of the infancy*, as if infant tenant in fee ſimple makes feoffment and dies, his heir ſhall enter. The ſame law of him that is heir general and ſpecial, and alſo of him that is heir ſpecial and not general. But privies *in eſtate* (unleſs in ſome ſpecial caſes) *ſhall not* take advantage of the infancy of the other. 8 Rep. 42. b. 43. Wittingham's caſe.

Privies in blood ſhall take advantage of nonage or coverture, but *not* privies *in law nor* privies in *eſtate*. Arg. 3 Bulſ. 272. cites 8 Rep. 42. Whittingham's caſe.

6. A *ſurrender by an ideot* of an eſtate for life to deſtroy a contingent remainder is void ab initio, and therefore any perſon may take advantage of it, as well privy in eſtate as heir at law. *But* a *feoffment and livery* made *propriis manibus of the ideot* not being merely void, makes a difference. Carth. 436. Hill. 9 W. 3. B. R. Thompſon v. Leech.

For more of **Privity** in general ſee **Aid, Aſſignment, Confirmation, Covenant, Deſcent, Fines,** (X. 2) and other proper titles.

Proceſs.

(A) *Judicial. How* it ought to be *made.*

[1. IF an *action* of battery be brought *againſt B. C. and D.* and *J. S. and J. D. are bail by recognizance for B. and C.* and *not for D.* and after judgment againſt B. C. and D. for coſts and

damages a *ſcire facias* is ſued to have execution againſt *J. S. and J. D.* the bail, and the ſcire facias *recites the action and judgment againſt B. C. and D. and that they were bail for B. and C. and that the ſaid B. and C. have not ſatisfied* the judgment, *nor rendered* themſelves to the priſon, and therefore they ſhall ſhew cauſe why execution ſhall not be awarded againſt them, and the ſcire facias is not, that D. againſt whom the judgment is alſo, has not ſatisfied the judgment as it may be that he has, nor that B. and C. has
[536] not ſatisfied it *nec eorum aliquis*, as is uſual, yet this is a good writ; for in as much as they were bail only for B. and C. it is ſufficient to ſay, according to the condition of the recognizance, that they have not rendered themſelves to priſon, without ſaying nec eorum aliquis, and without ſaying *nor the ſaid D.* for if B. or C. have paid it, it is the payment of both; and if D. has paid it, it ought to come of the other part to be ſhewn. P. 11 Car. B. R. between BARNES AND HILL. Adjudged upon a demurrer. Intratur. Hill. 10 Car. Rot. 897.]

2. *Debt by the executors of one parſon againſt another* parſon *upon arrears of annuity arrear in the time of their teſtator*, the *defendant ſaid, that he found his church diſcharged*, and *prayed aid of the patron and ordinary*, and had it. The prothonotary was in a doubt, if he ſhould make the *ſummons ad auxiliand' to the ſheriff of L. where the writ was brought, or to the ſheriff of E. where the church was;* and per Martin and Hals, becauſe this is *a judicial proceſs* he ſhall purſue the original, and it ſhall be brought firſt *in the county where the original is brought*, and if they are *returned nihil* there, then proceſs ſhall be made *upon a teſtatum* to a foreign county. Br. Proceſs, pl. 3. cites 2 H. 6. 8.

Fol. 277.

(B) *Diſtringas.* Diſtringas *upon Teſtatum* at the Common Law.

[1. UPON a diſtringas, if the ſheriff returns a nihil upon a teſtatum *of aſſets in other county*, by which he may be diſtrained, a diſtringas ſhall iſſue into the other county; for otherwiſe there ſhould be a failure of right. 3 H. 4. 4. 6 E. 4. 11. 27 H. 8. 22. b.]

[2. *So* if upon a diſtringas the ſheriff *returns petit iſſues*, ſo that the *parties do not appear* upon a teſtatum of *aſſets* in other county, a diſtringas ſhall iſſue for the benefit of the king *to have greater iſſues*, and for the ſpeedier juſtice. Entries, fo. 226. A. Diſtreſs, 4. Tr. 30 H. 8. Rot. 102. P. 18 H. 8. Rot. 304.]

(C) Upon the 25 E. 3. Cap. 17. *Capias or Exigent.*

Detinue of a box; the *defendant came by capias*, and the *plaintiff counted of a box with charters concerning land*, and therefore the defendant prayed to make attorney; and becauſe now it appears by the count, that it touches the realty, therefore capias does not lie, by the opinion of all the Court; and therefore now he ſhall make attorney. Br. Exigent,

[1. IN a *detinue of a cheſt with charters*, a capias and exigent lies by reaſon of the cheſt. 29 E. 3. 19. b. Adjudged.]

Exigent, pl. 15. cites 7 H. 4. 2.——Note, per Mowbrey, that *ca. ſa. lies for execution in detinue of a bag of charters, becauſe the bag is only a chattel*, and capias lies upon the original thereof, and therefore capias may be execution; quære inde. And from hence ſee, that where capias is not the proceſs upon the original, that there ca. ſa. is not the execution, & ſic dixit. Belk. ibidem. Br. Exigent, pl. 8. cites 40 E. 3. 25.——Br. Proceſs, pl. 18. cites S. C.

2. 25 *E. 3. ſtat.* 5. 17. *Proceſs ſhall be made in a writ of debt and detinue of chattels, and taking of beaſts by writ of capias, and by proceſs of exigent by the ſheriffs return, as is uſed in a writ of accompt.*

The capias is not by this ſtatute, but *by the common law.*

Per Manwood Ch. B. 2 Le. 88. pl. 112. in caſe of Ognel v. Paſton.

3. If the *diſſeiſin* be found *with force and arms*, capias pro fine ſhall be awarded, and exigent thereupon. Br. Proceſs, pl. 32. cites 7 H. 4. 39. [537]

4. In replevin *Witherman was awarded* for the defendant againſt the plaintiff; the *ſheriff returned, quod averia elongata ſunt*; there Witherman was awarded for the defendant of the goods of the plaintiff, and the *ſheriff returned nihil*, by which 3 capias's iſſued, and at the pluries returned exigent iſſued; quod nota, that the plaintiff may be *outlawed upon his own ſuit*. Br. Proceſs, pl. 34. cites 11 H. 4. 10. Br. Replevin, pl. 18. cites S. C.

5. *Juſticies to the ſheriff to hold plea upon obligation of* 1000 *marks*, the juſticies *was removed into Bank by pone*, upon which the *defendant was returned nihil*; the plaintiff prayed capias; and per Martin and Cockain, the capias does not lie, for the ſtatute which gives it *ſays, in writ of debt* capias lies, which is *intended original*, and this *juſticies is not original, but a commiſſion to the ſheriff to hold plea beyond* 40 *s.* And the ſheriff upon this cannot award capias in the county, nor ca. ſa. Br. Exigent, pl. 5. cites 3 H. 6. 54, 55.

6. In *treſpaſs* the *defendant appeared and had day by dies datus*, &c. and *at the day made default*, by which *iſſued diſtringas*, and he is *returned nihil*; there *ſhall iſſue* 3 *capias's & exigent*; quod nota after appearance. Br. Exigent, pl. 6. cites 19 H. 8. 1.

7. In treſpaſs upon the caſe the plaintiff had proceeded againſt the defendant in the old way by *pone & diſtreſs*, and the defendant moved to ſtay the proceedings, ſuggeſting the ſame to be contrary to the method preſcribed by the late act of parliament to prevent vexatious arreſts, 12 Geo. & 2 Geo. 2. And the queſtion was, whether by theſe ſtatutes the old method of proceeding be taken away, and another method inſtituted, or not. It was urged for the plaintiff, that *before the ſtatute of Marlbridge no capias lay*, that the *ancient courſe of proceeding was by original*, and where the party was returned attached no proceſs lay, but a diſtringas, except in treſpaſs vi et armis. In this caſe the party is returned attached upon the original, and no proceſs of outlawry lies. The act of parliament 12 *Geo. preſcribes a method in caſes where the cauſe of action is under* 10 *l. and the plaintiff proceeds by way of proceſs againſt the perſon*; but here the plaintiffs do not proceed by way of proceſs againſt the perſon, and after the original returned as aforeſaid, no proceſs againſt the perſon can iſſue, and conſequently the party cannot be ſerved with proceſs. There is alſo an *exception in the ſtatute* 12 *Geo. as to peers and privileged perſons*, who are to

be proceeded againſt as by the ſtatute 12 W. 3. but that can relate only to caſes where the proceeding is by way of proceſs againſt the perſon, and not by *method of pone and diſtreſs*, which is a dilatory method in the defendant's favour, where eſſoins may be caſt, and *remains as it was, not affected by any of theſe ſtatutes*. Per Cur. the *ſtatutes of Marlbridge and* 25 *Ed.* 3. *do not take away the ancient method of proceeding by original and diſtringas*; but where it is returned upon the original, that the defendant hath nothing whereby he can be attached, a capias againſt the perſon may be iſſued, and a proceeding to outlawry carried on. The words of the ſtatute 12 *Geo. extends only to proceedings by way of proceſs againſt the perſon, and ſeems to admit plaintiffs may proceed otherwiſe, as before*; and it would be hard to ſay, this clauſe hath repealed the law by implication. As to proceedings againſt privileged perſons; a new method by bill is preſcribed by the ſtatute of 12 W. 3. but the law not altered. Let the rule to ſhew cauſe why the proceedings ſhould not be ſtayed be enlarged. Notes in C. B. 292. Trin. 10 Geo. 2. Bias and Wife and Goodfleſh v. Lyell.

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(D) *What* Proceſs ſhall be *awarded*.

In falſe impriſonment the defendant juſtified by a capias directed to him upon a ſuit commenced

[1. A *Capias* ſhall not be awarded *before a ſummons*, but the firſt proceſs ought to be a ſummons. P. 16 Ja. B. R. between Banks and Pembleton. Adjudged.]

[2. *Alſo* a capias cannot be firſt awarded before any ſummons *by cuſtom of any court*, for it is contrary to the law. P. 16 Ja. B. R. between Banks and Pembleton. Adjudged.]

againſt the plaintiff in an inferior court; the plaintiff demurred becauſe it was not ſhewn that a ſummons iſſued firſt, and inferior courts can award no capias but upon a ſummons firſt returned. Hale Ch. J. ſaid, that the ordinary practice of thoſe courts to grant a capias without a ſummons is a great abuſe, ſo that the party is driven to bail in every trivial action; and though upon a writ of error this matter is not aſſignable, becauſe a fault in proceſs is aided by appearance, &c. yet falſe impriſonment lies upon it, and the officer cannot juſtify here as in proceſs out of the courts of Weſtminſter; and judgment for the plaintiff. Vent. 220. Trin. 24 Car. 2. B. R. Read v. Wilmot. —— S. C. of Read v. Wilmot was cited by Powel J. in the caſe of Gwinne v. Pool & al. who ſaid, that though he has as great reſpect as any man for the opinion of Hale Ch. J. yet he cannot agree to this judgment, which he ſaid was given upon the firſt argument upon a diſpleaſure conceived againſt the male practices of inferior courts in this irregular way of proceeding, but that it certainly is only a proceſs inverſo ordine, and erroneous only; and that in the caſe of Ward v. Ellard, Cro. J. 261. it was held to be error, and that ſo is Marget and Harvey's caſe, Palm. 449. and that no cuſtom of any inferior court will make this proceſs good; but that *by the cuſtom of London, which is confirmed by act of parliament*, this proceſs is held good in Mackalley's caſe, 9 Rep. 68. But it there appears, that without this cuſtom it would be only erroneous proceſs; and ſays, he ſees no reaſon why officers of the ſuperior courts ſhould be thought more knowing than thoſe of the inferior. Lutw. 1564, 1565. Mich. 4 W. & M.

(E) *Who may award* the Proceſs.

[1. If a man be *outlawed before the juſtices of the peace in their ſeſſions*, the juſtices of the peace may award a *capias utlagatum* thereupon; for *the Court which can outlaw* a man *may alſo award proceſs* of outlawry. M. 10 Ja. B. per Curiam.]

[2. The *ſame* law of *juſtices of gaol-delivery*. Mich. 10 Ja. B. per Curiam.]

(F) Execution.

[1. IF a *ſpecial bailiff, by* force of *a warrant upon capias in proceſs, enters* into the *houſe of J. S. the door being open, and there takes J. D.* againſt whom the writ is, the proceſs is well ſerved as to J. D. and all ſtrangers; and if any ſtranger reſcues him, he at whoſe ſuit he is arreſted ſhall have his action againſt the ſtranger. Tr. 16 Ja. B. R. between HODGES and MARKES. Adjudged upon demurrer.]

Bailiff ſtood at the ſtreet-door, and ſent his ſervant up 3 pair of ſtairs in a diſguiſed habit with the warrant, who laid hands on W. R. and told him, that he arreſted him. Holt Ch. J. doubted if this was a good *arreſt*, being done *by the bailiff's follower* or ſervant, and *not in the preſence of the bailiff himſelf*; but ſaid, that the plaintiff muſt prove his cauſe of action againſt W. R. and muſt prove the writ and warrant by producing ſworn copies of them. And he muſt prove the manner of the arreſt, that it may appear to the Court to be a lawful arreſt; and in point of damages, he muſt likewiſe prove the loſs of his debt, viz. that W. R. became inſolvent, or could not be retaken. 3 Salk. 311. Anon.——6 Mod. 211. * Trin. 3 Ann. B. R. S. C. By name of Wilſon v. Gary.——If a bailiff, having a warrant from a ſheriff on a capias, *ſends another* in his room to arreſt the perſon, ſuch arreſt *is illegal*. Per Holt Ch. J. 12 Mod. 73. Trin. 7 W. & M. Anon.

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(G) *At what Time* the Proceſs may be *executed*.

Fol. 278.

[1. IF a *latitat returnable die lunæ proximo poſt* craſtinum Sanctæ Trinitatis, *which was this year the 10th of July*, comes to the ſheriff to arreſt J. S. the ſheriff may arreſt him the ſaid *10th day of July*. Tr. 3 Ja. B. R. between MAY and HOPER, by Fenner and Yelverton agreed.]

The utmoſt length of time the law allows for executing a writ is the *day on which it is returnable*, and it is not executable that day any longer than the *Court ſits*. 1 Salk. 322. pl. 8. Paſch. 3 Annæ. B. R. in the caſe of Perkins v. Wollaſton.——6 Mod. 130. S. C.

[2. *So a capias in proceſs* may be executed *the day of the return* thereof.]

[3. *So* a *capias ad ſatisfaciendum* may be executed the day of the return thereof.]

[4. If a *writ of inquiry of damages* be returnable octabis Michælis, the ſheriff may take the inqueſt and inquire of the damages the day of the return, and afterwards return it the ſame day, and this writ is well executed. Tr. 38 El. B. R. between † GAWEN and LUDLOW. Adjudged. And there is cited to be adjudged accordingly in † BUGBER's caſe, which was Mich. 11 Car. B. R. between STAINSBY and WATERMAN in replevin, the writ to inquire for damages for detaining of rent executed *the ſame day of the return*, that is to ſay, the eſſoign day, and per Curiam good. But new writ was awarded, becauſe the damages were exceſſive.]

† Cro. E. 468. S. C. and cites the caſe of Buckleer v. the Queen. S. P. Adjudged. And S. C. cited Mo. 712. pl. 998. Mich. 41 & 42 Eliz. in the caſe of Woolley v. Mooſley.——But if the inqueſt had been taken the 2d day of craſt. Trin. and before the 4th day of craſt. Trin. it had not been good. Cro. E. 180. Paſch. 32 Eliz. Bugberd's caſe.

[5. If upon a writ *to inquire of damages*, the *inqueſt be impannelled the eſſoin-day, and the jury then hear their evidence, but give their verdict 2 or 3 days after*, yet this is well executed. Mich. 11 Car.

‡ S. C. & P. cited to have been adjudged good; for

the jury being charged at the firſt day, though they gave

11 Car. B. R. in the ſaid caſe of STAINESBY and WATERMAN, ſaid by Jones and Barkley, that this was adjudged in ‡ BUGBER's caſe.]

not their verdict till 2 days after, it ſhall not prejudice the party; but the verdict being given, ſhall relate to the firſt day of the return, and ſhall be ſaid to be executed upon the firſt day, to which it ſhall have relation; and for that reaſon, Popham Ch. J. who before differed, agreed in the principal caſe, that the writ was well executed. Cro. E. 468. (bis) Paſch. 38 Eliz. B. R. pl. 26. Gawen v. Ludlow.

[6. If a *niſi prius* be taken *after the 1ſt day of the return, and before the 4th*, it is not good; for the juſtices have no power to take it after the day of the return. 33 H. 6. 45. b. Adjudged. Tr. 38 El. B. R. Agreed.]

7. *But* if the niſi prius be taken the *day of the return, or before, and* the jury *do not give their verdict until* 2 *or* 3 *days after*, becauſe they cannot agree, yet it is good enough; becauſe otherwiſe the jury may prejudice the parties by their *diſagreement*. Tr. 38 El. B. R. per Popham.]

8. *So* it is of a writ of *inquiry of damages* taken in ſuch manner. Tr. 38 El. B. R. per Popham. And there ſaid, that it was ſo adjudged in BUGBER's caſe.]

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S. C. cited per Cur. Cro. E. 180.

[9. If a man be *outlawed after the firſt day of the return* of the writ it is erroneous. 33 H. 6. 46. ſaid to be oftentimes ſo adjudged by the advice of all the juſtices.]

pl. 15. Paſch. 32 Eliz. B R. in BUGBERD's CASE, and took a difference between the executing a writ of inquiry of damages and the caſe of an exigent, and of the *venire facias ad diem octabis*, there the day is excluded, but not in writ of inquiry.

S. P. For this is one and the ſame day in effect,

[10. The ſheriff upon a *capias in proceſs* cannot arreſt the party *after the day of the return, and before the 4th day*. 33 H. 6. 45. b.]

and when the firſt day is paſt, his authority is expired. Br. Proceſs, pl. 169. cites S. C. ——— In treſpaſs for battery and impriſonment, defendant juſtified by execution of a writ, but upon the plea it appeared to be executed *after the day of the return, but before the quarto die poſt*. The execution was adjudged illegal, and judgment for the plaintiff. Lev. 143. Mich. 16 Car. 2. B. R. Ellis v. Jackſon. ——— Sid. 229. S. C. accordingly.

11. If a man *vouches two as heirs*, the *one of full age*, the *other within age*, and prays that the parol demur, and the demandant ſays that he is of full age, and prays venire facias to be viewed, proceſs ſhall iſſue againſt him of full age; per Markham; but Newton e contra; and that *no proceſs ſhall iſſue till the other be adjudged to be of full age*. Br. Proceſs, pl. 61. cites 19 H. 6. 5.

12. A *writ by the roll* was *awarded returnable on Wedneſday*, but was *made returnable on the Thurſday*, and *executed on the Thurſday*. The writ was ordered to be amended according to the roll, and the execution upon the Thurſday void. Cited by Windham J. Lev. 143. Mich. 16 Car. 2. B. R. in caſe of Ellis v. Jackſon.

13. In falſe impriſonment defendant juſtified by arreſt on a *latitat*. Plaintiff replied, that the writ *was taken out after the arreſt*. The defendant demurred. Per Cur. the writ being antedated is no juſtification and judgment for the plaintiff. 3 Keb. 213. Mich. 25 Car. 2. B. R. Chancy v. Rutter.

(H) Who may execute it.

1. STATUTE of Lincoln, 11 E. 2. in Magna Charta, fol. 109. b. and that the executions of writs which ſhall come to the ſheriffs be made *by the hundredors* known and ſworn in full county, and not by others, if it be not in great default, or notorious diſturbance of hundredors, and then let them be made by others covenable and ſworn, ſo that the people might know who ſhall ſerve ſuch executions, ſaving all returns of writs to thoſe who have and ought to have them.

2. Treſpaſs of *battery in Middleſex*, and the *plaintiff counted in the palace of Weſtminſter where the ſheriff has no juriſdiction*; and per Marten the count ſhall abate; for it *is infra*, and *not de*; for the *palace is no part of the county*, for *proceſs ſhall iſſue* immediately from the Court *to the warden of the palace*, and *not to the ſheriff*, and therefore he may direct precept to the warden, as in caſe of a liberty within the county. Br. Count, pl. 77. cites 2 H. 6. 7.

3. *Writ ſhall not be ſerved part by the ſheriff*, and part by the bailiff of the franchiſe by parcels; quod nota. Br. Proceſs, pl. 33. cites 8 H. 4. 17.

*[541]

Fol. 279.

*(I) *What* ſhall be ſaid *a good Arreſt* in Law.

See Arreſt.

[1. IF *three writs of capias in proceſs at the ſuit of J. S. againſt J. D.* be directed to the ſheriff, and the ſheriff makes *three ſpecial warrants to one ſpecial bailiff, and he* comes to J. D. and *arreſts him generally*, without ſhewing in which action, nor is it demanded of him; but immediately upon the arreſt a ſtranger reſcues him, action upon the caſe lies againſt the ſtranger for all *three reſcues*: for this was an arreſt in law upon all. Tr. 16 Ja. B. R. Adjudged between Hodges and Marks.] The arreſt, without having the warrant in his hand, and having all the warrants about him, was well enough, though he did not ſhew by which of the warrants he arreſted him; for he, being under the bailiff's arreſt, is in cuſtody there for all cauſes for which the ſheriff had made his warrants againſt him, though the ſheriff or bailiff do not mention any ſpecially. Cro. J. 486. S. C.

[2. *So* if the writs and warrants were *at the ſuit of three ſeveral perſons*, and the bailiff arreſts him generally as before, this is a good arreſt for all, and all ſhall have actions for the reſcue. Tr. 16 Ja. B. R. between Hodges and Marks per Curiam.] Cro. J. 485. S. C.

[3. If a *warrant* be *directed* by the ſheriffs of *London* to certain ſerjeants there *to take A. B.* a counteſs *upon a capias ad ſatisfaciendum*, and the *ſerjeants, for fear of a reſcue, procure the* party *plaintiff to enter an action of* 1000*l. againſt the ſame A. B. by the cuſtom of London, whereupon they would arreſt her, and carry her to the compter, and there charge her in execution*, and after the ſerjeants come to A. B. and ſay that they arreſt her, without ſaying more; this *general arreſt* cannot be by force of the writ of execution; for when the ſheriff or other perſon by his authority makes arreſt When a bailiff makes an arreſt by warrant, he *ought to ſhew the cauſe* of the arreſt, as to ſay, that he arreſts him on an execution, and for how

much money; and if it be upon appearance, he ſhall tell the Court, and the day of appearance compriſed in the writ, otherwiſe the arreſt is not good.

reſt of the perſon of another, [he] *ought upon the arreſt to ſhew at whoſe ſuit, out of what court, for what cauſe* he does it, *and when the proceſs is returnable*, to the intent, if it be for any execution, that he ſhall pay it and free his body, or agree with the party, or put in bail according to the law, and to know when he ſhall appear. Co. 6. COUNTESS OF RUTLAND, 54. Reſolved.]

And yet a *known officer* ſhall not be compelled to *ſhew his warrnt* as a ſpecial bailiff ſhall, but thoug he has a warrant, and will not ſhew it, yet he ſhall declare to the party the cauſe of the arreſt. Mo. 767. pl. 1063. Mich. 3 Jac. in the Star-chamber. S. C.

If proceſs be delivered to the *ſheriff*, and he takes the party without ſaying any thing, it is good; for otherwiſe the ſheriff ſhall be a treſpaſſor, which the law does not intend, and the ſheriff has a lawful authority ſo to do; and ſo it is, though the ſheriff *had not the proceſs about him* at the time of the arreſt. Noy, 55. Beale v. Taylor.

And though the warrant was in his pocket, and he only ſaid, Here I do arreſt you by virtue of a warrant which I have, but did not ſhew him the warrant, nor had it in his hand, yet it was reſolved, that this was a good and legal arreſt, and that he needed not to ſhew the warrant till the other obeyed and demanded it. Cro. J. 485, 486. Trin. 16 Jac. B. R. S. C.

[4. Upon a *capias in proceſs* at the ſuit of J. S. if a *ſpecial bailiff* by force of a warrant to him directed, *arreſts* the party, and *does not ſay at whoſe ſuit, nor is it demanded of him* at whoſe ſuit it is, but *immediately* upon the arreſt *a ſtranger reſcues him*, this is a good arreſt, and an action lies againſt the ſtranger; for he had not time to ſhew at whoſe ſuit it was, nor is he bound to ſhew at whoſe ſuit it is, before that he has *peaceably ſubmitted to the arreſt*. Tr. 16 Ja. B. R. between HODGES AND MARKES. Adjudged upon demurrer.]

[542] 5. A man who is *ſheriff of London and Middleſex*, or of *Eſſex and Hertford*, cannot *take a man in the one county by capias directed to him in the other county*; but a man taken in Middleſex ſhall be brought to Newgate in London; for this is the gaol of both counties. Br. Proceſs, pl. 168. cites 16 E. 4. 5, 6.

6. *A. comes to the ſheriff, and tells him he has a writ againſt B.* who is *then preſent*, and on this the ſheriff ſays, I will take his word for his appearance, this cannot be taken for an arreſt. Arg. Vent. 118. Paſch. 23 Car. 2. B. R. in caſe of Methwin v. Hundred of Thiſtleworth.

7 Mod. 8. S. P. Anon. S. P. 2 Roll. R. 138. Sir William Fiſh's caſe.

7. A bailiff *caught one by the hand at a window* whom he had a warrant to arreſt; this was ſuch a taking, that the bailiff might juſtify breaking open the houſe to carry him away. Vent. 306. Hill. 28 & 29 Car. 2. Anon.

For more of **Proceſs** in general, ſee **Arreſt**, **Contempt**, **Execution**, and other proper titles.

Pro Confeſſo.

(A) In what Caſes a Bill ſhall be taken Pro Confeſſo.

1. BECAUSE the defendant *ſtood out all proceſs of contempt* for not anſwering, the bill was taken pro confeſſo. Toth. 100. cites 36 Eliz. Wildgoſs v. Ragland.—And 11 Jac. Denton Mill v. Brown.—Ibid. cites 13 Jac. Earl of Oxon v. Gouch.

S. P. Toth. 100. cites 10 Jac. Earl of Hertford v. Gerrard.

The *defendant ſtood in contempt* for not anſwering the plaintiff's bill, and thereupon a ſequeſtration was granted, and it was likewiſe *decreed, that* the *bill ſhould be taken pro confeſſo, unleſs* the *defendant ſhew cauſe within a certain time* limited for that purpoſe by the Court. But this muſt be underſtood (as the caſe then was) where the defendant had appeared; for if he did not appear at all, but ſtood out all contempts to a ſerjeant at arms, no decree can be had againſt him, or the bill taken pro confeſſo; for that muſt be after an appearance, and when he ſtands in contempt for want of an anſwer. N. Ch. R. 1, 2. Paſch. 1 Car. Okeham v. Hall.

Where the defendant has not *appeared*, Chancery cannot decree the bill pro confeſſo, but ordered a *ſequeſtration* againſt his real and perſonal eſtate until he cleared the contempt. 2 Ch. R. 284. 35 Car. 2. Nodes v. Battle.

The courſe of the Court now is, to take a bill pro confeſſo after the party has once *appeared*, and ſtands out in contempt until the plaintiff has got to the end of the line, and has run through all the proceſs of the Court againſt him; yet formerly this Court did not do it even in that caſe without putting the plaintiff to prove the ſubſtance of his bill. Arg. Vern. 224. Hill. 1683. in the caſe of Johnſon v. Deſmineere.

2. *Two defendants, the one* having *anſwered, the other refuſes*, he ſhall be bound by the other's anſwer, if the cauſe paſs againſt them. Toth. 74. cites 7 Jac. Matthew v. Matthew.

3. Defendant being a *priſoner in the King's Bench*, refuſed to anſwer. The bill cannot be taken pro confeſſo, unleſs he was *in the priſon of this Court;* whereupon he was removed by habeas corpus into the *Fleet*, and having a day given him to anſwer, and he ſtill refuſing, the bill was taken pro confeſſo, and he was ordered to be kept cloſe priſoner. N. Ch. R. 50. 1653. Thomas v. Jones.

4. Where the defendants were not bruoght in upon any proceſs of contempt, but they appeared to the ſubpœna to anſwer, and *craved a further day*, and had it, and ſtill *ſtood out at all contempts*, and could not be taken, the bill was taken pro confeſſo, and a decree upon it decreed to be well grounded, and a bill of *review* ordered to be diſmiſſed. N. Ch. R. 64. 14 Car. 2. Denny v. Filmore. [543]

5. In a ſuit for *tithes* the defendant was in *contempt* for not anſwering, and was brought by ſeveral orders to the bar; and being a *Quaker* refuſed to anſwer on oath, but prayed to anſwer without oath. Finch C. admoniſhed him of the peril, viz. that the bill muſt be taken for true *entirely as it is laid*, if he anſwered not; and he ſaying as before, the Lord Chancellor pronounced the decree,

decree, though Sir J. Churchill, as amicus curiæ, ſaid, that this cauſe for tithes, eſpecially ſmall tithes, was not proper for this court, and had not been uſed; but decreed for the plaintiff, and referred the valuation to the maſter. 2 Chan. Caſes, 237. Mich. 29 Car. 2. Anon.

6. *Defendant* having *appeared*, and *afterwards ſtood in contempt until ſequeſtration* was returned, it was inſiſted, that the bill ought to be taken pro confeſſo; but the Lord Keeper ſaid, he would conſider of it until the next term. And it being *alleged that baron and feme were defendants, and that* it was *the wife only* who had *appeared* and that without the huſband's privity, Lord Keeper referred it to a maſter to examine the fact, and ſaid, if it ſhould fall out to be ſo, he could not decree againſt the huſband, but they muſt proceed and lay on the ſequeſtration to bring him in. Vern. 247. Trin. 1684. Gibſon v. Scevengton.

7. A defendant refuſing to anſwer, and *ſtanding out all contempts until* an order was made for *a ſequeſtration*; it was prayed by the plaintiff's counſel, that the bill might be taken pro confeſſo. To which it was objected by the counſel on the other ſide, that this could not be done, becauſe the ſequeſtration was *neither under ſeal nor executed*, and alſo becauſe the plaintiff did *not produce the original* itſelf, but only a copy of it. Lord Chancellor Parker held the laſt objection certainly a good one; but as for the other, there ſeemed to him to be no reaſon for it; for the putting the ſeal to the ſequeſtration, and actually executing it, ſeems to be then only neceſſary when the plaintiff is not ripe for a decree upon his own bill, but wants ſome diſcovery from the defendant's anſwer, upon which the decree may be founded; and therefore the actual executing a ſequeſtration to extort an anſwer, of which the plaintiff has no occaſion, ſeemed to him very unneceſſary. 10 Mod. 431. Paſch. 5 Geo. Anon.

Mr. Serjeant Barnardiſton in his Reports of Caſes in Chancery, 401 to 404. tells us, that the opinion of the Court was, that it is not ſufficient upon this ſtatute to make *affidavit; that the party making it was informed, and believes that the defendants withdrew* themſelves into Ireland, in order to avoid being ſerved with

8. 5 *Geo.* 2. *cap.* 25. *ſ.* 1. enacts, That *if in any ſuit in equity any defendant, againſt whom proceſs ſhall iſſue, ſhall not cauſe his appearance to be entered according to the rules of the Court, in caſe ſuch proceſs had been ſerved, and affidavit ſhall be made, that ſuch defendant is beyond the ſeas, or that, upon inquiry at his uſual place of abode, he could not be found, ſo as to be ſerved, and that there is juſt ground to believe that ſuch defendant is gone out of the realm, or abſconds to avoid being ſerved, the Court may make an order, appointing ſuch defendant to appear at a day therein to be named, and a copy of ſuch order ſhall, within* 14 *days, be inſerted in the London Gazette, and publiſhed on ſome Lord's day, after divine ſervice, in the pariſh church where ſuch defendant made his uſual abode within* 30 *days next before his abſenting; and a copy of ſuch order ſhall be poſted up, viz. A copy of ſuch order made in Chancery, Exchequer, or Dutchy-chamber, ſhall be poſted up at the Royal Exchange; and a copy of every ſuch order made in any of the courts of equity of the counties palatine, or of the great ſeſſions in Wales, ſhall be poſted up in ſome market-town within the juriſdiction of the Court, neareſt to the place where ſuch defendant made his uſual abode, ſuch place of abode being alſo within the juriſdiction of the Court; and if the defendant do not appear within ſuch*

time

*time as the Court ſhall appoint, then, on proof made of ſuch publication of ſuch order as aforeſaid, the Court may * order the plaintiff's bill to be taken pro confeſſo, and make ſuch decree thereupon as ſhall be juſt; and the Court may order ſuch plaintiff to be paid his demands out of the eſtate ſequeſtered according to the decree, ſuch plaintiff giving ſecurity to abide ſuch order touching the reſtitution of ſuch eſtate, as the Court ſhall make upon the defendant's appearance. But in caſe ſuch plaintiff ſhall refuſe to give ſecurity, then the Court ſhall order the effects ſequeſtered to remain under the direction of the Court until the appearance of the defendant to defend ſuch ſuit.*

the proceſs of this Court. But it muſt be likewiſe ſworn by whom the deponent received ſuch information, and cites Hill. 1740. Burton v. Maloon.

Provided, that this act ſhall not affect perſons beyond the ſeas, unleſs affidavit be made of their being in England *within 2 years before the* ſubpœna.

Nor extend to Courts having a limited juriſdiction, unleſs oath be made of perſonal reſidence in ſuch juriſdiction one year before the ſubpœna.

9. The defendant appeared and ſtood out to a ſequeſtration, and afterwards, on getting time, put in an anſwer, which was reported inſufficient in near 20 exceptions, and was ſerved with ſubpœna to make a better anſwer. The defendant put in another anſwer alike inſufficient. It was inſiſted for the defendant, that the *practice of taking bills pro confeſſo is not of long ſtanding*, the ancient way being to put the plaintiff to make proof of the ſubſtance of the bill; and that, in this caſe, taking all the bill pro confeſſo, where part had been ſufficiently anſwered, ſeemed very ſtrange. But it was anſwered, that an inſufficient anſwer is as no anſwer, and therefore the whole to be taken pro confeſſo; and the Maſter of the Rolls decreed for the plaintiff. But Lord Chancellor King, on an appeal, ſaid, he would conſider how matters ſtood at the time of ſuch decree, and that it was ſufficient that there then was an anſwer, and which the plaintiff had admitted to be ſo by ſuing proceſs for a better; and that to ſay the defendant confeſſed the whole bill true, when, by the Maſter's report, (which was a record of the ſame Court,) that he had anſwered the greateſt part; and when the plaintiff himſelf had taken the firſt anſwer to be an anſwer in part by ſerving the defendant with proceſs to put in a better, is againſt common ſenſe; and reverſed the former decree. 2 Williams's Rep. 556. Mich. 1729. Hawkins v. Crook.

10. If a *defendant* obſtinately *inſiſts upon his demurrer*, and refuſes to anſwer *where* the Court is of opinion that *ſufficient matter is alleged* in the bill to oblige him to anſwer, and for the Court to proceed upon, the Court will decree the matter of the plaintiff's bill; for by the demurrer are confeſſed all matters of fact that are alleged. Curſ. Canc. 209.

For more of **Pro Confeſſo** in general, ſee **Contempt, Sequeſtration**, and other proper titles.

Procurations.

1. 34 & 35 *H.* 8. 19. ENACTS, That *penſions, portions, corodies, indemnities, ſynodies, proxies, and all other profits due out of religious lands diſſolved, ſhall be paid to biſhops, &c. by the occupiers of the ſame lands, if ſuch eccleſiaſtical perſons were ſeiſed thereof within* 10 *years before their diſſolution. And if upon ſuits in the eccleſiaſtical court for the ſame, where the payment thereof is wil-*
[545] *fully denied, the defendant be convicted, the plaintiff ſhall recover the value thereof in damages, together with his coſts of ſuit. The like he ſhall recover at the common law, when the ſame is thereby determinable.*

Provided, if the king hath demiſed any of the ſaid lands with a covenant to diſcharge the tenant of ſuch charge, that then the party claiming the ſame ſhall ſue for them in the Court of Augmentations, and not elſewhere.

In a *prohibition* to ſtay an excommunication for not paying procurations and proxies; the *ſuggeſtion* was, that by the ſtatute all ſuch archbiſhops, &c. as have a right to any proxies, &c. againſt thoſe to whom the king ſhould grant any lands charged therewith, with a clauſe in the grant, that the ſaid lands ſhould be d ſcharged, ſhould ſue for the ſame in the Court of Augmentations, now annexed to the Exchequer, and not elſewhere; that in the preſent caſe the *lands were granted by patent diſcharged of proxies*, &c. ſed non allocatur, becauſe this ſtatute *extends only where particular eſtates are granted over*, as appears by the words, any ſale, &c. for life, lives, or years, and not where the fee is granted, as it was in this caſe. Hard. 388. Mich. 16 Car. 2. in Scacc. the King v. Lake.

2. An archdeacon brought his *bill in the Exchequer* againſt the defendants, being parſons and vicars in London, *for* certain ſums of *money due* for their proxies *by preſcription*. The defendants demurred, for that the thing in demand was merely of eccleſiaſtical cognizance; and if the title by preſcription altered the caſe, then the plaintiff ought to have his remedy at law, and not in equity. But of this the Court doubted, et adjornatur. The chief baron cited Lindw. that there are 3 *ſorts* of proxies, ratione *viſitationis conſuetudinis*, and *pacti*; and the 2 laſt were recoverable at law, but becauſe in this preſent caſe the matter was douhtful, the defendants were ordered to anſwer, and this matter ſhould be ſaved to them at the hearing. Hard. 180. Paſch. 13 Car. 2. in the Exchequer. Dr. Parker v. Seabrook & al.

2 Show. 97. S. C. by the name of Girton v. Gilder; but adjornatur. But there Scroggs Ch. J. ſaid, that *if the difference be about the quantum*, then they ought to have ſaid in the ſuggeſtion, that ſo much is due, and no more; but here the whole

3. *Libel* againſt K. for procurations due to him as archdeacon of York *ſet forth that, for* 10, 20, *&c. years* there *hath been* due and *paid* 6 *s. yearly* by the ſaid K. and his predeceſſors, parſons of D. but K. ſuggeſted for a prohibition, that the ſaid duty hath not been payable, and *denied the preſcription*, and that the eccleſiaſtical court cannot try preſcriptions. Per Curiam, a conſultation is granted quoad procurations demanded generally; but if the plaintiff denied the quantum, then a prohibition. Raym. 360. Paſch. 32 Car. 2. B. R. Kirton v. Guilder.

is denied. But the whole Court agreed, that a ſuggeſtion cannot be amended after a prohibition is gone, nor in this prohibition.

4. Adjudged, that * procurations *are an eccleſiaſtical duty*, and therefore properly ſuable for in the ſpiritual court. 2dly, Where it was *claimed by and from an eccleſiaſtical perſon*, it is ſo much the ſtronger. 3dly, Though there was an *impropriation* in the caſe, ſtill there muſt be a curate to take care of the ſouls of the pariſh; and curates as well as other perſons muſt ſtand in need of biſhops or archdeacons inſtructions and viſitations. Conſequently, 4thly, That the † ordinary or archdeacon ought to be *allowed* for his procuration *what had been uſually paid for it*, which in the principal caſe appeared to be 6s. 8d. 5thly, That where a thing is *claimed by cuſtom in the ſpiritual court*, it muſt be *intended according to their conſtruction* of a cuſtom, and by their law 40 years make a cuſtom or preſcription. 6thly, That the *payment* of 6s. 8d. *for* 70 *or* 80 *years is* an *evidence of an immemorial payment*. But if it could not be ſtrictly immemorial, as taking the *archdeaconry* to have been *founded in E. 6th's time*, yet ſince that period it might become due by endowment, which might in this diſtance of time have been loſt. Williams's Rep. 657. 663. Mich. 1720. B. R. Saunderſon v. Clagget.

* Procurations, ſynodals, and pentecoſtals being denied when due, are *recoverable in the ſpiritual court*, being profits of a more ſpiritual nature. 2 Gibſ. Cod. 1017.

† Procuration is due to the perſon viſiting, de jure communi. The term is thus explained by the canoniſts. *Hoc munus ideo procuratio vocatur quia eccleſiæ epiſcopum procurant*, i. e. curant alunt, ac tuentur. 2 Gibſ. Cod. 1016. ——Donatives & free chapels pay no procurations to any eccleſiaſtical ordinary, becauſe they are not viſitable by any. Ibid.

5. *Churches newly erected* ſhall be rated to procurations according to the proportion paid by the neighbouring churches. 2 Gibſ. Cod. 1016. [546]

For more of **Procurations** in general, ſee Dav. Rep. The Caſe of Proxies.——Godolph. Rep. cap. 9.——Gibſ. Cod. &c.

Profeſſion.

(A) Profeſſion. *Dereignment.*

Fol. 280.

[1. *A Monk* under obedience may be diſcharged of the obedience *by the archbiſhop, with licence of his ſovereign.* 3 H. 6. 24.]

He could not be diſcharged of his profeſſion by any but the *pope*. Br. Nonability, pl. 2. cites S. C.

[2. A man profeſſed cannot be made *able for things temporal*, as to purchaſe land, or to have advantage of an obligation, *by any except the head of the church, not by the archbiſhop.* 3 H. 6. 24.]

Br. Nonability, pl. 2. cites S. C

[3. *But* the ordinary may make him able to take advantage of *things ſpiritual* without the head of the church, as *to be vicar or parſon*; for this is not contrary to the profeſſion, which is ſpiritual. 3 H. 6. 24. b.]

4. *Mortdanceſtor*; becauſe his *mother had taken* upon her the *habit of religion*. The tenant ſaid that *before* the *entry* into religion, the mother *eſpouſed W. N.* who is *yet* in full life; for if he be *alive*, ſhe may be deraigned. Contra if he died after. Br. Deraignment, pl. 9. cites 5 E. 4. 3.

(B) *What* will be *good Cauſe* of Dereignment.

[1. IF a man marries a *wife*, and ſhe *before carnal conuſance enters into religion*, yet the marriage is not good cauſe of dereignment. 18 H. 6. 83.]

[2. Otherwiſe it is if ſhe enters into religion *after carnal conuſance*; for then by this the marriage is compleat. 18 H. 6. 33.]

(C) Profeſſion. *At what Time a Man ſhall be ſaid* a dead Perſon, and *profeſſed*.

[1. IF the *freres put my ſon*, being *an infant, into the habit without my aſſent* before his full age, he may come back to me with my aſſent, or I may retake him from them; for he is not profeſſed by the habit. 11 H. 4. 31. b.]

[547] [2. *So* I may *retake him after his full age*. 11 H. 4. 31. b. before he is profeſſed.]

[3. If a *man enters into religion, and is under obedience*, yet he is not a dead perſon before profeſſion. 3 H. 6. 24.]

Br. Nonability, pl. 2. S. C.—See Sir Laurence Anderton's caſe.

[4. For *land may deſcend* to a man *after entry* into religion *before profeſſion*, and may have action for it as heir. 3 H. 6. 24.]

For more of **Profeſſion** in general ſee **Faits**, (C) **Grants**, (C) pl. 1. **Trial**, (A) pl. 3. (O) pl. 12, 13, 14. and other proper titles.

Profit Apprender.

1. PROFITS apprender are *ſaved by the* third ſaving of the *ſtatute of uſes*. 2 And. 26. pl. 52. in the caſe of Lord Cromwel v. Andrews.

2. If I grant 10 *load of eſtovers* and hay, or ſuch like, to be *taken annually*, or *common for* 10 *beaſts annually*, to be taken in ſuch a place

place for term of life or years, or otherwiſe, and he does not take any thing of it for 3 or 4 years; there, in the 5th year *he ſhall not take* 40 *load* nor can he put 40 beaſts in, *in the 5th year*; for then peradventure the grantor cannot take any thing himſelf this year; for it is not like to a rent-charge. By the opinion of the Court. Br. Parnor de Profits, &c. pl. 2. cites 27 H. 6. 10.

3. Præcipe quod reddat does not lie *of common*, but quod permittat *and* the like of *other profits apprender*, which lie in prender and not in render; for *at the common law no action lay* of profit apprender, but the *quod permittat*. Br. Precipe, pl. 13. cites 4 E. 4. 1.

4. A. as tenant of a manor has right by preſcription *to take clay, &c.* yet he cannot take that which another has dug. The ſame of *eſtovers*. Mo. 411. pl. 561. Trin. 37 Eliz. Stile v. Butts.

5. If the lord had reſerved *decimam partem* of the corn, &c. he ſhall have aſſiſe of it, as of profit apprender. Mo. 531. pl. 699. cites 44 E. 35. Cro. E. 609. pl. 5. Hill. 40 Eliz. ſays, that he may have decimam *garbam*, but not decimam *garbarum*.

6. Such manner of profits (though they are appendant to a franktenement) *cannot be divided*; for if ſuch heritage deſcends to parceners, one alone ſhall have the entire profits, and the other *parcener* ſhall have an allowance; alſo feme ſhall have for her *dower* but an *allowance*. Finch. 36. b. And if aſſigned to ſeveral, muſt be taken jointly; as if the grant be to *dig turf to make allum, &c.* the aſſignees muſt work together, with the ſame ſtock and workmen belonging to both. Godb. 18. pl. 24. Paſch. 25 Eliz. C. B. the Lord Mountjoy's caſe.

7. *Libertas falcandi is* a profit apprender, but a man is not thereby tenant or occupier, nor can preſcribe to be diſcharged of tithes as ſuch. 2 Bulſ. 249. Suckerman & Coates v. Warner.

8. Licence to take a profit in alieno ſolo, need not be *by deed*, where it is only *unica vice*, there paſſing no eſtate in it. Vent. 25. Paſch. 21 Car. 2. B. R. Rumſey v. Rawſon. But profits in apprender *in alieno ſolo*, and which are not of neceſſity, will not paſs without a deed. Cro. J. 190. pl. 13. Mich. 5 Jac. B. R. Bewdly v. Brook.

For more of Profit Apprender in general, ſee Common, and other proper titles.

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* Prohibition.

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* Prohibition *iſſues out of* the Chancery, B. R. or C. B. into the ſpiritual court, admiralty, court of chivalry, &c. *to forbid a judge, &c. to proceed in a cauſe, that belongs to the common law courts, or* that belongs *not to their juriſdiction, though the courts at law can give no remedy*, or it may forbid a judge of any temporal court to proceed in a cauſe depending before him, upon ſuggeſtion that the cognizance of the cauſe does not belong to him. Wood's Inſt. 570.

(A) The *Antiquity* of Prohibitions.

[1. 3 E. 1. Rot. Clauſarum, M. 10.] A Prohibition was granted, and after an *attachment againſt the biſhop*, and the official for holding plea after the prohibition.

The king's courts that may award prohibitions, being informed by plaintiff or defendant, or by any ſtranger, that any court temporal or eccleſiaſtical, do hold plea, where they have no juriſdiction, may lawfully prohibit that court, *as well after judgment and execution, as before*, and if the judge of the inferior court, or the party, proceeds notwithſtanding a prohibition, an *attachment* may be had againſt them, *or* an action of the *caſe will lie* againſt them; but upon a prohibition in the ſpiritual court, the party may appear and take a declaration upon the ſuggeſtion, and go to trial; and if thereupon it be found againſt the plaintiff in the prohibition, a writ of conſultation will be awarded with coſts. Wood's Inſt. 570.

It is in the diſcretion of a court to deny a prohibition, when it appears to them that the ſurmiſe is not true. Per Hobart Ch. J. Hob. 67. pl. 71. in the caſe of Aſton Pariſh v. Caſtle-Birmidge chapel.—But all the judges agreed, that the granting prohibitions is not a diſcretionary act of the court; but are *grantable ex merito juſtitiæ*, and denied Lord Hobart's opinion, and ſaid, that Roll Ch. J. had frequently done ſo before. Raym. 3, 4. Hill. 12 Car. 2. B. R. in the caſe of Woodward v. Bonithan.—S. P. that they are grantable ex debito juſtitiæ, and are not honorary, and in the diſcretion of the juſtices. Per tot. Cur. Sid. 65. pl. 38. Mich. 13 Car. 2. B. R. in Serjeant Morton's caſe.——Raym. 92. in the caſe of Ford v. Weldon. Hill. 15 & 16 Car. 2. B. R. Hide Ch. J. affirmed that a prohibition is ex gratia, and not ex debito juſtitiæ; but Keyling and Twiſden J. poſitively denied it.

(B) *Of what Things or Actions*, and *for what Cauſes it lies*, [*where*] *the Judges* [before whom the Cauſe is brought] *have not* any *Juriſdiction.*

[1. IF the *collector of the pope* in England *holds plea* in England *of ſpiritual matters*, a prohibition lies; for he has not juriſdiction here to do it, for this belongs to the ſpiritual judges of the king in England. 3 H. 4.]

[2. If there be *one entire contract above* 40 *s.* and a man *ſues for it in a court baron, ſevering it into divers ſmall ſums under* 40 *s.* a prohibition ſhall be granted, becauſe this is done to defraud the court of the king. 19 H. 6. 54.]

See (J. a) pl. 1. S. C.—F. N. B. 46. (A) in the new notes there (a) cites S. C.——If a man *owes* unto another man 5 *marks*, and he *ſues ſeveral plaints* for the ſame in the county-court, or in any other court, againſt the debtor, he ſhall have a prohibition thereof, and rehearſe the matter, and that he would defraud the king's court of its juriſdiction, and alſo the party of his anſwer, &c. commanding them that they do not proceed, &c. and that he command the party to ſue at the common law in the king's court; and if they will not ſurceaſe, he ſhall have an alias and pluries, and attachment upon the ſame, &c. F. N. B. 46. (A).—So if the *executor ſueth* in the county, or in a court baron, for a debt of 5 marks, by divers plaints, whereas the debt is *upon a contract*, *or* upon an *obligation*, now the defendant may ſhew the ſame, and plead unto the juriſdiction of the court, or he may have a writ of prohibition directed unto them, that they do ſurceaſe, &c. *and* if he *have judgment* in any of the plaints ſued *for parcel* of the debt, yet in the prohibition, he *may prohibit* him in *the plaints*, which are *depending, and that execution of judgment ceaſe* for the reſidue. F. N. B. 46. (A).

If there be *ſeveral contracts* between A. & B. *at ſeveral times, for ſeveral ſums*, each ſum under 40 s. and they do *all amount to a ſum ſufficient to entitle the ſuperior court*, they ſhall be there put in ſuit, and * not in a court which is not of record; and ſo it was reſolved in the caſe of the SAVOY COURT, AND STAUNDFORDE. 22 Car. 2. Vent. 65. pl. 1. Paſch. 22 Car. 2. in B. R. Anon.

In a prohibition to the court of the honour of Eye the caſe was, one *contracted* with another *for divers parcels of malt*, the money to be paid for each parcel being under 40s. and he levied divers plaints thereupon in the ſaid court; wherefore the court here granted a prohibition; becauſe, though there be ſeveral contracts, yet for as much as the *plaintiff might have joined them all* in one action, he ought to have ſo done, and ſued here, and not put the defendant to an unneceſſary vexation, any more than he can ſplit an intire debt into divers, to give the inferior court juriſdiction in fraudem legis. Vent. 73. Paſch. 22 Car. 2. B. R. Girling v. Alders.

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3. If one ſues another in the *ſpiritual court for a chattle or debt*, the defendant ſhall have a prohibition. F. N. B. 40. (H).

S.P. F.N.B. 43. (G)—So of treſpaſs *vi & armis ſued in the county court*, &c. the defendant may ſue a prohibition to the ſheriff or plaintiff. F. N. B. 47. (A).

4. If one ſues *for treſpaſs in* the *ſpiritual court*, prohibition lies for the king or the party unto the judge or the party, or both. F. N. B. 40. (M).

5. If bailiffs, *mayors*, or others, who claim jurisdiction to *arrest* a man *upon a plaint* before them, or to attach his goods, &c. do *arrest* one *for trespass or contract*, who was *not within their jurisdiction*, the party arrested, &c. shall have a prohibition directed unto them, &c. F. N. B. 45. (F).

6. If a man sue another in the *county court for debts or chattels which* do *amount to the sum of* 40l. then the party shall have a prohibition against him who is sheriff, that he shall not hold plea thereof, and that he tell the party that he sue in the Common Pleas. F. N. B. 46. (A).

So it is if a man will sue in the county court a *writ of covenant or trespass unto his damages of* 40s. or more, the party shall have a prohibition for to surcease, and thereupon an alias, pluries, and attachment, &c. F. N. B. 46. (A).

7. If a man sue *in the county a plaint of* 20*l. and hath judgment* to recover in that court, yet the defendant may sue a *prohibition*, commanding the sheriff and the suitors *not to execute* the judgment, although he has before admitted the jurisdiction. F. N. B. 46. (A).

So after judgment given, and execution awarded in the county or in other court baron, which hath not power to hold plea of debt of the sum of 40s. &c. or of damages in trespass amounting to such sum, or more, the party defendant shall have a writ of prohibition unto the bailiffs, or the under sheriff or officer of the court, that they make not execution; and if they have distrained the party to make satisfaction, that then they *release the distress*, and that they revoke what they have done therein. F. N. B. 46. (A).

8. If one man sueth another in a court-baron, or other court, which is not a court of record, for *charters concerning* inheritance or *freehold*, he shall have a prohibition. F. N. B. 47. (B).

9. A prohibition was moved for *to the county court* to stay a suit there *in debt for tithes on a justicies*; for that it is not *debitum ex contractu*, but *ex delicto*, *founded on a statute*, of which the sheriff cannot hold plea, and *the justicies* doth not enlarge his jurisdiction to other actions, but *only enables him to hold plea of greater sums* than by his ordinary jurisdiction he could; the Court held it to be a very considerable case, and directed a suggestion and a declaration thereupon, that the defendant might plead or demur, and so the matter might come judicially before the Court. 1 Lev. 253. Mich. 20 Car. 2. B. R. Bishop v. Corbett.

S. C. 2 Keb. 416. 420. and that he was informed the Court inclined strongly that it did not lie.

10. An action of *debt on a judgment in B. R. was brought in the Marshalsea*, and therefore a prohibition was granted. 2 Salk. 439. in pl. 2. an anonymous case, cites it as Trin. 11 W. 3. B. R.

(C) *Jurisdiction Spiritual.* [550]

[1. IF the *farmer of the king sues in the Exchequer* against a parson for detaining of tithes parcel of the possessions leased to him in farm by the king, though *the right of tithes comes in debate* between them there, yet the Court shall not be ousted of jurisdiction. 38 Ass. 20. Adjudged; but the report says, *quod mirum.*]

Scire facias against debtor of the king in the Exhequer, who came and prayed process against A. parson of O. who had part of his goods, by which he could not pay, and he came and claimed them as his tithes, and the other claimed them as his tithes, as parson of S. and the other thereupon pleaded to the jurisdiction, & non allocatur; but the Exchequer held plea because it was the suit of the king, and in his behalf;

behalf; but it is ſaid there, quod mirum eſt! and that B. R. nor C. B. will not hold plea of tithes as here. Br. Juriſdiction, pl. 90. cites S. C.——Br. Prerogative, pl. 74. cites S. C.

The *king has tithes* in the foreſt of Inglewood, &c. *which are not in any pariſh*, and *grants them to another, who brings ſcire facias againſt thoſe who received them before*; in this caſe the temporal court ſhall have juriſdiction. Br. Prohibition, pl. 23. cites 22 Aſſ. 75.——*But* if they be in variance *who ought to pay the tithes and who ought to have them*, the ſpiritual court ſhall have thereof juriſdiction. Br. Prohibition, pl. 23. cites 22 Aſſ. 75.

2. A libel was againſt H. queſtioning ſome matters as to the validity of his *induction* to the church of S. but a prohibition was granted, becauſe the very *title of the patronage in this caſe came in queſtion*, which they ought not to meddle with; beſides, the validity of induction is triable at common law, and not in the ſpiritual court. 1 Bulſt. 179. Trin. 9 Jac. Holt's caſe.

3. Suits for *adultery*, unleſs *exorbitant and notorious*, ought to be brought before the proper ordinary. Per Hutton J. ſaid to have been ſo ruled. Cro. C. 114. Trin. 4 Car. Iſabel Peel's caſe.

4. L. C. was *excommunicated upon a libel* againſt him, founded upon a preſentment by the churchwardens *for not receiving the ſacrament in his own pariſh church*, and *ſuggeſted* for a prohibition; *that he had* alleged and *ſhewed* to the official *a certificate that he had taken it elſewhere*. The Court held that the Eccleſiaſtical Court had conuſance of the cauſe, and had good cauſe to proceed upon the preſentment prima facie; and that it lies on his part to prove that he received it elſewhere, and upon ſuch plea a prohibition lies, but not elſe. And becauſe it did *not appear* to the Court *that this was pleaded in the ſpiritual court*, *nor* was there any *affidavit made of it*, the Court denied to grant a prohibition, and being moved twice afterwards the Court denied to grant a prohibition, becauſe the *cauſe was purely ſpiritual*, and they proper judges of the certificate; and that if they refuſe the plea, an appeal will lie, but no prohibition; beſides the allegation in the certificate, (viz.) that he hath received the ſacrament elſewhere, is not ſufficient; becauſe, by the rubric, he is to receive it three times a year, and ſo the effect of the libel not anſwered. Hard. 406. Paſch. 17 Car. 2. in the Exchequer. Copley's caſe.

5. A libel was againſt the plaintiff *for keeping conventicles*, &c. and this was *ex promotione A. B. public notary*; neither the libel or articles alleged any preſentment of this matter, but the *regiſter ſwore that a preſentment was made by the curate* of the pariſh where, &c. *and that a copy by him delivered into Court was a true copy* thereof. It was inſiſted for the plaintiff in the prohibition, that no man ought to be proſecuted in the ſpiritual court to anſwer articles ex mero officio as here he was, without a due preſentment. And ſo is the ſtatute 25 H. 8. cap. 14. as to the proſecution for hereſy, but the reaſon thereof extends to other things as well as to hereſy: indeed that ſtatute is repealed; but my Lord Coke, in 12 Rep. 26. obſerves, that it was herein declaratory of the common law, and that it is very reaſonable that there *ſhould be a preſentment and accuſation by ſome proper perſon*; for otherwiſe an innocent perſon, in caſe of falſe accuſation, would not know where to have remedy. A prohibition was denied; and it was ſaid by

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Wylde

Wylde J. that they muſt judge upon the ſuggeſtion only, and the ſuggeſting the proceedings to be *ex officio*, may be *underſtood* either of a proceeding *officioſe* of his own head; *or*, that it was *according to his duty*; and here nothing appears but he did ſo. But *if* the *plaintiff had ſuggeſted that the law required a preſentment by ſuch perſons and in ſuch a manner*, &c. *he might have brought that into queſtion.* And of the ſame opinion were the other Juſtices, and that faith and credit ought to be given to their proceedings. But Tyrrel J. held, that if it had been ſuggeſted, that no preſentment by a curate was ſufficient, nor unleſs it were upon oath, &c. he ſhould have been of opinion for a prohibition. And Vaughan Ch. J. ſaid, that if the articles were exhibited merely ex officio, viz. out of the mind of the Chancellor himſelf, they were not warrantable; but that there is no colour for this ſuggeſtion, becauſe they appear to be by the information of a public notary. 2 Vent. 41. Paſch. 22 Car. 2. C. B. Grove v. Elliot.

6. The plaintiff being *parſon* of S. in D. and *having a diſpenſation for two benefices, agreed with the defendant for* 22*l. to ſerve the cure of S.* The defendant made his application to the biſhop to enlarge his ſtipend; the *biſhop ordered that he ſhould allow him* 32*l.* per ann. The plaintiff paid him his 22 l. according to agreement; and he *libelled* againſt the plaintiff *for the addition* by the biſhop in the ſpiritual court, and the plaintiff prayed a prohibition. The defendant's counſel inſiſted, that this being an allowance by order of the biſhop, was properly ſuable in the eccleſiaſtical court, and cited 3 Cro. 675. Nat. Br. 51. 4 Inſt. 491. But the Court granted a prohibition; for there being a *contract between the parties*, the biſhop had no power to make any order; *but if* the curate had ſerved the cure, and made *no agreement*, then the *biſhop might have allowed* him *what he thought reaſonable*, in the nature of a quantum meruit; and a prohibition was granted. Freem. Rep. 70. pl. 84. Hill. 1672. C. B. Pierſon v. Atkinſon.

7. Sr. O. B's lady *ſued* him in the ſpiritual court *for alimony*; and he moved for a prohibition, and *ſuggeſted, that he had*, by indenture, *conveyed* over *lands to truſtees of the value of* 300*l. per ann. for her ſeparate maintenance; and* that they *ſhewed this in the ſpiritual court, but they refuſed to admit it*, &c. Per Cur. no prohibition; for this Court cannot take notice of a deed of truſt; but if it be proper for them to move for a prohibition any where, they *muſt go into Chancery; for the execution of truſts* properly belongs to them. But beſides, alimony is a thing that the eccleſiaſtical court has properly conuſance of; and if there be a ſeparate maintenance already, they will take it into conſideration, at leaſt by way of defalcation in alimony; and if the party be charged too hard, he may have his appeal. Freem. Rep. 282, 283. pl. 324. Trin. 1673. C. B. Sir Oliver Butler's caſe.

8. A. had iſſue 3 *daughters, B. and C. the two plaintiffs, and D.* and A. dying inteſtate, M. his wife adminiſtered and died, and made the two *plaintiffs* her *executrixes*, who *had ſeveral bonds*, ſome in their own names, and ſome *in the name of M. to whom they were executrixes*; they alſo took out adminiſtration de bonis non

to the father. It was *ſuggeſted in the ſpiritual court, that ſome bonds* which they had *in their own names were in truſt for their father*; and that ſome bonds in the mother's name, were debts owing to the father, but the mother, being adminiſtratrix, had altered the property, and taken them in her own name; *D. ſued for diſtribution* of theſe debts. As to the firſt part, the Court were of opinion that a prohibition ſhould go; for a *truſt is not examinable in the ſpiritual court*; for they are not a court of equity. Freem. Rep. 283, 284. pl. 327. Trin. 1674. C. B. Miller's caſe.

[552] 9. The mayor and aldermen of Briſtol preſented A. to the pariſh church of C. in that city, and the defendant *libelled* againſt him in the arches, for *that he was not* 23 *years old when made a deacon, nor* 24 years old *when he entered into prieſt's orders*; and the ſtatute of 13 Eliz. cap. 12. requires, that none ſhall be made a miniſter, or admitted to preach, under that age. It was *ſuggeſted* for a prohibition, *that this matter was triable at law*, and not in the ſpiritual court; *becauſe*, if true, a *temporal loſs*, viz. deprivation, *might follow*. But the Court denied the prohibition, and compared the caſe to that of a drunkard or ill liver, who are uſually puniſhed in the ſpiritual court, though a temporal loſs may enſue. 3 Mod. 67. Paſch. 1 Jac. 2. B. R. Roberts v. Pain.

S. C. 6 Mod. 188. Trin. 3 Annæ. And per Holt Ch. J. If the libel be grounded upon the ſtatute of 1 Eliz. they may compel you to come to your pariſh church; for that ſtatute does directly ſubject people to the eccleſiaſtical law in this point. Afterwards a prohibition was granted, and ordered to declare forthwith.

10. The parſon libelled againſt the defendant *for not coming to his pariſh church* on Sundays. Defendant *pleaded* that *he went to another church more commodious for him*. A prohibition was granted and plaintiff declared therein. The ſingle queſtion was, whether a pariſhioner is compellable to go to his pariſh church? It was inſiſted that he was; becauſe every parſon is obliged not to allow a pariſhioner of another pariſh to partake of ſacraments with him, and by the act of uniformity every man is required to reſort to his pariſh church. To this it was ſaid, that the *diſtribution into pariſhes was by the common law*, and if in conſequence thereof the people were brought under a new obligation, ſuch obligation ought to be examinable at common law. The Court agreed, that an entire neglect to go to any church, is puniſhable in the eccleſiaſtical court; that this matter was of eccleſiaſtical conuſance, and that prima facie it was a good charge, that a man went not to his pariſh church. And they ſeemed of opinion, that though the *act of uniformity* be taken as introductive of a new law, yet the thing being purely of eccleſiaſtical conuſance, and proper for their examination, a conſultation ought to go. But there was no reſolution. 1 Salk. 166. Hill. 3 Annæ. B. R. Britton v. Standiſh.

11. If a man be proceeded againſt as an *heretic* in the ſpiritual court, pro ſalute animæ, and thinks himſelf aggrieved, his proper remedy ſeems to be to bring his *appeal to a higher eccleſiaſtical court*, and not to move for a prohibition from a temporal one, which, as it ſeems to be agreed, cannot regularly determine or diſcuſs what ſhall be called hereſy. Hawk. Pl. C. 4. cap. 2. ſ. 9.

(D) In what Caſes the *Court* ſhall not be *ouſted*. *In reſpect of collateral Things.*

[1. IN *treſpaſs*, if the *right of tithes comes in debate between a parſon and a layman*, being a *farmer of another parſon*, the Court ſhall not be ouſted of juriſdiction. 20 H. 6. 17. b.]

[2. In an *annuity between ſpiritual perſons* by reaſon of certain churches chargeable, *grounded upon the deed of grant* of the predeceſſor of one, though the perſons and thing, out of which it iſſues, are ſpiritual, yet by reaſon of the deed the Court ſhall not be ouſted of juriſdiction. 29 E. 3. 39. b. Adjudged.]

3. If the patron has *indenture to go quit of* tithe of cheeſe, &c. and is ſued in the ſpiritual court for thoſe tithes, he ſhall have prohibition upon this indenture. Br. Prohibition, pl. 21. cites the Regiſter, 38.

4. If a *woman hath title to ſue a cui in vita*, and *ſhe ſwears* unto the tenant, *that ſhe will not ſue the cui in vita* againſt him; if ſhe afterwards ſueth forth the writ, for which the tenant ſueth her in the ſpiritual court for breach of her oath, ſhe ſhall have a prohibition, becauſe *the oath toucheth a temporal thing*, viz. lands. F. N. B. 42. (I). [553]

5. If *ſlander or* * *laying violent hands upon a clerk happen upon a temporal cauſe*, and the other ſues for it in the ſpiritual court, prohibition lies; and therefore it ſeems that *of* † *thoſe defamations, by which the party is damnified*, the ſpiritual court cannot hold plea; for it is ſaid, that *crimes of falſity and adultery* appertain to the ſpiritual court, and conſultation ſhall be thereof granted; and the ſame it ſeems of *uſury*. Br. Action ſur le Caſe, pl. 115. cites the Regiſter, 54.

* As for arreſting him at common law, and he ſues in the ſpiritual courts, prohibition lies. Br. Prohibition, pl. 21. cites Regiſter, fol. 42. and quære fol. 51. —— † As becauſe he gave evidence againſt the plaintiff who was indicted, and he ſues in the ſpiritual court for defamation, a prohibition lies. Br. Prohibition, pl. 21. cites Regiſter, fol. 42.

6. When the *original begins in court chriſtian*, although that afterwards *a matter happens* in iſſue which is *triable by our law*, yet this ſhall be tried there by their law; *as* if one do ſue there for a horſe to him deviſed, the defendant there pleads, that the deviſor did give this horſe unto him in his life-time; this is triable by our law, yet the ſame ſhall be tried there. 2 Bulſt. 227. Paſch. 12 Jac. Parker v. Kemp.

So where one ſued in the ſpiritual court *for tithes of apples*; the defendant *pleaded* there *an award*, and then prayed a prohibition, for that an award is matter triable at law; but it was denied by the court. *So* if a ſuit is *for a legacy*, and the *defendant ſuggeſts payment*; *or if an acquittance* is pleaded, no prohibition ſhall go; becauſe, where the ſpiritual court has conuſance of the principal matter, there a matter ſubſequent and dependant upon it, which is triable at common law, ſhall not deprive the ſpiritual court of their juriſdiction; but it was ſaid by Coke, and agreed by Doderidge, that if that court ſhould adjudge otherwiſe upon an acquittance, or an award, than according to the common law, in ſuch caſes a prohibition ſhould go. 1 Roll. Rep. 12. Paſch. 12 Jac. B. R. Anon. S. C.

So where the churchwardens libelled for a church rate which was ſentenced againſt them, and then they appealed to the metropolitan; but pending the appeal, one of the appellants releaſed to the appellee all actions, ſuits, and demands; but the other appellant proceeded in his and his partner's name to reverſe the ſentence; whereupon the appellee prayed a prohibition, and ſuggeſted this *releaſe*, ſuppoſing that it diſcharged the appeal. But upon demurrer it was adjudged by all the judges una voce, that prohibition lies not upon this ſuggeſtion; becauſe the temporal court has nothing to do to meddle with the principal

principal matter, that being merely ſpiritual, and to be determined in court chriſtian; and ſince the ground of this ſuit belongs to that court, all things dependent thereupon will belong to them alſo. And whether this releaſe will bar both the churchwardens or not, ſhall be determined there, and not in B. R. Yelv. 172. Hill. 7 Jac. B. R. Starkey v. Barton and Gore. —— Cro. J. 234. S. C. but not exactly S. P. Noy, 129. S. C. by name of Gore v. Stark —— So where churchwardens after the year were cited into the ſpiritual court to make a preſentment per vim juramenti taken by them as churchwardens, whereupon they preſented F. for not coming to church; and it being ſuggeſted for a prohibition, that this was the ſame as citing one ex officio; for that the determining of the office determined the oath. Atkins J. was of opinion for a prohibition; but North, Wyndham, and Scroggs e contra: for 1ſt, where a *matter is wholly of eccleſiaſtical conuſance*, there, though they *proceed irregularly*, no prohibition ſhall go, but the *remedy lies by way of appeal*. And here this preſentment, though it be after the party is out of his office, yet whether this may not be by their rules and canons non conſtat to this court. Where a matter is of eccleſiaſtical cognizance, if a matter determinable at common law intervene, they ſhall try that, except it be in caſe of a modus, which by law they cannot try; as if a legacy be ſued, and a releaſe pleaded, they ſhall try this releaſe; but then it muſt be with this difference, that when they try an incident matter determinable at common law, by reaſon of their juriſdiction in the principal matter, there they ſhall be tied up to the rules of common law; as in the caſe, if a releaſe be pleaded to a legacy, and there be but one witneſs, or elſe the witneſs is dead, and they will not admit of proving hands, nor allow one witneſs for a proof, they ſhall be prohibited; for although thoſe matters come under their cognizance as incidents, yet being matters originally of temporal cognizance, they ſhall go according to the rules of common law. Freem. Rep. 290. pl. 341. Trin. 1677. C. B. Anon. —— S. P. And ſo where *libel is for the tithes of ſuch a cloſe*, and the *defendant pleads* that it is *not his cloſe, but the cloſe of another perſon*; this ſhall be tried in the ſpiritual court. Sid. 89. Mich. 14 Car. 2. B. R. Butler v. Yateman.

Where an eccleſiaſtical court has *original juriſdiction* of a cauſe, yet there is ſaid to be a *difference* in the caſe of an *eccleſiaſtical and lay perſon*, viz that in the caſe of the firſt, their ſentence may not be examined in the temporal court, but in that of the other it may; quære tamen. Arg. Skin. 493. Trin. 6 W. & M. B. R. In the caſe of Philips v. Bury.

[554] 12 Rep. 67. takes the ſame diverſity; but if iſſue be taken at common law upon a matter there, and which is triable by the ſpiritual law, in ſuch caſe the judges of our law ſhall write to the judges of the ſpiritual court to try it, and to certify, which they cannot do to the judges of our law. Reſolved per tot. Cur. Mich. 8 Jac. in Roberts's caſe.

7. So *where the original begins here* and a *matter happens*, the ſame *ſhall be tried here by our law*; as in a quare impedit, able, or not able. If it were otherwiſe, they ſhould there try nothing; this is belonging to them; but if they will there draw the matter, ad aliud examen, as upon proof of a deed, they judge otherwiſe than we do, as in caſe of a leaſe for years to be made, they hold the ſame muſt be traditione, or void; and ſo of grant of goods to be delivered, or not good, in ſuch caſe we will prohibit them. 2 Bulſ. 227, 228. Paſch. 12 Jac. Parker v. Kemp.

8. A *biſhop granted the office of commiſſary and vicar-general* within his dioceſe to Dr. B. *for life with all fees*, &c. thereunto belonging, which grant was confirmed by the dean and chapter; afterwards the *biſhop inhibited the regiſter from entering acts by the doctor, or paying him any fees*; and thereupon the doctor libelled againſt the biſhop for diſturbing him in his office; and the biſhop *ſuggeſted* for a prohibition, that *this concerned freehold*, viz. the office which was grahted for life; but per Ley Ch. J. Doctor B. may have a prohibition againſt the biſhop for a diſturbance. 2 Roll. Rep. 306. Paſch. 21 Jac. B. R. Doctor Barker v. Biſhop of Oxon.

9. Prohibition was moved for to the high commiſſion court, where a *parſon libelled for an aſſault on him*. And though they have an expreſs authority by their commiſſion to meddle in ſuch affairs, yet becauſe this would make all the ordinaries in England be to no purpoſe, the prohibition was granted. Hetley, 19. Paſch. 3 Car. C. B. Giles v. Balam.

10. A *prebendary* who had a peculiar jurisdiction *leased his prebend with all profits, commodities, and advantages, &c. thereto belonging.* The question was, whether the ecclesiastical jurisdiction passed to the lessee, so that he might make a commissary to hold courts or not. The Ch. J. and Windham held, that he could not; for this is annexed to the spiritual person, and not to the lay corps of the prebend; and Windham said, that the commissary is only a deputy of the prebendary, which his lessee cannot make for him; but Keeling and Twisden contra, and held it annexed to the corps of the prebend, and passed with it. But this being the first motion, the plaintiff was ordered to declare upon his suggestion, and the defendant to demur upon it, and so the point to come judicially in question. Lev. 125. Hill. 15 & 16 Car. 2. Sherock v. Boucher.

Raym. 88. SHARROCK v. BOUCHIER, S.C. and the suggestion was, that the prebendary and his farmers, time out of mind had had the granting the said office, and that the defendant pretended that the disposal thereof belonged to the dean and chapter of L. who libelled for it in the spiritual court, and so the *freehold of it would come in question.* The Court was divided; but afterwards Hide said, that the right of the office did come in question, and thereupon a prohibition was granted.

11. Spiritual court may proceed upon an *act of parliament*, or other temporal matter incident, so long as they proceed according to the rules of the common law. 2 Lev. 64. Trin. 24 Car. 2. Juxon v. Biron.

12. A *proctor libelled for his fees*, and upon praying a prohibition it was said by Vaughan Ch. J. and Windham J. that no court can better judge of the fees which have been due and usual there than themselves, most of which are appointed by constitutions provincial, and thereby they prove them. And they granted a prohibition as to some particulars in the libel which were of temporal cognizance, but not as to the suit for the fees. Windham said, that if there had been *an actual contract upon the retainer*, the plaintiff ought to have sued at law. But Atkins J. thought a prohibition ought to go for the whole; because, as he said, fees had no relation to the jurisdiction of the spiritual court, nor to the cause in which the proctor was retained; that the proctor might *have action on the case, the retainer being an implied contract. But a prohibition was granted quoad, &c. Mod. 167. pl. 5. Mich. 25 Car. 2. C. B. Horton v. Wilson.

S. C. by the name of HAUGHTON v. WILSON. Freem. Rep. 129. pl. 151. accordingly. Ellis J. absente, and reports, that the other part of the libel was for the *expences of a journey, and charge of a messenger, &c.* which being as things grounded on a contract, or quantum meruit, the spiritual court cannot try them, but as to the customary fees they may; though if the custom be controverted a prohibition shall go. And that Atkyns J. who was for a prohibition for the whole, said, that fees differed from *costs*; for they may give costs, which *are part of the suit and decree*, as at common law it is part of the damage of the party, and in the same judgment; and reports, that Windham doubted, whether the proctor could recover his fees by an action of the case. —— But upon a like question it was held per Cur. that it is custom, and not the authority of constitutions, which entitles proctors, &c. to their fees, and that an action will lie for them at common law, and therefore the spiritual court ought to be prohibited; and the rule was, that they should declare upon the prohibition. 4 Mod. 254. Hill. 5 W. & M. B. R. Johnson v. Oxenden. *[555]

13. Libel in the spiritual court by *clerk of a parish for 4d. per annum* due to him *by custom* from every master of family in a parish; defendant denied the custom; prohibition was granted, because custom is not triable there except in case of *pensions*. 12 Mod. 260. Hill. 11 W. 3. B. R. Pollard v. Awker.

14. *Administration* was *committed to* a woman as *widow of T. S.* and a *libel* was in the spiritual court *to repeal* the administration, *upon*

upon ſuggeſtion that T. S. *had a former wife* living at the time of his death; a prohibition was granted. Per Holt Ch. J. 12 Mod. 432. Mich. 12 W. 3. in caſe of Hemming v. Price, and cited 7 Rep. 43. b. 44. a. Kenn's caſe; and Style's Rep. 10.

15. *Solicitation to incontinence coupled with force and violence* does, by reaſon of the force which is temporal, become a temporal crime in toto. 2 Salk. 552. Mich. 1 Ann. B. R. Galizard v. Rigault.

But if one commits *adultery*, and huſband brings *aſſault and battery*, this ſhall not hinder the ſpiritual court; for it is a criminal proceeding there, and no indictment lies at common law for adultery. Per Holt Ch. J. 2 Salk. 552. cites 1 Roll. 295. 2 Inſt. 488.

16. A libel was for *Eaſter offerings*, ſuggeſting that they had, time out of mind, uſed to be paid in that pariſh. The defendant made no defence at all in the ſpiritual court; but *after ſentence* againſt him moves the Court of B. R. for a prohibition. The motion was granted *niſi*. The reaſon why the Court doubted whether the prohibition was to be granted or not, was their ignorance of the practice of the ſpiritual court; for the Court ſeemed clearly of opinion, that if the *practice of the ſpiritual court* was *agreeable to that of the courts at law*, viz. *to take* every thing *pro confeſſo* againſt a defendant that *makes no defence*, and ſo give ſentence for the plaintiff without obliging him to prove the truth of this caſe, then the prohibition was not to be granted; becauſe the cuſtom ſet forth by the plaintiff was not denied by the defendant, and conſequently no occaſion for trial of the cuſtom. But in caſe the *practice* of the ſpiritual court was *not to give ſentence for the plaintiff even in caſe of no defence* made by the defendant, *without proof made to the Court* by the plaintiff of the truth of his caſe, that then a prohibition was to be granted; becauſe then the ſentence of the ſpiritual court was *founded* plainly *upon proof* made before them *of a cuſtom*, which is not to be permitted, becauſe the proof required by them is very *different from that required by common law*. Doctor Pinfold, who ſpoke againſt the prohibition, ingenuouſly owned, that it was the practice of the ſpiritual court to require proof. However, the Court took time to conſider, and would not make the rule abſolute. 10 Mod. 440. Trin. 5 Geo. B. R. Doctor Bows v. Jurat.

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Fol. 282.

(E) *What Pleas ſhall ouſt the* Court of *Juriſdiction.*

Br. Juriſdiction, pl. 31. cites 38 E. 3. 6. and pl. 51. cites 39 E. 3 23.

[1. IF the iſſue be *whether the place where the tithes* were be *in the pariſh of one parſon or of another*, the court ſhall not be ouſted of juriſdiction. 50 E. 3. 20. b. 20 H. 6. 17. b. 22 E. 4. 22. 38 E. 3. 5. b. 39 E. 3. 23. b.]

——S. P. that becauſe they were at iſſue upon the place, the iſſue was accepted, and the defendant compelled to anſwer, where he ſhould have anſwered to the juriſdiction. Br. Juriſdiction, pl. 30. cites 5 H. 5. 10.

[2. If the iſſue be, whether the one *parſon* has by preſcription a *portion of tithes in the pariſh of the other* parſon, this ſhall not ouſt the

the court of juriſdiction, becauſe 40 years by the ſpiritual law is good by preſcription, which it is not at the commen law. 20 H. 6. 17.]

[3. If a parſon ſues for tithes in the eccleſiaſtical court, and the defendant ſays, that the *place*, for which the *tithes* are ſued, *is in another pariſh*, a prohibition lies.]

S. P. becauſe they meddle with that which is out of their juriſdiction, though the original thing be of their conuſance, and this comes in obliquely. Arg. Show. 10. Mich. 4 Jac. 2. in caſe of Clarke v. Andrews. ——— For the bounds of pariſhes are triable at the common law. But the court denied a prohibition, becauſe it *did not appear that a plea thereof had been offered* in the eccleſiaſtical court. Vent. 335. Anon.

A prohibition ſhall not be granted *on a bare ſurmiſe* that he is ſued for tithes *by the parſon of D. of lands in the pariſh of S.* unleſs it *appears in the pleading in the ſpiritual court*. Noy, 147. Phillips v. Slacke.

4. In treſpaſs by the abbot againſt the parſon, of corn carried away, the *defendant pleaded compoſition*, and concluded to the juriſdiction for tithes; per Morrice, the compoſition goes in bar, and therefore you have affirmed the juriſdiction. But per Thorpe and Mowbray, no, where he concludes to the juriſdiction and not in bar. Quære. Br. Juriſdiction, pl. 35. cites 38 E. 3. 19.

5. In *treſpaſs of corn* the *defendant claimed them as tithes*, if his *plea and concluſion goes to the action*, the common law ſhall take cognizance; per Finch; quod non negatur. Br. Juriſdiction, pl. 12. cites 46 E. 3. 9.

6. If a man ſues in court ſpiritual *for a legacy* or deviſe, where the *other alleges a gift of it*, yet the ſpiritual court ſhall have juriſdiction; and this, notwithſtanding that the party be not executor nor adminiſtrator. Br. Juriſdiction, pl. 13. cites 46 E. 3. 32.

7. *Treſpaſs by a parſon* againſt a prior, *of a cloſe broken and graſs ſpoiled*, the *defendant ſaid, that it is his glebe, and the plaintiff claiming it as his glebe entered*, &c. judgment if the Court will take cognizance; & non allocatur; for *treſpaſs done upon his franktenement cannot be tried in court ſpiritual*. Br. Juriſdiction, pl. 41. cites 19 H. 6. 20.

8. Prohibition was awarded upon a *ſuggeſtion*, that the defendant was a *clerk*, and *aſſaulted the plaintiff's ſervant, whereupon the plaintiff peaceably laid his hands on the ſaid clerk, and* that he *had alleged the ſame in the ſpiritual court, and they would not allow it*. And it was ruled and adjudged, that the prohibition ſhould ſtand, notwithſtanding the ſtatute de articulis cleri, cap. 3. Mo. 915. pl. 1297. Mich. 31 Eliz. B. R. Kelly v. Walker.

S.C. Cro. E. 655. pl. 18. Hill. 41 Eliz. B.R. reports, that the defendant in the ſpiritual court pleaded further, that on his laying his hands peaceably on the plaintiff there (the now defendant) the plaintiff there made an aſſault upon the now plaintiff, and the now plaintiff defended himſelf; and that if the defendant here had any hurt, it was de ſon aſſault demeſne. The defendant here confeſſed, that the plaintiff here pleaded ſuch plea there; but ſhewed, that the plaintiff here was condemned there for non-attendance. * and traverſed the refuſal of the plea. Gawdy held, that this caſe was out of the ſtatutes of articuli cleri, and of circumſpecte agatis, for here the party had good cauſe to beat the clerk; and as to the traverſe, it is not good, for *the ſurmiſe is not traverſable*. And adjudged for the plantiff.

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9. A *preſentment* was ex officio in the eccleſiaſtical court, *for not frequenting his pariſh church*; he *pleaded*, that *this was not his pariſh church*, but that he had uſed to frequent another pariſh church, and to reſort to this. And upon refuſal of this plea he had

had a prohibition, for that court *cannot determine* the precincts of parish churches, nor judge *what shall be said a man's parish church*; and so was the opinion of the whole court, and therefore a prohibition was granted. Bulst. 159. Trin. 9 Jac. Anon.

S. C. cited 8 Mod. 328. Mich. 11 Geo. 1. in the case of Cuband v. Dewsbury. But the Court there was of a contrary opinion; for that the legacy was drowned in the bond, and that the opinion of Judge Doderidge was not law.

10. The *executors gave bond to legatee for payment* of his legacy. It was held by Doderidge J. that the obligee might either sue in the court christian for the legacy, or at common law upon the bond; for that the taking of the obligation for the payment had not totally destroyed the nature of the legacy. 2 Roll. Rep. 160. Pasch. 18 Jac. B. R. Gardiner's case.

11. Upon a libel *for tithes*, the defendant *suggested*, that the lands where, &c. are parcel of Hackney marsh; and that time out of mind there was *a modus of* 18*s*. The defendant had a prohibition. A consultation was prayed, because the *defendant had not proved his suggestion within 6 months according to the statute*; for he brought 2 *witnesses*, *who proved only*, *that they heard that for* 40 *or* 50 *years last past*, *no tithes in kind had been for these lands*, *but a certain sum* of money. But per Ley Ch. J. in many cases, by the general [word] (proof) is to be understood (concluding proof) such as may persuade a jury, &c. But by him and Doderidge J. the mischief was, that persons were delayed by false suggestions, and therefore the statute ordained, that all suggestions should be proved; but this means, that it should be by a probable, and not by a strict and concluding proof. And by Doderidge, the strict proof shall be afterwards upon the traverse before the jury; and consultation was not granted. 2 Roll. Rep. 434. Trin. 21 Jac. B. R. Pagget's case.

12. A surmise that the *tithes belong to the vicar and not to the parson*, will not be a good ground for a prohibition; for the right of tithes is confessed by it, and whether they belong to the one or the other, is merely spiritual. Noy, 147. Randal v. Knowles. —— And cites it as so ruled in one Bushell's case, and in one Milbray's case.

13. In any plea in the spiritual court, where a *custom is alleged* and denied, a prohibition shall be granted. Per Jones. Lat. 48. Anon.

The Court at first inclined strongly, that the custom was good; but adjornatur. 3 Keb. 606. pl. 15. S. C. —— But afterwards exception was taken, that this prescription by a parish for a *prest a prendre* is void, and the value being certain or not is not material, though ratione tenuræ a man may

14. The count on a prohibition was, that all *customs* are triable at common law, and that the defendant libelled against him in the ecclesiastical court, shewing that all farmers of such a farm have used *to find cakes and ale* at the † perambulation of the parish, *to the value of* 8*s*. *aut eo circiter*; and *averred*, *that there is no such custom*, and that he alledged so in the spiritual court, but they refused the plea. The *defendant pleaded*, *that there is such a custom*; upon which the plaintiff demurred. Adjudged, that no consultation shall go; for the custom in farmers is no more than a prescription in ‡ occupiers, which, according to GATEWARD's case, is not good in matters of charge on the land. 2 Lev. 163. Hill. 27 & 28 Car. 2. B. R. Welby v. Herbert.

may be bound to such a charge, yet not by bare prescription; for here none can release this charge, neither parson nor churchwardens; and this is not like an easement of resting at such a house or pulling up a hedge; which the Court agreed; this being originally a kindness, like the Lord Carlisle's venison a party to the judges in the circuit, and Lord Bedford's wine and cakes. And to bring it in as a custom would destroy all civility, and it is a prescription for an interest as much as for a corody; and judgment for the plaintiff in the prohibition. 3 Keb. 609. S. C.

* † In the perambulation of a parish, no refreshment can be claimed by the parishoners, as due of right from any house or lands in virtue of custom. The making good such a right upon that foot has been twice attempted in the spiritual court (13 Jac. 1. & 27, 28 Car. 2.) But in both cases prohibitions were granted, and the custom declared to be against law and reason. 1 Gibs. C. 239.

‡ See (Occupier.)

15. A. *procured a will out of the prerogative court, and gave bond,* with condition *to redeliver it* by such a day, but he not doing it, the spiritual court proceeded against him *pro læsione fidei, and to have the will again* into court; the defendant pleaded his having given bond, and that a proper remedy lay thereupon; but the Court rejecting that plea, A. moved for a prohibition; but it was objected, that the witness to the bond was dead, and probably, if put in suit, they might not recover; besides, the penalty might fall short of the damages sustained by those interested in the lands conveyed by this will, by not having it produced, so that a power to inforce the bringing it in seems necessary; besides that, it is in the party's election either to put the bond in suit, or to sue in the spiritual court. The Court inclined to grant a prohibition. 8 Mod. 327. Mich. 11 Geo. 1. Cuband v. Dewsbury.

It is no certain rule, that a thing triable at law is not triable in court christian, as laying violent hands on a clerk, a pension by prescription, &c. 3 Lev. 17. in case of Cranden v. Walden.

(F) *Jurisdiction Spiritual.* Jurisdiction *of the Thing.*

[1. ID. de anesse pardonatur, for suing in court christian *de cafiris villis maneriis, &c. & aliis laicis feodis & placitum inde prosequi præsumendo in enervationem juris nostri regii & exhæredationem coronæ nostræ & subversionem stat. Regni nostri manifestam.* 31 E. 3. Rot. Patentium & Consimile. M. 11. ib. M. 12. Consimile, 4 E. 2. Rot. Pat. M. 6.]

If one sues another in the spiritual court for a lay fee, which is lands or tenements, &c. he shall have a prohibition to the court, and may have another writ to the party himself. F. N. B. 40. (I).

[2. Mirror of Justices, fol. 27. cap. 2. s. 13. because he held plea *against the defence* [prohibition] *of the king, and in prejudice of the dignity of his crown,* for as much as it belongs to no judge ecclesiastical to hold away secular plea, except of *testament and matrimony* in prejudice of the power of the king.]

[3. If a man be admitted, instituted, and inducted to a church, and after he is *sued* in the spiritual court *for the institution,* supposing it not to be good, and so *to have it to be defeated,* a prohibition shall be granted; because by the induction, the patron has the church as a lay fee, and therefore the common law shall be preferred before the spiritual law, and shall draw the trial of the whole to it; for otherwise by [this] all quare impedits shall be overthrown; for by this means they may try all rights of patronages in the spiritual court. Tr. 15 Ja. B. a prohibition was granted in one WILSON's case accordingly. Hill. 15 Ja. B. R. between HITCHIN AND GLOVER, resolved, per totam Curiam.]

Watf Comp. Inc. 8vo. 415. cap. 21. cites S. C.— An incumbent was instituted by the vicar general, and afterwards was inducted. Afterwards the bishop contested this in the spiritual court in Ireland; but upon a writ of error brought here, it was agreed by Holt Ch. J. Powell,

Powell, Powis, and Gould J. that after ſuch induction, which is good de facto, the inſtitution ſhall not be controverted in the ſpiritual court, and ſo reverſed a judgment given in Ireland. Holt's Rep. 599 to 603. Hill. 4, and Trin. 5 Annæ, Gibbons v. Biſhop of Cloyne, & e contra.

S. P. Litt. R. 165. Stevens v. Criſp.—— S. P. Poph. 133. in Rone's caſe. S. P. Show. 10. Mich. 4 Jac. 2. in the caſe of Clark v. Andrews, cites Hob. 15. Sir Timothy Hutton's caſe.

[4. Mich. 15 Car. B. R. between PHIPPS AND HAYTER, per Curiam, prohibition granted for the church of Tuffont Ebias in the county of Wilts, where the ſuit was in the arches *after induction to avoid the inſtitution*, becauſe the inſtitution was *made after a caveat* entered, not to inſtitute, &c. for this does not make the inſtitution * void in our law. Hobart's Reports, 22. HUTTON's caſe. Prohibition granted.

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Watſ. Comp. Inc. 8vo. 416. cap. 21. cites S. C.

[5. If a man be admitted, inſtituted, and inducted to a church, and after he is *deprived, becauſe he was inſtituted againſt the courſe of the eccleſiaſtical law*; this is a void ſentence of deprivation, becauſe it is now a lay fee by induction. Hill. 15 Ja. B. R. adjudged between HITCHING AND GLOVER.]

† Fol. 283.

[6. 35 E. 1. Rot. Patentium Membrana. 25. Cum M. B. adeptus fuit poſſeſſionem *theſaurariæ in eccleſia* beati Petri eborum, *upon collation of the king by judgment in the king's court*, and he is now diſturbed in his poſſeſſion by citations and appeals, nos volentes jura noſtra prædicta, & judicia in curia noſtra rite reddita in omnibus manutenere vobis † mandamus, quod dictum clericum in poſſeſſione manuteneatis & ſi qui provocationes, citationes, appellationes, aut alia impedimenta interponere præſumpſerint, per quæ, &c. tunc eos arreſtare & in priſona cuſtodire faciatis donec aliud, &c.]

A prohibition was prayed to the commiſſary of the archdeacon of Richmond to ſtay a ſuit againſt a ſchoolmaſter *for teaching ſchool without* the *licence* of the biſhop; prohibition was granted, becauſe they *endeavoured to turn him out*, whereas they can only cenſure him, becauſe he comes in by the preſentation of the founder. 1 Vent. 41. Mich. 21 Car. 2. B. R. 1669. Bate's caſe.——Mod. 3. pl. 11. Mich. 21 Car. 2. Bayle's caſe S. P. to the eccleſiaſtical court at Cheſter, and the prohibition denied.——There was a libel in the ſpiritual court *againſt* Wood, *a ſchoolmaſter* and rector; *and a prohibition* was *granted as to the examination of* any *matters relating to the office* of ſchoolmaſter; for when the biſhop hath once granted his licence, he has executed his authority, (eſpecially in this caſe where the ſchool is of the foundation of queen Elizabeth, and the king's chancellor is viſitor) *but they may proceed upon the article againſt him for being drunk*, &c. which is contra bonos mores. Comb. 324. Paſch. 7 Will. 3. B. R. Wood v. Hill.

[7. If a *town erects a common ſchool, and gives allowance to a ſchoolmaſter*, the biſhop cannot *remove* the ſchoolmaſter, and put in another at his pleaſure; but if he be a *recuſant* he may remove him by the ſtatute of 23 El. cap. 1. M. 13 Ja. B. The Biſhop of Carliſle's caſe. Per Curiam.]

As to accounts in the eccleſiaſtical courts, ſee Eccleſiaſtical Court.

[8. If *adminiſtration be granted to A.* where it ought not to be granted to him, and after the adminiſtration *is repealed and granted to B.* becauſe he is next of kin, *B. may ſue A. in the eccleſiaſtical court, to account for the profits* of the chattels of the teſtator during his time, and no prohibition ſhall be granted; for B. cannot have action of treſpaſs againſt A. nor has any remedy for them at the common law. Hill. 15 Ja. B. R. adjudged between Wadſworth and Andrews.]

[9. King H. 4. *confirmed a church* which was *incorporated* before by the name of cuſtos & collegium in the dioceſs of Exeter, *and ordained*

ordained certain number of singing-men, in which were some spiritual and some lay. The dean and chapter, with the bishop, *abridged the number* to 24 in all; and after to *16*, 4 spiritual and 12 lay, *and now they will add* 2 more to the number of spiritual men, by which their livings shall be less; yet no prohibition shall be granted, because it appears that the number was greater, and after made less. P. 8 Ja. B. per Curiam, between Withers and Owen.]

[10. If a man sues in the spiritual court for *perjury*, where the *principal*, *upon which*, or for which *the oath was made*, *does not touch*, nor is *spiritual* matter, of which the spiritual court ought to have jurisdiction, prohibition lies. 2 H. 4. 10.] Br. Jurisdiction, pl. 20. cites 2 H. 4. 9.——If perjury be committed in the spiritual court in a cause of matrimony, tithes, testament, or legacy, or of any other thing of which the conusance belongs to their jurisdiction, that court shall have jurisdiction in such case of perjury, and no prohibition lies; but it is otherwise where the perjury concerns a temporal matter. By all the judges of both benches. Jenk. 184. case 76.

Note, by if *a man buys a horse of me, and swears* upon the Evangelist *to pay 10 l. for him at such a day*, and *he does not pay*, I shall have *debt* at common law, *and citation* pro læsione fidei at * the spiritual law, for these are diverse things, and it does not offend the common law. Br. Jurisdiction, pl. 2. cites 34 H. 6. 70.—— But see 22 E. 4. 18. and 2 H. 4. 10. contra there; because it arises upon lay matter. But quære if it be taken there, that he shall not have suit in court spiritual to make him hold his bargain, or to punish the perjury. Br. Ibid.——See (D) pl. 4.

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[11. *As* if a man *makes oath to pay debts*, *or make feoffment*, if he be sued in the spiritual court for the breach of the oath, prohibition lies; for otherwise he shall be compelled there to perform his oath, and so lay contracts shall be determined in court christian. 2 H. 4. 10. b.] Br. Jurisdiction, pl. 20. cites 2 H. 4. 9. and pl 27. cites 11 H. 4. 85.——Br. Prohibition, pl. 2. cites 2 H. 4. 10. accordingly, but 34 H. 6. 70. contra.——Br. Prohibition, pl. 4. cites 2 H. 4. 9.—Pl. 8. cites 38 H. 6. 29.—Pl. 18. cites 11 H. 4. 88.—Pl. 9. cites 12 H. 7. 24.

[12. *Contra* 22 Ass. 70. But the ordinary cannot *injoin* him to pay the debt, but to [do] *penance*.]

[13. H. 2. ordained, that it should not be lawful for a bishop to punish any man for *perjury* or *breach of faith*. Speed, 458. b.]

[14. If a man *promise* another *to pay debts*, *or* to *make a feoffment*, and does not perform it, the ordinary may ex officio cite him for breach of his faith, and award him to *penance*.]

[15. 15 E. 3. cap. 6. It is accorded, that the ministers of holy church for money taken for *redemption of corporal penance*, nor for *proof or account of testaments*, or for travail taken for the same, nor for solemnity of *marriage*, nor for other things touching the jurisdiction of holy church, shall not be impeached, arrested, nor driven to answer before the king's justices, &c. But *this was after repealed* in the same year. 18 E. 3. cap. 6.]

[16. A *prescription* cannot be tried in the ecclesiastical court, because it ought to be *tried by jury*, which cannot be there. In time of E. 1.] S.P. 13 Rep. 40. Trin. 7 Jac. in the case of modo decimandi.——*Assise against a parson*, and made his *plaint of a house*; the *parson said, that he is parson of P. and that it has been parcel of his church time out of mind*, &c. *and there has been sepulture of dead bodies*; judgment, if the Court will take cognizance; and after the defendant, by agreement, pleaded to the assise; Quære; for per Persey, the Court ought not to take cognizance. Br. Jurisdiction, pl. 7. cites 44 Ass. 8.

Whether the proprietors of a messuage, called the Priory, have *time out of mind repaired the chancel*, may be tried and determined in the spiritual court as well as a modus decimandi; and though the parson is of common right to repair the chancel, yet it may be on a particular man's estate by prescription. 2 Vent. 239. Mich. 2 W. & M. C. B. Williams v. Bond.

Libel ſet forth a preſcription for the *vicar of the pariſh of M. to find a parſon to officiate in the chapel of G.* being an ancient chapel *within the ſaid pariſh* for the eaſe of the pariſhioners, *in conſideration whereof* the *pariſhioners* time, &c. *paid* him and predeceſſors *two quarters of wheat, and two of malt yearly*; upon ſuggeſtion of no ſuch preſcription, prohibition was moved for. And it was agreed by all, that the things being by *preſcription*, which properly is triable at common law, *did not always* ſuffice to *ouſt the ſpiritual court* of juriſdiction; as if a *penſion* be by preſcription, though one may bring annuity for it at common law, yet they may libel for it in the ſpiritual court upon the preſcription; and cited F. N. B. 51. Holt Ch. J. ſaid it is the very point adjudged in WILLIAMS's caſe, 5 Co. 72. for it is an eccleſiaſtical duty, to be performed for the advantage of the pariſhioners; and though it commences by preſcription, yet it *concerns eccleſiaſtical perſons*, and is a mere ſpiritual thing; and is not at all the ſame as if it were againſt a layman, who is not ſo eaſily bound by canon law as eccleſiaſtical perſons are; for their proceedings there by preſcription ſhall not charge a layman, or any temporal right. 12 Mod. 404, 405. Trin. 12 W. 3. B. R. Stone v. Jones.

Though *preſcription*, as whether a *whole pariſh or a ſelect veſtry ſhould chuſe churchwardens*, is a matter triable at common law, yet ſentence is to be given in the ſpiritual court according to their verdict. Agreed on a motion for a prohibition. 10 Mod. 12. Mich. 9 Ann. B. R. Baniſter v. Hopton.

See (M) pl. 9.——See Diſmes (B. a) —S. P. 2. † Fol. 284.

[17. A parſon may ſue in the ſpiritual court for a *modus decimandi*, and no prohibition ſhall be granted; for it is in nature of tithes. Co. 11. Doctor GRANT, 16. My Reports, 14 Ja. GOSLIN AND † HARDEN, [per] Curiam. Hobart's Reports, caſe 314. between Scott and Wall.]

Vent. 239. in caſe of Williams v. Bond. —— —— He may ſue in the ſpiritual court *pro modo decimandi*; but if he ſues for tithes in kind, (which by a modus decimandi are utterly extinct, and the land * diſcharged of them) then upon a plea *de modo decimandi* a prohibition lies. 13 Rep. 44. Trin. 7 Jac. in the caſe of modus decimandi.

It was reſolved, that the parſon might ſue for modus decimandi in the ſpiritual court, and cited 2 R. 3. 3. a. *But if the pariſhioner denies it*, that they ought to ſurceaſe, and a prohibition lies; and it ſhall be tried at the common law. Noy, 81. Steward's caſe.

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For this might have a lawful commencement, becauſe it

[18. *So* if the parſon *preſcribes* to have tithes *of things not tithable, as of rents of houſes*, he may ſue for it in the ſpiritual court, and no prohibition lies, yet no tithes de jure ought to be paid of them. Co. 11. Doctor GRANT, 16.]

might be, that this modus decimandi had been paid time out of mind for all the tithes of the land, whereupon the houſes are built; and though this land was afterwards built upon, this ſhall not take away the right of the parſon in this caſe, and ſince it *might have a lawful commencement, and that it had been time out of mind*, it was for this reaſon reſolved, that conſultation ſhould be granted; and that he might ſue for this money in court chriſtian, becauſe it is *in the nature of tithes*, viz. a modus decimandi; and every ancient city and borough has for the moſt part ſuch cuſtom of a modus decimandi for their houſes, for the maintenance of their parſon. And a conſultation was granted. 11 Rep. 16. a. b. S. C.

See Diſmes (L)—‡ It ſeems that this ſhould be 56. the S. P. being there at pl. 42. in the Year-Book.

[19. So he may ſue in the ſpiritual court for *tithes of great trees* which he claims *by preſcription*, and no prohibition lies, yet de jure they are not tithable. Quære. 9 H. 6. ‡ 46.]

See (U) pl. 19.—S. C. 3 Bulſ. 241. ——S. C. Roll. Rep. 119. and it

[20. So he may ſue there for a *modus of the tithes of fiſh* taken in iſland, and brought into the town where, &c. (yet no tithes de jure are due thereof as it ſeems.) My Reports, 14 Ja. Goſlin and Harden.]

was upon a cuſtom in Yarmouth; but becauſe the ſpiritual court had rejected the proof of another modus differing from that which the plaintiff had alledged, a prohibition was granted; and at another day a prohibition was granted by Mountague Ch. J. [who was made Ch. J. after the former prohibition granted] and all the Court, becauſe he miſtook his modus.

And though the cuſtom was denied,

[21. If there be a *cuſtom*, that after the *graſs* is cut and ſet in graſs cocks, the 10th cock ſhall be aſſigned to the parſon, and that

that he by the cuſtom ſhall *have lawful authority to make it into hay upon the land*, if the owner of the land *diſturbs him* to do it, he may ſue for this in the ſpiritual court, and no prohibition ſhall be granted; for it is *incident to the cuſtom* to come there to make it into hay. Mich. 14 Ja. B. Reynolds and Newbury.]

and it was ſaid, that hereby the cuſtoms would be altered, and that they ought to be tried by the common law, yet the Court would not grant a prohibition; but [the book ſays] it ſeems that they did not intend this, for they did not ſpeak of it; but Warburton ſeemed [of opinion] that it was an unreaſonable cuſtom. Roll. Rep. 420. S. C.

[22. The proper place to ſue for a *legacy*, is in the eccleſiaſtical court; becauſe it is not any debt, but only due by the will.]

Br. Juriſdiction, pl. 52. cites 37 H. 6. 9. per Aſhton.——J. S. libels in the conſiſtory court of the biſhop of Exeter againſt C. and D. ſiſters to B. and executors of his laſt will, *for* a *legacy* left, &c. they *pleaded no aſſets*, and *made a ſpecial allegation, that A. their father was poſſeſſed of ſeveral long leaſes in ſeveral tenements, and deviſed them to B. his ſon; but if he ſhould die unmarried, or if he ſhould marry and die without iſſue, then C. and D. his two daughters, to have thoſe leaſes*, &c. and that *B. dying without iſſue, they claim as deviſees of A. their father*, and not as executors of B. their brother; and the Court there over-ruled this plea of theirs; and a prohibition was granted; becauſe it is matter of title with which they ought not to meddle. 2 Show. 50. pl. 36. Paſch. 31 Car. 2. B. R. Baſtard v. Stockwell.

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[23. If *A. gives B.* 5 *marks, and he deviſes* by will, *that whereas he owes B. five marks, his executor ſhall make it* 10 *l.* the ſuit for this 10 l. may be in the eccleſiaſtical court; for this is not any addition to the 5 marks, but a new ſum given in *ſatisfaction* of the 5 marks, and ſo no part of the 10 l. nor any debt but only a *legacy. M. 22 Ja. B. R. between CHURLY AND WOOD. Prohibition denied.]

W. on his marriage with M. *covenanted with J. S. to pay A. B. and C.* (who were *his wife's children*) *and every of them* 10 *l.* at their reſpective ages of 21 years, and gave bond for his performance of this covenant. Afterwards he *deviſed* to the ſame A. B. and C. 10 *l. a-piece to be paid them at their ſeveral ages of* 21 *years, in performance of his bond and covenant* in that behalf, made at his marriage, and not otherwiſe, and died. A. and B. ſued in the ſpiritual court for their legacies. The Court at firſt inclined to grant a conſultation, becauſe they were all ſtrangers to the covenant, but it being moved in another term, the Court doubted, becauſe it was not given as a legacy, but in performance of the covenant, and not otherwiſe; and Anderſon and Rhodes ſaid preciſely, that a conſultation ſhould not be granted, but the others heſitated, and at laſt they compounded the matter. Goldſb. 58. pl. 15. Trin. 29 Eliz. Peirce v. Davy.—2 Le. 119. pl. 164. Mich. 29 & 30 Eliz. S. C. by name of DAVIS v. PERCIE, ſays, that afterwards the juſtices looked and adviſed upon the indenture, and finding that the deed and obligation were made to the friends of the mother, and not to the daughters themſelves, to whom the legacies were bequeathed, were of opinion that a prohibition did not lie.

If the teſtator *charges his executors to pay his debts* to his creditors, the *creditors may ſue* them *in the ſpiritual court* on non-payment, and a prohibition ſhall not be granted; becauſe this charge of the teſtator is as a deviſe to his creditors. F. N. B. 44. (B) cites H. 9 E. 3. Prohibition, 17.—S. C. cited 2 Le. 120. pl. 164. by the juſtices; but Anderſon Ch. J. utterly denied it in the caſe of Davies v. Percie.

[24. H. 2. ordained, that the laity, or the king, or other, ſhould hold plea of *churches and tithes*. Speed, 458. b.]

[25. If a man *deviſes a rent out of his ſtock and houſe, which he has for years*, he may ſue for this rent in the eccleſiaſtical court, becauſe it iſſues out of a chattle, and he has not remedy for it at common law. H. 7 Ja. B. MARY JAMES's caſe, per Curiam, and prohibition denied.]

One deviſed a *rent out of a term for years* whereof he was poſſeſſed *to A. for life*, and a libel was for this legacy, it was ſuggeſted for a prohibition that this was a legacy out of land. After two motions, the Court held, that no prohibition ſhould be granted; becauſe the rent iſſued out of a term, which was a chattel, and is teſtamentary by the common law, and conſequently the rent is ſo too; and no prohibition was granted. Sid. 279. Paſch. 18 Car. 2. B. R. Ramſey v. Roſs.——Lev. 180. S. C. by name of ROSSE v. ROSSE; and Windham ſaid, that if the term itſelf had been deviſed, it would have been ſuable for there, and therefore the rent out of it is likewiſe; but Keeling and Twiſden doubting, they did not then grant the prohibition, but ordered proceedings to ſtay till the other ſide be heard.

heard.——2 Keb. 5. pl. 2. S. C. by the name of Rumney v. Roſſe, & Ibid. pag. 8. pl. 22. S. C. the Court denied the prohibition, it being a mere teſtamentary legacy, and no more than a deviſe of ſo much money out of goods, which is but a direction how it ſhall be paid, and the rent is but a chattel, and goes to the executors.

S.P. becauſe not within their conuſance. 2 Show. 50. pl. 36. Baſtard v. Stockwell. But where A. ſeiſed in

[26. If a man *deviſes a legacy* to another *out of* certain *land*, whereof he is ſeiſed *in fee*, and the deviſee ſues for this in the ſpiritual court, a prohibition lies; for this iſſues out of the land, and the executor ſhall not have any eſtate in the land, till the legacy raiſed out of the profits (as was objected of the other part). P. 15 Ja. B. R. SINGLETON AND WADE. Per Curiam. H. 7 Ja. B.]

in fee, and poſſeſſed of a leaſe for years of lands in D. for divers years yet to come, deviſed all his lands and leaſes to T. his ſon and heir (whom he made executer) excepting 20l. per annum for 7 years, to be employed in this manner, viz. 100l. to his daughter E. to be paid within 5 years, and 30l. to his daughter E. within 7 years, and in anno 1600 died, and T. entered, and took the profits as well of the one as the other for the 7 years, and died, and made M. his feme (now wife to the defendant) his executrix, and left aſſets unto her, whereupon the ſaid E. the younger daughter ſued her for that legacy of 30l. and now they brought a prohibition, ſurmiſing, that this legacy being out of the profits of land, no ſuit could be in the eccleſiaſtical court for it. But in regard it was a mere perſonal legacy, although it is to be raiſed out of the profits of land, yet being raiſed out of the leaſe for years as well as out of the land, and he having raiſed it, and being dead without payment, there being no action maintainable for it at the common law by account againſt his executors, or otherwiſe, it is therefore reaſon ſhe ſhould have her remedy in the ſpiritual court; whereupon a conſultation was awarded by all the juſtices beſides Williams, who doubted thereof. Cro. J. 279. pl. 9. Paſch. 9 Jac. B. R.

If a legacy be granted out of land, this ſhall not be ſued for in the ſpiritual court; but if one by will *deviſes lands to be ſold for payment of debts and legacies*, this ſhall be ſued for in the ſpiritual court. Per tot. Cur. Brownl. 32. Anon.

[27. If a man deviſes a certain *legacy* to another, *and that if his executor has not ſufficient* to pay it, *then he deviſes it out of a certain houſe, of which he is ſeiſed in fee, the which deſcends alſo to the executor*, if the executor has not aſſets of perſonal goods, he cannot
[563] be ſued for this in the ſpiritual court, as payable out of the houſe; becauſe it has no juriſdiction thereof. Paſch. 15 Ja. B. R. reſolved, per Curiam, between SINGLETON AND WADE.]

See Aſſets. Hob. 265. pl. 345. Edwards v. Graves, S.C. accordingly, and that it was

[28. If a man ſeiſed of land in fee makes B. his executor, and by his will in writing *deviſes* that B. and 3 others *ſhall ſell the land, and that the monies ſhall be diſtributed into* 4 *parts*, whereof one part ſhall be to F., &c. and dies, and after B. will not ſell the land, and F. ſues him in the court chriſtian, a prohibition lies; becauſe if it be a legacy, yet it iſſues out of land, and the monies ſhall not be *aſſets* in the hands of the executor. Tr. 17 Ja. B. between GRAVES AND ADWARDS, per Curiam, and * conſultation denied. Hobart's Reports, caſe 343. ſame caſe.]

* Fol. 285.

appointed to ſpecial uſes in way of a court of equity, neither can they hold plea of a legacy in equity, but where it is a legacy in law in deed; for they muſt hold plea by their law as our courts of law do.

Show. 11. S. C. cited Arg. and ſays, though the *ſubjectum circa quod* be ſpiritual, yet if the *conſequence* be a determination of a thing belonging to common law conuſance, a prohibition will go.——N. B. there is no pl. 29. in Roll.

[30. If a man ſues in the eccleſiaſtical court to prove a *nuncupative will of land to revoke a will in writing thereof*, a prohibition ſhall be granted. P. 14 Ja. B. R. REYNOLD's caſe. Prohibition granted.]

A man having a *legacy* deviſed unto

[31. If a man, poſſeſſed of a *leaſe for years*, deviſes that *his executor out of the profits of it ſhall pay* to every one of his daughters 20l.

20l. at their full age, the executor may be sued in the spiritual court to *put in surety to pay* the legacies, and prohibition shall be granted, for this is to issue out of a chattel. Hill. 11 Ja. B. per Curiam. PROWE's case.]

him *out of a lease for years, which indenture* of lease *was in the hands of a stranger*; the legatee sued the executors in the *spiritual court* to assent to the legacy; and a prohibition was prayed, because they order that the lease should be brought into court, which they ought not to have done, being in the hands of a stranger; but the prohibition was denied by the whole Court; for they *may make an executor assent to a legacy out of a lease, and* therefore *may order, that* though *the lease* be *in the hand of a 3d person*, that it shall *be brought in* to execute it; for the order, although it be general, binds only the defendant. Mar. 96, 97. pl. 167. Trin. 17 Car. in C. B. Anon.

[32. If a man devises, *that his executor shall sell* certain *land* after his death, *and with the monies*, for which it is sold, that he *shall pay* certain legacies; if he sells the land after the death of the testator, and the legatees sue him in the spiritual court for those legacies, a prohibition lies; because those legacies issue out of land, which is not within their jurisdiction, but their remedy lies in Chancery. P. 4 & 5 Ma. 151. 5. by the justices of both benches. Contra D. 9 El. 264. 41. Opinion. M. 14 Car. B. R. between TAWYER AND WHISTLER, a prohibition granted per Curiam. Hobart's Reports, case 343. between ADWARDS AND GRAVES.]

A. devised that J. S. should sell his land, and that his daughter should have one part of the money for her advancement, and gave other parts to others in certain sums,

and died; the executors sold, but refused payment of the legacies; the daughter libelled in the court christian. It was the opinion of all the justices of both benches, that a prohibition well lies in this case, in as much as this is not a legacy testamentary, but out of land, by reason of the will, the performance whereof the court christian has nothing to do to intermeddle with; but the party may have action of account at the common law. D. 151. b. pl. 5. Mich 4 & 5 P. & M. Anon. ——— S. C. by the name of PASCHAL v. KETERICH accordingly, Bendl. 60. pl. 104. And there is a note, that if testator in such case *devises his lands to his executors for a term to levy a certain sum out of the same to pay it to the devisee*, yet if after sale the devisee sues in court christian for the legacy, a prohibition shall be granted. ——— D. 151. b. Marg. pl. 5. says that in Mich. 36 & 37 Eliz. B. R. it was so adjudged in Lord Rich's case.

[33. In the statute of 21 *H.* 8. *cap.* 5. *of probate of testaments*, there *is a proviso, that if the testator devises by his will, any land, tenement, or hereditament to be sold, that the monies thereof coming, nor the profits of the same land for any time to be taken, shall not be taken as any of the goods or chattels of the testator.* (By the coherence it seems it is intended to be put in the inventory.)] [564]

[34. P. 15 Car. between ROPER AND MATTINGLEY, prohibition granted, per Curiam, where the suit was *to put the money for which the land was sold into an inventory*, and this at the suit of the legatees.]

Though it is generally true, that all the personal estate of the deceased, of

what nature or quality soever it be, ought to be put into the *inventory*, and appraised, yet the *goods, to which the husband is intitled as administrator to his wife*, are not, *nor goods given away in the life-time of the deceased*, and actually in the possession of the person to whom they were given; as for instance, an administratrix exhibited an inventory to the ordinary, in which she put some goods, which the intestate had given to a younger child, and which were then in her possession; for her younger child and she being sued in the spiritual court for those goods, she *pleaded* this *deed of gift*, and the plea being rejected by that court, she moved for a prohibition, and had it. 2 Bulst. 315. Hill. 12 Jac. James v. James.

[35. If the ecclesiastical court holds plea of a *legacy in equity*, a prohibition lies; for they ought to hold plea *by their law*, as other courts of law do. Hobart's Reports, case 343.]

Hob. 265. pl. 345. S. C. ——— See pl. 28

[36. If the *archdeacon grants* to one the *office of register* of the archdeaconry by his patent *for life in reversion*, and after the *grantee*

tee is a recuſant convict, by which the archdeacon, ſuppoſing him to have forfeited the office, *by another patent grants it to another for his life*, and he libels in the ſpiritual court againſt the firſt grantee, to *deprive him of the office for the recuſancy, and becauſe it was granted in reverſion*, and that he may have the office according to his patent, a prohibition ſhall be granted; becauſe here the office, which is a matter of franktenement, comes in debate, and which of the 2 patents ſhall be preferred, which does not belong to their juriſdiction. Mich. 15 Ja. B. R. KITE AND BRIDGEMAN. Reſolved, and prohibition granted.]

* Fol. 286. S. C. cited 4 Mod. 28. Hill. 3 W. & M. B.R. in the caſe of Jones v. Beau.

[37. If there be a *queſtion between* 2 *upon ſeveral grants*, which of them ſhall be regiſter of the court of the biſhop, this ſhall not be tried in the biſhop's court, but at the common law; for though the *ſubjectum circa quod be ſpiritual*, yet the office itſelf is temporal. Hill. 8 Ja. B. ſaid by Coke to be SKINNER AND MINGEY's caſe.]

[38. If the *biſhop grants the office of chancellor to A. and B.* and after *A. releaſes to* B. *and then B. dies, and* after the *biſhop gives it to R.* againſt whom A. ſues in the eccleſiaſtical court, ſuppoſing his releaſe to be void, a prohibition ſhall be granted; becauſe the office is temporal, though he exerciſes the office in ſpiritual matters. H. 8 Ja. ROBOTTAM's * caſe reſolved, and prohibition granted, per Curiam.]

Palm. 450. S. C. by name of Glanvil's caſe. —— God. 390. by name of Sutton v. Chancellor of Glouceſter's caſe.

[39. *But* if a *chancellor* be *ſued* in court chriſtian *to be deprived for inſufficiency*, as not having conuſance of the canon law, no prohibition lies; becauſe they are the proper judges of his ability, and not the judges of the common law. P. 3 Car. B. R. caſe, Chancellor of Glouceſter. Reſolved per Curiam, and prohibition denied.]

—— Noy, 91. Dr. Sutton's caſe. S. C. —— Latch. 228. S. C. —— Cro. C. 65. S. C. —— S. C. cited Arg 4 Mod. 28. and ſays that it was the opinion of Juſtice Croke, who reported that caſe, [but it ſeems there to be the opinion of the Court] that the doctor might have an aſſize to try it, if he had any wrong done him, which ſhews he had a freehold; and if ſo, then admitting the ſpiritual court can try the ſufficiency of a chancellor, yet if the temporal courts have alſo in the ſame caſe a juriſdiction in reſpect of the freehold, the authority of the eccleſiaſtical court ſhall be ouſted. —S. C. cited Comb. 306. in caſe of Jones v. the Biſhop of St. Aſaph; but the Court there denied that caſe to be law. And Eyres ſen. J. ſaid the high commiſſion court at that time bore all before it, no one durſt ſpeak againſt it but my Lord Coke, and it bore him down at laſt.

[40. If a *vicar ſues the parſon propriate* of the ſame pariſh *to ſhew cauſe why a terrar*, made concerning the land and tithes appertaining to the vicar, *ſhall not be allowed after a trial at common law againſt the vicar* for the ſame thing, a prohibition lies, becauſe they cannot determine matter of *franktenement* there. P. 11 Car.
[565] B. R. between PEARSE plaintiff, and SIR G. WINTER AND CHESTER HIS FARMER defendants, of the pariſh of St. Philips in Glouceſter, where the vicar would have tithes of grain, and ſuch like, ariſing from land, whereof he had before tithes of hay and paſture before it was plowed.]

Br. Juriſdiction, pl. 32. cites 38 E. 3. 6. — * S. C. Cro. E. 607. pl.

[41. If a man *ſets out his tithes* by ſeverance from the 9 parts of the 10, *and after carries away the 10th part*, the parſon cannot ſue for this in court chriſtian, becauſe by the ſeverance from the 9 parts, it was become a chattel, for which he might have action

of

of *treſpaſs*. Dubitatur. P. 40 El. B. R. between * LEIGH AND WOOD.]

8. where the the plaintiff *ſurmiſed* for a prohibition, that he ſet forth the tithes, *and afterwards for ſome reaſonable cauſes* (not ſaying what) *he detained part of them*, and that the parſon had ſued him for them in court chriſtian, and thereupon it was demurred; and Fenner and Clench held it to be good cauſe for a prohibition, they being, by the ſetting out, become lay chattels, for which he may have treſpaſs or detinue at law; but Gawdy and Popham contra, becauſe this ſuit is againſt the party himſelf that ſet them forth, though the parſon, if he would, might take his remedy againſt him at common law; and that this is proved by the words of the ſtatute of 32 *H.* 8. that *if any do not ſet out, or do detain or withhold his tithes* (which is to be intended after they are ſet out) *he ſhall be ſued in the court chriſtian, &c.* For otherwiſe miſchief would enſue to the parſon, becauſe he would ſecretly ſet his tithes forth, ſo as the parſon ſhould not know thereof, and then afterwards would carry them away. Et adjornatur.——S. C. Mo. 912. pl. 1287. reports, that it was agreed that if the owner himſelf does not ſet forth the tithes, or carries them away after they are ſet forth, there the ſuit ſhall be in the ſpiritual court for them. *But if* the owner ſets them forth, and *a ſtranger carries them away*, no ſuit ſhall be for them in the ſpiritual court.——S. P. 12 Rep. 23. Trin. 44 Eliz. Sprat v. Heal.———But where after ſeverance a *ſtranger carried them away*, and the parſon libelled againſt the owner of the land for the tithes, who prayed a prohibition; it was adjudged that no prohibition ſhould go, becauſe he might plead the ſame matter in bar in the ſpiritual court. 4 Le. 7. pl. 30. Hill. 26 Eliz. B. R. Gerrard's caſe.

A pariſhioner ſevered the tithes from the 9 parts, but being in a cloſe the gate was locked, ſo as the parſon could not come at them, and he ſued in the ſpiritual court; and there the queſtion was whether the gate were locked or open. And thereupon a prohibition was brought, ſuppoſing this to have been a temporal matter; for the tithes being ſevered are lay chattels. But the Court ſaid, that although the tithes be ſevered, yet by the ſtatute they remain ſuable for in the ſpiritual court, and then the other is but a conſequent thereof, and therefore is triable there; and if they refuſe to allow his proofs, as it was ſurmiſed, (but not within the prohibition) it was ſaid that he ought to appeal. Cro. E. 843, 844. pl. 26. 43 Eliz. in C. B. Blackwell's caſe.

[42. If the *churchwardens* of a pariſh have *uſed* time out of mind *to elect the clerk of the pariſh*, and ſuit in the eccleſiaſtical court to *remove him*, *and put in one of the election of the parſon*, a prohibition lies. Mich. 22 Ja. B. R. between WALPOOLE AND COLDWELL, for the clerk of St. Thomas Apoſtles in London, prohibition was granted by conſent of the parties to try the cuſtom. Intratur, Hill. 22 Ja. Rot. 177. And like prohibition granted between BROWNE AND CRAWSHAWE, for Whitechapel pariſh. P. 19 Ja. B. R. Rot. 177. And like prohibition granted between BEAUMONT AND WESTLEY, for the pariſh of St. Cuthbert's in Wells in the county of Somerſet. P. 11 Car. B.]

2 Bulſt. 154. S. C. but not S. P.—Suit was in the ſpiritual court to eſtabliſh a clerk choſe by the parſon, by reaſon of the canon. And the churchwardens and pariſhioners prayed a prohibition, upon ſurmiſe of a cuſtom that the pariſhioners at their veſtry ought to chooſe him; and after diverſe motions a prohibition was granted; for they held that it was a good cuſtom, and that the canon cannot take it away. Cro. J. 670. pl. 9. Trin. 21 Jac. Jermyn's caſe.——In ſuch a caſe, Mich. 16 Car. B. R. the Court ſaid they would adviſe, and appointed that precedents ſhould be ſearched what had been done in ſuch caſes. And the caſe of Trin. 21 Jac. was cited, but nothing more is ſaid of the matter. Cro. C. 589. Orme v. Pemberton.———By cuſtom he is eligible by the pariſhioners notwithſtanding the canon, and then the election is determinable at common law only. Per Hale Ch. B. Hard. 379. Mich. 16 Car. 2. in caſe of Dawſon v. Fowle.

* [566]

[43. If a *clerk of a pariſh claims* by a cuſtom to have a certain quantity of *bread at Chriſtmas of every inhabitant* of the pariſh, and ſues for it in the ſpiritual court, a prohibition lies; for it is not like to a †*penſion* due to a parſon; for a ‖ regiſter of the ſpiritual court may have an aſſiſe of his office. Mich. 8 Car. B. R. between MARSH AND BROOKE, per Curiam reſolved, and prohibition * granted to York, the plaintiff there being the pariſh clerk of Berſtoll in Yorkſhire.]

A clerk of the pariſh may ſue in the court chriſtian for his fee, which are called largitiones charitativæ. Arg. 2 Roll. Rep. 71. Hill. 16 Jac. in Biſhop's caſe; cites the Regiſter, fol. 52. for he is quodam modo an officer ſpiritual; and cites 21 E. 4. 47.

† See Penſion.——*Penſions* ſhall be demanded in the ſpiritual court. Br. Prohibition, pl. 21. cites the Regiſter, fol. 47.———Penſion iſſuing out of an appropriation, *though by preſcription*, is ſuable in the

the eccleſiaſtical courts; for it could not begin but by the grant and inſtitution of ſpiritual perſons. And therefore if the duty be traverſed, it may be tried there. Per Holt Ch. J. Salk. 58. Paſch. 12 W. 3. B. R. Smith v. Wallis. —— ‖ S. P. 1 Salk. 333. Mich. 13 W. 3. B. R. in caſe of Ballard v. Gerard.

[44. If a ſuit be in the ſpiritual court againſt a feme for *exerciſing the trade of a midwife without licence* of the ordinary againſt the canons, a prohibition lies; for this is not any ſpiritual function of which they have conuſance. Tr. 9 Car. B. R. between *Benſkin and Cripps* reſolved, and prohibition granted to the court of audience.]

S. C. Hob. 246. pl. 313. Mich. 16 Jac.—Het. 132. S. C. and P. but is Hill. 4 Car. C. B. and ſeems to be taken from Hobart.

[45. If a preſentment be made by the churchwardens of a pariſh in the eccleſiaſtical court, that J. S. a pariſhioner *is a railer and a ſower of diſcord* among the neighbours, a prohibition lies; for this belongs to the leet and not to this Court, unleſs that it was *in the church*, or ſuch like. Hobart's Reports, caſe 311. between SMITH AND PANNEL, prohibition granted.]

S. C. Hob. 248. pl. 321. Mich. 16 Jac.—Het. 133. S. C. Hill. 4 Car. C. B. but ſeems to be taken from Hobart.

[46. If the *pariſhioners* of a pariſh *libel* in the eccleſiaſtical court *to make proof of divers manners of tithing in perpetuam rei memoriam*, a prohibition lies; for this [is] conceived to be a ſtrange attempt. Hobart's Reports, caſe 319. between NAPPER AND STEWARD.]

* Fol. 287.

Cognizance of *ways for carrying tithes* belong to court chriſtian, as appears by 2 Ed. 6. and F. N. B. in conſultation, 51. A. and Linwood in his Treatiſe of Tithes. Jo. 230. Halſey v. Halſey.

[47. If a ſuit be in the ſpiritual court ex officio, or otherwiſe, for * *a way to the church for the pariſhioners*, a prohibition lies upon a ſurmiſe that it is a common highway; for it ſhall be tried at common law whether it be a highway or not. Tr. 15 Car. B. R. between SMITH AND BENNET. Per Curiam, prohibition granted.]

S. P. And a prohibition was granted. 2 Roll. Rep. 41. Trin. 16 Jac. B. R. Hill v. Bedoe.

[48. If the churchwardens of a church ſue for a *way to the church*, which they claim to appertain to all the pariſhioners *by preſcription*, a prohibition ſhall be granted; for it is temporal. P. 16 Ja. B. R. between the Churchwardens of BITHORNE AND BOWE, prohibition granted accordingly.]

S. P. and S. C. Roll. Rep 250. pl. 29. And there Coke Ch. J. took notice of the cuſtom for the preacher at Paul's to dine with the lord mayor, and aſked whether he was ſuable for this in the ſpiritual court. —— See (E) pl. 14.

[49. If the *churchwardens* of a church *ſue J. S.* in the eccleſiaſtical court, *becauſe he and all thoſe who have been ſeiſed of ſuch an houſe, &c. at the perambulation* of the pariſhioners of the pariſh, &c. have *uſed to find* a refreſhing for them, ſcilicet, *bread and ale, and to ſuffer them to reſt themſelves there*; a prohibition ſhall be granted, becauſe they claim it in nature of a corody, and if this ſhall be ſuffered great inconvenience may enſue. M. 13 Ja. B. R. The wardens of the church of UFFINGTON's caſe in the county of Berks reſolved, and prohibition granted. Hill. 15 Car. B. R. like prohibition prayed for the ſame pariſh in one LOCK's and the churchwardens of the ſame church upon a ſuit by them in the ſpiritual court, but it [was] not granted, but referred to juſtice Jones when he comes in his circuit.]

[50. If

[50. If the *pariſhioners* of a pariſh have *uſed* time whereof memory, &c. *to elect one churchwarden, and the vicar another*, and *a canon is made that the vicar ſhall elect both*, and he does accordingly, and the pariſhioners elect one according to the cuſtom, and the ordinary diſallows him and eſtabliſhes the two elected by the vicar, a prohibition ſhall be granted. P. 5 Ja. B. R. The pariſhioners of ROLVENDON in Kent adjudged.]

S. P. For otherwiſe the parſon might have all the authority of his church and pariſh. Per Hubbard. Noy, 31. Butt's caſe. The canons ought to be according to the law and cuſtom of the realm, and they cannot make churchwardens that were *eligible* to be *donative*, without an act of parliament; and the canon is to be intended where the parſon has the nomination of a churchwarden before the making of the canon. Per Coke Ch. J. Noy, 139. Anon. —— S. C. cited Vent. 267. Hill. 26 & 27 Car. 2. B. R. in an anonymous caſe, where the Court ſaid that cuſtom would prevail againſt the canon.

[51. Tr. 7 Car. B. R. between SHIRLEY AND BROWN. Rot. 1391. A prohibition granted againſt the churchwardens *choſen by the parſon* of St. MAGNUS near London Bridge, by force of the canon, upon a ſurmiſe that the pariſh has a *cuſtom to elect both churchwardens*. P. 4 Car. B. R. Rot. 420. DRAPER AND STONE for ABCHURCH in London, prohibition granted.]

S. C. cited, and a mandamus granted to ſwear the churchwarden choſen by the pariſhioners, becauſe the eccleſiaſtical court cannot try the cuſtom of chuſing, as is here alleged. Raym. 439, 440. Paſch. 33 Car. 2. B. R. Carpenter's caſe. ——— See Mandamus (H. 3).

[52. If the *wardens* of a church *ſue* in court chriſtian, J. S. ſuppoſing by their libel that he and all whoſe eſtate he has in certain land next adjoining to the church-yard have uſed time whereof memory, *to repair ſo much of the fences of the church-yard* as was next adjoining to the ſaid land, a prohibition lies; for this ought to be tried at the common law, inaſmuch as it is to charge a temporal inheritance. Mich. 14 Car. B. R. The churchwardens of CLAYDON AND DUNCOMB.]

The eccleſiaſtical court can have no conuſance till the *cuſtom* be tried at law, but that being tried and found againſt the plaintiff in the prohibition, a conſultation will go. Carth. 33. cites the caſe of Vanacre v. Spleen.

[53. If a ſuit be in the ſpiritual court *by the official* ex promotione of one adminiſtrator againſt another *pro ſalute animæ for a temerarious adminiſtration* by defendant of the goods of the inteſtate, and to hinder him to make an inventory, and to ſhew in an inventory annexed the particular goods; prohibition lies, becauſe otherwiſe they ſhall * try the property of the goods there, where he may have *trover and converſion, or detinue* at the common law for them. Mich. 16 Car. B. R. between SAY AND HARWARD, per Curiam. Prohibition granted to the conſiſtory of Winton in 2 ſuits.]

* They may, in ſuch caſe of *defendant's denying the property in the plaintiff, and claiming it himſelf*, try the property there. Per Huſſey C. J. Kelw. 110. b. pl. 34.

54. For *marriage money*, the ſuit lies in the ſpiritual court, and therefore prohibition does not lie thereof. Br. Prohibition, pl. 21. cites the Regiſter, fol. 46.

If a *man gives goods in marriage with his daughter*, and afterwards they are divorced, the wife may ſue in the ſpiritual court for the goods, and no prohibition will lie thereof. F. N. B. 44. (C).

55. Where the ſpiritual court ought to have juriſdiction, prohibition does not lie. Contra, where the temporal court ought to have juriſdiction. Br. Prohibition, pl. 23. cites 22 Aſſ. 77.

56. If

56. If a man ſues in the ſpiritual court for *rent reſerved upon a leaſe of tithes*, or offerings, prohibition lies; for this is a lay rent. Br. Prohibition, pl. 3. cites 44 E. 3. 32.

57. Of a *thing which ariſes upon their judgment in their ſpiritual court*, the ſuit for it ſhall be in the ſpiritual court. Per Hill. Br. Juriſdiction, pl. 26. cites 11 H. 4. 85.

[568] 58. If a man *ſtrikes* a chaplain, or *a man infra ſacros ordines*, and he ſues him in the ſpiritual court, prohibition lies; for they uſe there to excommunicate him for this offence, and will not abſoil him of it till he has made a ſatisfaction to the party grieved. Br. Prohibition, pl. 18. cites 11 H. 4. 88.

59. An action upon the *caſe* is maintainable *for not doing divine ſervice*, though it be a ſpiritual matter. Br. Juriſdiction, pl. 43. cites 22 H. 6. 52.

60. In *treſpaſs in B. R. againſt a parſon* for *taking goods, claiming them to be tithes by cauſe of ſilva cædua*, and the parſon ſued him in the ſpiritual court for the ſame matter, and upon this the Court granted a prohibition. Br. Prohibition, pl. 6. cites 38 H. 6. 14.

Br. Spoliation, pl. 4. cites S. C.

61. A prohibition ſhall go *where the right of advowſon comes in debate* in ſuit of ſpoliation in the ſpiritual court. Br. Prohibition, pl. 7. cites 38 H. 6. 19.

62. *Spoliation*, and debate upon *appropriation*, ſhall be determined in the ſpiritual court. Br. Juriſdiction, pl. 110. cites 38 H. 6. 20.

63. A prohibition lieth for *chauntries, chapels, prebends, and vicarages*, &c. F. N. B. 40. (G).

64. If one be ſued in the ſpiritual court *for the collation to a grammar ſchool*, a prohibition lies. F. N. B. 40. (L).

65. The chancellor of N. made an order, and publiſhed it there, *that every woman coming to be churched* after child-bearing, according to the law of the church of Eng. *ſhould come covered with a white veil*, and *that Eliz. Shipden, being admoniſhed of it, refuſed to conform, for which contempt ſhe was excommunicated*, and a certificate thereof into Chancery, whereupon a capias was to be awarded againſt her; to prevent which, a prohibition was moved for, alleging this to be a new law, not allowed by any cuſtom or canon, &c. and offered obedience if there was any ſuch, whereupon the judges deſired the reſolution of the archbiſhop, who convened all the biſhops then in London to the number of 6, and they all agreed and certified, that this was an *antient cuſtom in the church of England*; thereupon the prohibition was denied. Palm. 296. Trin. 20 Jac. B. R. Shipden v. Dr. Redman, chancellor of Norwich.

S. C. and reported verbatim alike. Litt. Rep. 51.

66. A *chaplain*, who was *under a vicar*, *libelled againſt him for a ſalary*, and preſcribed that the vicar ought to pay him 4l. per annum for his ſalary; the vicar *ſuggeſted*, 1ſt, *That the chaplains* were eligible by himſelf, and therefore becauſe that *chaplain was not choſen by him*, he is not chaplain, but is in of his own wrong. 2dly, That the *preſcription* for ſalary was *triable at common law*. It was inſiſted for the chaplain, that the ſalary was ſpiritual, as the cure is, like the caſe in D. 58. pl. 4. [it ſhould be pl. 8.] But a prohibition was granted, till it was determined to whom the election appertained. Hetl. 36. Mich. 3 Car. C. B. the Vicar of Hallifax's caſe.

67. In cafes of *licences to marry*, granted by the ordinary, no prohibition lies, but the remedy is by appeal; but if it comes in queſtion in eccleſiaſtical court, whether the words of the act of 25 H. 8. give ſufficient power to the archbiſhop to grant licence there, if eccleſiaſtical court adjudge againſt the power, prohibition lies, and not otherwiſe. Jo. 259. Paſch. 8 Car. B. R. Matingley v. Martin.

68. *Aſſets* or *not aſſets* is triable by the ſpiritual court. Mar. 97. Trin. 17 C. B. Anon.

69. If there be a *feoffment of lands and tithes without livery;* and upon a libel for the tithes, the court does adjudge the tithes to paſs, though no livery, a prohibition ſhall be granted. Vent. 41. Mich. 21 C. 2. B. R. [but this ſeems only to be a point mentioned in Bates's caſe, and to refer to the caſe of Flutter v. Whiſkin, Paſch. 35 Eliz. cited by Coke Ch. J. in Cro. J. 269, 270. in Robert's caſe.]

70. Libel was by the churchwardens of, &c. in the eccleſiaſtical court *for* 1*l.* 10*s.* 8*d.* *upon a cuſtom* for payment of ſo much *for being buried in the body of the church;* and a prohibition was prayed, *ſuggeſting that there was no ſuch cuſtom.* The Court held ſuch a cuſtom muſt be good, becauſe the pariſh is to be at the charge to make up the church floor; but if the cuſtom be denied, it muſt be tried at law; and therefore inclined, that a prohibition was to go, though it was objected, that this duty belongs properly to the eccleſiaſtical court, and no remedy lies for it elſewhere; for ſo is the caſe of a *modus decimandi*, which may be demanded in the ſpiritual court, but if the cuſtom be denied, there ſhall be a prohibition, and ſo the caſe of a mortuary, ſince the ſtatute of H. 8. And afterwards it being moved again, Hale Ch. J. being preſent, the prohibition was granted, which, Hale ſaid, was ſometimes granted *pro defectu juriſdictionis*, and ſometimes *pro defectu triationis*, as in this caſe and others, where the ground of the ſuit is preſcription; for in their law they have ſometimes allowed preſcriptions of 20 years, ſometimes of 40 years, but we admit none but what are *de temps dont, &c.* Vent. 274. Mich. 27 Car. 2. B. R. Anon. [569]

71. In a ſuit for *fees for ſwearing churchwardens*, and taking their preſentments, a prohibition was granted. 1 Salk. 330. Hill. 5 W. & M. B. R. Goſlin v. Elliſon.

72. A. was libelled againſt in the ſpiritual court ex officio for teaching ſchool contrary to the 77*th canon*, anno 1603. which is that no man ſhall teach a ſchool, except licenſed by the biſhop, and otherwiſe qualified, as the canon preſcribes, and now A. prayed a prohibition, ſuggeſting that every man at common law may teach and inſtruct another; that all canons, contrary to the law of the land are void, and do not bind the laity whereof he is one; that the ſtatute of 1 *Jac.* and 13 Car. 2. *have appointed penalties* for keeping ſchool without licence; and that the expoſition of all ſtatutes belongs to the king's courts; and the ſingle queſtion was *how far this canon binds a layman*, which Holt ſaid was no queſtion to be determined on a motion, and therefore granted a pro-

S. P. F. N. B. 40. (L) in the new notes there (a).—And Holt Ch. J. ſaid, that prohibitions have deſervedly gone to ſtop proceedings for teaching ſchool without licence, becauſe it is a point never

yet determined. 12 Mod. 518.

prohibition, and that they declare upon it. 12 Mod. 192. Paſch. 10 W. 3. B. R. Oldfield and Sir Richard Raines.

In the caſe of the King v. Hill. ——— But a prohibition having been granted to the ſpiritual court to ſtay proceedings there on a libel for teaching ſchool without licence, and it being moved in Chancery to diſcharge the prohibition, Lord Keeper declared that he always was and ſtill is of opinion that keeping ſchool *is by the old laws of England of eccleſiaſtical conuſance*, and therefore diſcharged the order for a prohibition. Wms's Rep. 29 to 32. Mich. 1700. Cox's caſe.—*But* upon being moved, that it was for *teaching ſchool generally, without ſaying what ſchool*, and that the court chriſtian could not have juriſdiction of writing ſchools, reading ſchools, or dancing ſchools, &c. which his lordſhip aſſented to, and thereupon granted a *prohibition as to the teaching all* ſchools but *grammar ſchools*, which he thought of eccleſiaſtical cognizance. Williams's Rep. 32, 33. ut ſupra.

73. *Whether vicarage or not* ſhall be tried in the ſpiritual court; and ſo it is of an *appropriation*. 3 Salk. 378. Trin. 12 W. 3. B. R. Smith v. Waller.

S.C. 1 Salk. 333. Mich. 13 W. 3. B. R.

74. Suit cannot be in ſpiritual court for the *fees of a regiſter*; for the office of regiſter of archdeacon is a freehold, for which an aſſize will lie; and if ſo, a denial of the reaſonable and uſual fees thereof will be a diſſeiſin of his office. Per Holt Ch. J. 12 Mod. 608, 609. Hill. 13 W. 3. B. R. Ballard v. Gerrard.

75. Motion for a prohibition, *ſuggeſting*, that where there is *a diſpute between a peculiar, and the prerogative court, whether bona notabilia or not*, it muſt be tried by the common law, and cited 1 Mod. 211. But per Cur. this muſt often have happened; and if a prohibition lay, there muſt have been frequent inſtances of it; *where a prohibition is granted pro defectu triationis, it is upon ſuppoſition of different rules eſtabliſhed* by the ſpiritual and common law, as in caſe of preſcription; but as to bona notabilia, the ſpiritual and the common law are the ſame, and the caſe quoted was not much regarded. 10 Mod. 272. Mich. 1 Geo. 1. B. R. Cottingham v. Lofts.

76. A pariſh clerk, choſen by the parſon by cuſtom, was libelled againſt *to deprive him for drunkenneſs in church* at the time of
[570] divine ſervice, *and for lewdneſs, and other crimes* of the like ſort, which rendered him unfit for the ſervice of the ſaid office. It was *ſuggeſted* for a prohibition, *that thoſe crimes are properly puniſhable by indictment*, and ſo not cogniſable in the ſpiritual court, *nor can the ſpiritual court determine that the party is guilty of crimes triable by the courſe of the common law, before he is convicted of them at law*; but on the other ſide it was ſaid, that in this caſe the pariſh clerk being choſe by the parſon his office is ſpiritual, and conſequently the ſuit for a deprivation is proper in the ſpiritual court, but admitted that it would be otherwiſe if the ſuit had been to inflict a corporal puniſhment for thoſe crimes, which are properly indictable, and that ſo was the judgment in B. R. in the caſe of TOWNSEND v. THORPE, Trin. 13 Geo. 1. where a conſultation was awarded as to the ſuit for deprivation; but the prohibition ſtood for ſo much of the ſuit as went to puniſh the crime itſelf; and the caſe of THE CORPORATION OF CARLISLE being mentioned to the Court, where a diſtinction was taken, viz. where the *crime* was *againſt the duty of the party's office*, as *extortion in a judicial officer*, he might be proceeded againſt to a deprivation or removal before conviction of ſuch crime in a due courſe of law, otherwiſe not; which

which difference was agreed by the court; and thereupon the motion was denied quoad the deprivation, that matter having been solemnly settled in the case of Townsend and Thorp aforesaid. Gibb. 189. Hill. 4 Geo. 2. B. R. Newcomb v. Higgs.

(G) For Seats in the Church.

Fol. 288.

[1. THE disposing of the seats *in navi ecclesiæ* belongs of common right to the *ordinary* of the diocese, so that he *may place and displace whomsoever he please.*]

The disposal of seats in the mother church belongs to the ordinary, and so of seats *in a chapel of ease belonging to the mother church*; and to know whether it be a church or not, is by knowing whether it has *baptisterium et sepulturam.* 12 Mod. 228. Lee v. Daniel.

[2. If a man and his ancestors, and *all those whose estate he has* in a certain messuage, have *used* time whereof memory, &c. *to repair an isle in the church, and to sit in it and no other*, the ordinary cannot displace him; for if he displaces him a prohibition lies; because he has it by *prescription* for a reasonable consideration. M. 11 Ja. B. R. per Curiam. M. 10 Ja. B. per Curiam. PIMME's case. Hobart's Reports, 95.]

12 Rep. 104. S. C. by name of Corven's case—alias Corven v. Pym.—S. P. Cro. J. 366. Hill. 12 Jac. in the case of Frances v. Ley.——But where a libel was for a seat in a church, the defendant surmised in C. B. *that he and his ancestors have used time out of mind*, &c. *to have an isle with a seat* in the said church *for himself and family*, and thereupon prayed a prohibition; but because *it did appear upon examination of the party himself, that the* * *parish* have *always used to repair the said isle and seat*, the court would not grant a prohibition; for that proves, that his ancestors were not the founders of the said isle and seat. *Also another* man hath always *used to sit with him* in the said seat, which also proves, that it does not belong to him alone. Godb. 199. pl. 286. Trin. 10 Jac. C. B. Garven v. Pym.——But otherwise for a seat in an isle, a man may prescribe; because it may be presumed, that his ancestor, or he whose estate he has in the house and land in the parish, had built the isle. Mo. 878. pl. 1232. Mich. 10 Jac. Pym v. Gorwin.——12 Rep. 104. CORVEN's case accordingly, and that it shall be intended that such building the isle was done with the assent of the parson, patron, and ordinary to the intent to have it only to himself.——S. C. 3 Inst. 202. cap. 97.——2 Watf. Comp. Inc. 8vo. 711. cap. 39. cites S. C.

* If the isle has been used to be repaired at the charge of all the parish in common, the ordinary may there from time to time appoint whom he pleases to sit there, notwithstanding any usage to the contrary. Resolved per Cur. Cro. Jac. 366. Hill. 12 Jac. in the star-chamber. Frances v. Ley.

[571]

[3. If a man *prescribes*, that he and his ancestors, and all those whose estates they have in a certain messuage, have used *to sit in a certain seat in navi ecclesiæ* time whereof memory, &c. in consideration that he, &c. have used time whereof memory, &c. *to repair the said seat.* If the ordinary removes him from this seat, a prohibition lies; for the ordinary has not any power to dispose of it; for it is a good prescription; and by intendment there may be a good consideration for the commencement of this prescription, though the place where the seat is be the franktenement of the parson. Tr. 12 Ja. B. CROSSE's case resolved per Curiam, and a prohibition granted to the Bishop of Exeter; for Crosse was a parishioner of his parish of Silverton. M. 13 Ja. B. between LAUGH and HUSSEY. Resolved, and prohibition granted and tried by verdict. M. 13 Ja. B. between † BOOTHBY and DAY or BAILY. Hobart's Reports, 95. Same case.]

S. C. by name of Hussey v. Leyton. 12 Rep. 105. Pasch. 10 Jac. in the star-chamber. Resolved accordingly. For if he hath it by prescription, he has as good a right in the seat as he has in his house; but observe, he *must claim it as belonging to his house*, and not otherwise; for properly it *belongs to the manor-house*, if any manor be, and *not to the manor*, which includes other tenants, farmers, and inhabitants.

One

One cannot preſcribe for a ſeat *in the body of the church*, but thoſe are diſpoſable by the parſon and churchwardens; but for a ſeat in *an iſle* he may. Mo. 878. Lym v. Corwin. —— In a prohibition the queſtion was, whether a *preſcription to an iſle* in a church *which he and all thoſe, &c. uſed to repair as belonging to a manor where he had no dwelling houſe, but only land*, were good? The Court inclined that it was not good, but ordered the prohibition to go, and defendant to plead, that it came judicially before them. 2 Mod. 283. Hill. 29 & 30 Car. 2. C. B. Shambrook v. Fettiplace.

A *preſcription* for a ſeat in the church *ratione meſſuagii* where he inhabits, is a temporal thing, and a prohibition was granted. Noy, 120. Anon.

A libel was in the biſhop's court of Exeter for a ſeat, which the *churchwardens* had *aſſigned to M.* in whoſe right the plaintiff claimed to ſit there; the defendants there *ſuggeſted* now for a prohibition *a preſcription by a que eſtate* for the ſeat, as being an ancient ſeat *and belonging to their tenement in W. and that they and all thoſe, &c. had uſed to repair it*. It was doubted, whether this preſcription *in navi eccleſiæ* was good, but it were good in an iſle. The Court inclined that ſuch preſcription in navi eccleſiæ may be *for ſpecial cauſe, as* for *repairing*, but they would not grant a prohibition. 5 Mod. 439. Paſch. 11 W. 3. Crook v. Sampſon.

Where a man has a right by preſcription to a ſeat in the church, he may ſue in the ſpiritual court *for quieting his poſſeſſion*, and may admit his preſcription to be tried there as a defendant does a *modus or a penſion* by preſcription. 2 Salk. 551. Jacob v. Dallow.—5 Mod. 436. Paſch. 11 W. 3. S. C.

† Hob. 69. pl. 79. S. C.

12 Rep. 105. Corven's caſe. S.P.— So of an iſle in the church, and conſtant ſitting and burying there, without uſing to repair it, *gains no peculiar property*. Cro. J. 366. Frances v. Ley. —— S. P. Noy, 104. Day v. Bedingfield.

[4. *But* if a man preſcribes to have a ſeat in navi eccleſiæ *generally, without* the ſaid *conſideration of repairing* the ſeat, yet the ordinary may diſplace him. M. 11 Ja. B. R. per Curiam. M. 13 Ja. B. between Boothby and Day or Baily. Hobart's Reports, 95. S. C. Per Curiam.]

Reparation of a ſeat ought to be given *in evidence*, though it be not mentioned in the declaration. Sid. 203. Paſch. 16 Car. 2. B. R. in caſe of Buxton v. Bateman.

[5. The ordinary hath nothing to do with the ſeats *in the chapels annexed to the houſes of laymen*, as of nobles, &c. Tr. Ja. 12. B. agreed.]

See pl. 8.

[6. If a *layman*, by the diſſolution of monaſteries, *has a monaſtery, in which is a church*, parcel thereof, and he *ſuffers the pariſhioners* by a long time to come to it to hear divine ſervice, and *to uſe it as their pariſh church*; this ſhall give juriſdiction to the ordinary to order the ſeats, becauſe now in fact *this is a pariſh church*, though before it was not ſubject to the ordinary. Tr. 12 Ja. B. Buzzard's caſe held.]

* [572] Poph. 140. S. C. by the name of Brabin v. Tradum, and a prohibition was granted, becauſe this grant to one and his heirs is not good; for the ſeat ‡ Fol. 289. belongs not to the perſon but to the houſe; and ſhould it be otherwiſe, then when the perſon leaves this place and dwells in another he might retain the ſeat, which is not reaſonable.

[7. If there be a *cuſtom* in a pariſh, that 12 of the pariſhioners may elect churchwardens, the which *churchwardens* have power by the cuſtom to *repair the ancient ſeats*, to *erect new in navi eccleſiæ, and appoint what perſons ſhall ſit in them*. And the churchwardens ſo elected *erect a new ſeat in navi eccleſiæ, and appoint a certain man to ſit there*, and after the ordinary decrees, that another ſhall have *the ſeat, a prohibition lies; for the cuſtom has fixed the power of the diſpoſing of the ſeats to the churchwardens. P. 16 Ja. B. R. between Brabin and Tredennick, for a ſeat in the church of Breock in Cornwall. Reſolved, and prohibition granted. But it was alſo partly granted becauſe the ſentence of the ordinary was, that Tredenham ſhould have the ſeat ‡ *to him and his heirs*, and that none ſhould diſturb him under the pain of the greater excommunication, which is unreaſonable; and by this ſentence he and his heirs ſhall have it, though they be not inhabitants within the pariſh.]

It

It was ſuggeſted for a prohibition, that *time out of mind the pariſhioners, at their own charge, had repaired all the ſeats in the church*, and that by reaſon thereof they had been time out of mind diſpoſed of by the churchwardens, but that the biſhop had now taken upon him the diſpoſal of the ſeats; and for the plaintiff was cited this caſe of Tredennick. Jones J. ſaid, that de communi jure the ordinary has the diſpoſal of the ſeats, and de communi jure the pariſhioners ought to repair them, and ſo nothing appears here to ouſt the ordinary of his juriſdiction; for they have only ſaid, that the pariſhioners have repaired at the charge of the pariſh, which is no more than what is their duty to do, and for which they have the eaſement of ſitting in them, though by the diſpoſition of the ordinary; whereupon the prohibition was denied by the whole Court. 2 Lev. 241. Hill. 30 & 31 Car. 2. B. R. Greaterchy v. Beardſley. ——— Raym. 246. S. P. in the ſame term in C. B. LANGLY v. CHUTE, where the caſe was, as appeared by the libel, that *one* B. being *ſeiſed of land* in Stretham, in 1611. *built a houſe* upon it, *and a pew* in the church, *at his own coſt*, in 1637, *for himſelf and his family*, and afterwards ſold houſe and pew to Chute the defendant and his heirs; and *the ordinary by ſentence in the eccleſiaſtical court annexed the pew to the ſaid houſe*. Notwithſtanding which the churchwardens would have placed the plaintiff in the ſaid ſeat. But by the Ch. J. & 2 J. a prohibition was denied; and the Ch. J. ſaid, that if ſuch ſuggeſtion ſhould hold, the ordinary's juriſdiction would be totally ſet aſide; but Atkins J. held that a prohibition lay, becauſe this caſe did not differ from the caſe of Brabin. And North Ch. J. obſerved, that in the principal caſe the defendant claimed only for himſelf and family, whereas *had he claimed for him and his heirs*, he ſeems to admit, that *a prohibition would lie*.

A prohibition was prayed to the ſpiritual court, where the *pariſhioners preſcribed to diſpoſe of the pews excluſive of the ordinary*. But per Cur. that cannot be; and the ordinary's not acting might be, becauſe there was no occaſion for his intermeddling; but that cannot veſt the right in the churchwardens, who are only a corporation capable of goods, but not of inheritance; ſed adjornatur. 1 Salk. 167. Hill. 3 Annæ. B. R. Preſgrave v. Churchwardens of Shrewſbury.

[8. If a *layman*, by the diſſolution of monaſteries, *has a monaſtery, in which is a church, parcel of it*, and he *ſuffers the pariſhioners about 60 years* to come there and *hear divine ſervice, and* he *himſelf has uſed* by all that time *to have the placing of men there in the ſeats*, the ordinary cannot diſplace them, becauſe the ſaid patron had uſed by all the time that it had been uſed for the pariſh church, to have the placing in the ſeats. Tr. 12 Ja. B. BUZARD's caſe.] Watſ. Comp. Inc. 8vo. 713. cap. 39. cites S. C.

9. A *foreigner*, though occupying lands in the pariſh, ſhall not be *taxed for reparations* of ſeats in the church, becauſe he has no benefit by them in particular. Per omnes. 2 Brownl. 10. in the caſe of Glover v. Wendham. See pl. 6.

10. When *preſcription* for a ſeat in a church, and *priority there* alſo is claimed by preſcription, it is *triable in* this court *(of B. R.) by an action on the caſe*, and not in the ſpiritual court. Per Cur. agreed. Lat. 116. Paſch. 2 Car. in Hutton's caſe. Palm. 424. S. R. Carleton v. Hutton.—Noy, 78. S. C.—All controverſies concerning ſeats in a church are determinable before the ordinary, except where one *claims* a ſeat *by preſcription*. Per Cur. 12 Mod. 401. Paſch. 12 W. 3. B. R. Anon.

11. It was ſuggeſted for a prohibition, that within ſuch a pariſh there is ſuch a *cuſtom that the inhabitants of ſuch* and ſuch *ancient tenements have ſat in the firſt ſeat of ſuch an iſle*, that the biſhop removed them, and gave licence to others to ſit there; and becauſe they went to *try the cuſtom* in the ſpiritual court, he prayed prohibition, inaſmuch as it is an idle cuſtom; and that where courts held plea for an idle cuſtom, they ſhould be prohibited, and cited the caſe of TOPSALL and FERRERS. Hob. 175. But it was denied; and Pemberton Ch. J. ſaid, that here beſides cuſtom, the Court has *conuſance of the matter*, placing and diſplacing being in the ordinary, ſo that if the cuſtom were out of the caſe, yet they might proceed; but in TOPSALL's caſe they proceeded only upon the cuſtom, which being a *vain unreaſonable* one, they were prohibited. Skin. 7. Mich. 33 Car. 2. B. R. Anon. [573]

12. The

12. The plaintiff brought an action of the caſe, and declared, that he was *ſeiſed of* 3 ſeats in ſuch a part of the church, belonging to an ancient meſſuage, and that the defendant diſturbed him, &c. Exception was taken, 1ſt, For that he *ſhews not, that he hath repaired* theſe ſeats; this was held a good exception, and that he ought as well to ſhew it in an action ſur caſe as upon a prohibition. 2dly, For that he preſcribes that he was ſeiſed of 3 ſeats *appertaining to an houſe*, whereas he ought to ſay, of an *houſe, to which the ſeats were appertaining*. And it was ſaid in this caſe, that the freehold of a ſeat may be in one, though all the church beſides be in the parſon; becauſe churches are of lay foundation, and the patron might at firſt except it; but this ſhall *not be intended unleſs ſpecially ſhewn*. Skin. 34. Hill 33 & 34 Car. 2. B. R. Freem v. Dane.

13. Bill *to quiet one in the poſſeſſion of an iſle in the church*, the plaintiff having obtained a decree before the ordinary, was diſmiſſed with coſts; for this Court executes not their own decrees by a bill without examining the juſtice thereof; but we cannot examine if the biſhop has done right, nor will ſuch a decree bind his ſucceſſors. 2 Vern. 226. Paſch. 1691. Baker v. Child.

14. The *churchwardens* of Ludlow were libelled againſt for *pulling down ſeats* between ſuch and ſuch iſles of the church, and anciently belonging to the Lord Preſident of Wales, &c. *without leave of the biſhop, and for erecting new ſeats* there, *and placing people therein after admonition*, &c. The plaintiffs *ſuggeſt* for a prohibition the ſtatute of magna charta, that no man ſhall be diſſeiſed of his freehold, &c. that all cuſtoms and preſcriptions ought to be tried at common law, *that* in the pariſh of Ludlow *the churchwardens, by the conſent of the pariſhioners, &c. have uſed* to diſpoſe of ſeats in the church, &c. that they had diſpoſed of certain ſeats to the bailiffs of Ludlow, which being ruinous, the plaintiffs, by the command of the ſaid bailiffs, pulled down, and erected new ſeats in the place of the old ones, notwithſtanding which, the defendant cited them into the ſpiritual court, &c. A prohibition was granted. 2 Lutw. 1032 & 1037. Mich. 4 W. & M. Colebatch v. Baldwyn.

15. Preſcription for a pew in a church by reaſon of his houſe; affidavits were made, that he was *not*, nor is an *inhabitant* there; this is not ſufficient, for *poſſeſſion only* is enough without living there. 12 Mod. 40. Paſch. 5 W. & M. B. R. Anon.

16. It was ſaid that anciently there were no pews in churches, but only forms, and that it had been a *good preſcription* to ſay that time out of mind the *corporation did repair* ſuch an iſle in the church, ratione cujus the *mayor and aldermen ſat there*; for though the right be in the whole body, the enjoyment may be and enure to a ſelect number. 6 Mod. 231. Mich. 3 Ann. B. R. in caſe of Jacob v. Dallow.

17. A libel was *for 2 ſeats in the pariſh-church* of King's Norton; the *defendant pleaded* that ſhe was in *poſſeſſion of 2 ancient meſſuages to which* thoſe ſeats belonged; which plea being objected to by that Court, the plaintiff now moved for a prohibition, which was oppoſed, for that the *church was new built* by the pariſhioners; and for

for that reaſon there could be no preſcription to the ſeats, but that they were in the gift of the biſhop; ſo a conſultation was prayed. The plea tendered by the defendant was ſuch as could not be tried in the ſpiritual court, becauſe they cannot hold plea of the inheritance of the ſeats, nor of any thing which concerns the freehold; ſo the prohibition muſt ſtand. 8 Mod. 338. Mich. 11 Geo. 1725. Swetnam v. Archer.

(H) Juriſdiction. *Reparation.* [*Of the Church.*] [574]

[1. THE eccleſiaſtical court has conuſance of the reparation navis eccleſiæ. Co. 5. JEFFERIES caſe, 67. Reſolved.]

[2. If a man continues, and *inhabits in one pariſh, and has land in another pariſh which he himſelf occupies there*, he ſhall be charged for this land to the reparation of the church of the pariſh in which the land lies; becauſe he may come there when he will, and he is to be charged in reſpect of the land. Co. 5. JEFFREY, 67. Reſolved. Tr. 11 Ja. B. ANDREWS's caſe; per Curiam. Contra M. 40, 41 El. B. R. per Curiam.]

A libel was *for not paying to the repairs of the church, and for books and veſtments*, within which pariſh he had *lands in his hands, but was not an inhabitant, nor had any houſe therein.* And this being ſuggeſted for a prohibition, Popham was at firſt of opinion that it was not good, becauſe ſuch as do not inhabit within the pariſh have no benefit of the divine ſervice there. But upon ſhewing the precedent of this caſe of Jeffries v. Foſter, and to the opinion of which caſe all the juſtices here agreed, Popham changed his opinion. Cro. E. 659. Paſch. 41 Eliz. B. R. Paget v. Crompton.——S. P. reſolved as to the having lands in a vill, and not inhabiting there. Cro. E. 843. pl. 24. Trin. 43 Eliz. C. B. Stephenſon v. Caſe.——*But* in a prohibition in B. R. it was held, that no man ſhould be charged for his land to contribute to the *church reckonings*, if he doth *not dwell in the ſame pariſh*, or unleſs he conſents thereto. Mo. 554. pl. 749. Penner v. Crompton.

But Paſch. 8 Jac. it was reſolved by the whole Court, that for and towards the reparation of a church, the *land of all, as well of foreigners there inhabiting, as of all others*, is liable thereunto; and this is ſo by the general cuſtom of the place, and this is *to be raiſed by a rate impoſed according to the value of the land*, and that in the nature of a fifteenth; and this is not merely in the realty. And by Williams and Yelverton Juſtices, and Fleming Ch. J. it is not the land but *the perſon of him who occupieth the land* is to be charged. Per Yelverton J. a man is chargeable for reparations of a church by reaſon of the land, and for the ornaments in the church by reaſon of his coming to church. And per Williams J. and Fleming Ch. J. if the party have land there, he is chargeable for both, whether he comes to church or not; for that he may come to church if he pleaſe. 1 Bulſt. 20. in an anonymous caſe.——S. P. 2 Roll. Rep. 262. Mich. 20 Jac. in Wilmore's caſe.

[3. But if an *inhabitant* of a pariſh *leaſes his land which he has in another pariſh*, reſerving a rent, he ſhall not be charged where the land is in reſpect of the *rent*; becauſe there is a pariſhioner and inhabitant who may be charged. Co. 5. JEFFREY, 67. b. Reſolved. M. 5 Ja. B.]

S. C. and P. cited and agreed by the Juſtices, and thereupon Popham Ch. J. changed his former opinion, in the caſe of Paget v. Crompton. Cro. E. 659.——When there is a farmer of land, he ſhall not be charged alone; for there is no reaſon that a poor huſbandman that pays rent for his land, and perhaps to the utmoſt value, ſhall build churches; but as it may be unknown to the pariſhioner and churchwardens who has the fee in reverſion, they may for that reaſon impoſe all the tax upon the farmer, and he by way of anſwer may ſay in the ſpiritual court that he is farmer; and thereupon the tax ſhall be divided between him and his landlord, according to the rate that his land is of greater value than the rent, and upon the landlord according to the quantity of the rent, quod non fuit dedictum. Quære; for in JEFFRIE'S CASE, 5 Rep. it is reſolved, that the farmer only is chargeable, and that conſultation was granted, but not for this reaſon, but becauſe the reverſioner had pleaded an inſufficient plea in the ſpiritual court, viz. that he was not an inhabitant, &c. which was not a good plea, and alſo for the *great delay which he had uſed*, having brought two appeals, and after a prohibition, *and ſo had put the pariſh to 60 l. expence for the recovery of 6 l.* and for this reaſon principally, and *not upon the matter in law, was the conſultation awarded*; for he had forceaſed his time. 2 Roll. Rep. 270. Hill. 20 Jac. B. R. the churchwardens of . . . .——In ſuch caſe the tenant muſt be charged, and

not the owner, and the ſuggeſting that the lands were in the occupation of the tenant, and that himſelf did not inhabit there, is a good ſuggeſtion for a prohibition. 4 Mod. 148. Trin. 4 W. & M. B. R. Anon.

[4. A man cannot be charged, in the pariſh where he inhabits, *for land which he has in another pariſh*, to the reparation of the church; becauſe then he may be twice charged; for he may be charged for it in the pariſh where the land lies. P. 16 Ja. B. R. Sir H. BUTLER againſt Reſolved, and prohibition granted. Co. 5. JEFFREY, 67.]

[575] S.P. 4 Mod. 148. Trin. 4 W. & M. B. R. in an anonymous caſe.

[5. If a *petit chapman takes a ſtanding for a rent* in the waſts of manor within the market for 2 or 3 hours every *market-day, to ſell his commodities*, the market being held there one day every week, but he *inhabits in another pariſh*, he cannot be rated to the reparation of the church for this ſtanding. M. 20 Ja. B. R. between HOLLYNES and the churchwardens of KETTERING in Northamptonſhire; reſolved, and prohibition granted accordingly.]

The *miſ-rating* of lands for reparations, is no cauſe of prohibition. 2 Roll. R. 463.—*But quære* upon a *cuſtom* in the pariſh, *that the pariſhioners ought to be rated according to the value of their ſheep-walks, and not of their farms or houſes.* 2 Roll. R. 463.

[6. If a citizen of London *erects a houſe* in the pariſh of A. *to dwell there in the time of the ſickneſs* in London, and has not any land in the pariſh, and after he *is aſſeſſed* 20*s.* for the reparation of the church, *where others who have* 100 *acres of land* in the ſame pariſh *pay but* 6*d.* yet no prohibition ſhall be granted upon ſuit for the 20*s.* in court chriſtian, becauſe they have juriſdiction of the thing; and therefore may order it according to their law. M. 5 Ja. B. Sir ROBERT LEE's caſe, per Curiam.]

A libel was againſt the inhabitants of B. a vill in the pariſh of A. *for the repairs of the parochial church.* B. *ſuggeſted that they had in B. a chapel parochial,*

[7. If there be a *chapel of eaſe* in a pariſh, *and ſome part of the pariſh have uſed* time whereof memory, &c. *alone, without others* of the pariſhioners, *to repair the chapel* of eaſe, *and there to hear ſervice, and marry, and do all other things, but* only they *bury at the mother church*, yet they ſhall not be diſcharged of the reparation of the mother church, but ought to contribute to it; for the chapel was ordained only for their eaſe. M. 13 Ja. B. between the Wardens of ASHTON and the inhabitants of CASTLE BROMAGE. Hobart's Reports, 91.]

and parochial rites, and that they *repair their own chapel, and* that *ratione inde time out of mind they have been diſcharged of the repair of the parochial church of A.* The Court granted a prohibition, and ordered the plaintiffs to declare, who declared *that they had* in B. a chapel parochial or church of B. within the pariſh of A. where time out of mind have been a body of a church, chancel, *bells, and all other parochial trophies*, and *divine ſervice and ſacraments*, and a *diſtinct perambulation* of B. and A. ſeverally. And that the inhabitants of B. *never went to the church of A. nor have they any ſeats there*, and that they have diſtinct churchwardens; and *make no other uſe of the church or church-yard of B. but for burial only*, and that time out of mind they have repaired their parochial chapel of B. and the inhabitants of A. have been exempted from that charge, and ratione inde the inhabitants of B. have time out of mind been diſcharged from repairing the church of A. and yet have the defendants libelled againſt them to repair it, &c. The defendants demurred; it was inſiſted for the plaintiff, 1ſt. That a preſcription generally, without ſhewing any cauſe to exempt them from repair of the pariſh church, is not good; for of common right every pariſhioner is liable to it. 2dly, As to what is ſaid, that they repair their own parochial chapel, that cannot be a ſufficient cauſe, becauſe it is for their own eaſe; and therefore cannot diſcharge them from what they are liable to of common right. 3dly, If there is any ſuch cuſtom, it might be pleaded in the ſpiritual court; and this by the expreſs words of the ſtatute circumſpecte agatis, viz. de eccleſia diſcooperta vel cœmiterio non clauſo non jacet prohibitio. It was admitted on the other ſide, that a general preſcription to be diſcharged from repairing, &c. is not good; but here is a good cauſe ſhewed, (viz.) want of ſeats in the parochial church, and not going thither, unleſs to bury; and this might have a reaſonable commencement, as by an agreement upon the multiplying the houſes in the pariſh,

pariſh, and its growing more populous; beſides, here is a cuſtom alleged; and though the repairs of churches is expreſsly within the ſtatute circumſpecte agatis, yet when a cuſtom is in queſtion, it is a temporal matter, and muſt be tried in the temporal courts, becauſe their law and the common law differ in the eſſence of cuſtoms: and the Court was of this opinion, ſo adjudged that prohibition lies. And the Court adviſed the defendant to take iſſue upon the cuſtom. 2 Lev. 186. Hill. 28 & 29 Car. 2. B. R. Wiſe v. Creeke.

[8. *So* in the ſaid caſe, if the inhabitants, who uſe to repair the chapel, *preſcribe that they* time whereof memory, &c. *have uſed to repair the chapel*, and *ratione inde have been diſcharged of the reparation of the mother church*, yet this ſhall not diſcharge them of the reparation of the mother church; becauſe it is not any direct preſcription to be diſcharged, but it is *ratione inde*; ſcilicet, of the reparation of the chapel. M. 13 Ja. B. in the ſaid caſe of ASHTON.] Fol. 290. Libel was *for repairs of the church and bells.* It was *ſuggeſted* for a prohibition, *that they are a parochial chapel in another pariſh, and that the inhabitants of the chapelry have time out of mind had a parochial chapel, and divine ſervice and ſacraments, &c. and have uſed to be exempted* from the repair of the parochial church, bells, &c. *in conſideration that they have been charged to the repair of their own chapel*, and that they have repaired the ſame, &c. And the prohibition was granted. 2 Lev. 102. Paſch. 26 Car. 2. B. R. Brown v. Palfry.——3 Keb. 286. 325. S. C.——By reaſon of repairing a chapel of eaſe, that he had been time out of mind exempted from contributing towards the repairs of the church, was held a good preſcription. Freem. Rep. 468. pl. 644. Trin. 1678. Wiſe v. Green.

A prohibition was moved for. The *libel* was *for rates towards the repair of a church*; it was *ſuggeſted that they had uſed to repair a chapel a tempore cujus*, &c. but foraſmuch as they had not *alleged it to be a chapel that had all parochial rites*, the prohibition was denied; for if but *one is omitted* (as burial) no prohibition ſhall go, and therefore they were adviſed to amend the ſuggeſtion. Comb. 132. Trin. 1 W. & M. in B. R. Huſley v. Caſſock.

*[576]

[9. If the *chapel be* 3 *miles diſtant from the mother church*, and the *inhabitants who uſed to come* to the chapel have *uſed always to repair the chapel, and marry and bury there, and never within* 60 *years were charged to repair the mother church*, yet this is not any cauſe to have prohibition, but they ought to *ſhew* in the ſpiritual court *their exemption*, if they have any, upon the endowment. Hill. 8 Car. B. R. per Curiam, prohibition denied, it being moved by Mr. South.]

[10. If a man be ſued in the ſpiritual court for reparation of the church, no prohibition ſhall be granted *upon a ſurmiſe that other perſons have land within the pariſh, who ought to be charged* with the reparation of the church as well as himſelf, and are not charged with it; for if this be true, it is a good plea there, and if they do not allow it he ought to appeal. Tr. 9 Car. B. R. between Per Curiam, and prohibition denied accordingly.] See (K) pl. 3. contra.

[11. If the *men inhabiting in a chapelry preſcribe to be diſcharged* time whereof memory *of the reparation of the mother church*, and they are ſued for reparation of the mother church, a prohibition *lies upon this ſurmiſe.* Hobart's Reports, 92.] See pl. 7 and 8. in the notes.

12. A libel was for a rate *for repairing the church.* The defendant *ſuggeſted*, 1ſt, *That his lands were over-valued*, viz. 100l per annum when they were worth but 60l. 2dly, That there was a cuſtom in the pariſh *that they ought* not *to be rated* after the value of their houſes and lands, but *only according to* the value of *their ſheep*-walks. As to the firſt, all the Court except Whitlock reſolved, that the rates ought to be according to the value of their lands; and therefore the valuation thereof properly belongs to them-

themſelves; and the church being the houſe of God, a cuſtom in prejudice of the repairs thereof is void, for of common right houſes and all lands are chargeable to it. And the Court ordered him to ſuggeſt the cuſtom, and omit the value, and then they would conſider whether a prohibition ſhould go. 2 Roll. R. 463. Mich. 22 Jac. B. R. Holland v. Kirton.

13. It was ſuggeſted for a prohibition, that there was a cuſtom in the pariſh that the pariſhioners ſhould be *rated* towards repair of the church, ſo that ſuch tax be *in proportion to the tax pro domino rege;* and that the tax there for his lands to the king was *but* 2*s.* and yet he was rated to the church 5*s.* Per Cur. this is a ſpiritual matter, and ought to be tried in the ſpiritual court. And ſo a prohibition denied; but if any thing is offered in proof, which is allowable by our law, and they will not allow of it, in ſuch caſe a prohibition ſhall go. Beſides, it is *not ſhewn what ſort of tax this tax pro domino rege*, which he mentions, *is;* but it is utterly uncertain. And afterwards a conſultation was awarded by the whole Court. Lat. 217. Paſch. 3 Car. Longmore v. Churchyard.

* [577] S. P. and ſeems to be S. C. Mod. 236. pl. 2. Anon. And there it is ſaid, that in caſe of a church's being ſo much out of repair, the biſhop's court muſt proceed againſt the whole pariſh to have it repaired; and that if a church be down, and the *pariſh increaſed, ſo that of neceſſity they muſt have a larger church*, the major part of the pariſh may raiſe a tax for the enlarging it, as well as the repairing it, and that the conſent of every pariſhioner is not neceſſary.

14. In a prohibition it was the opinion of the whole Court, that if a *church* be *ſo much out of repair, that it is neceſſary to pull it down*, and that it cannot be otherwiſe repaired, then, *upon a general warning* given to the pariſhioners, *the major part* of the pariſhioners then meeting according to ſuch notice *may make a rate for* pulling down of the church, and *building of it* upon the old foundation, and for making of vaults where neceſſary (as they were in this church, by reaſon of the *ſpringing water) and though the rate be higher than the money paid for doing all this, yet it is good, and the churchwardens are chargeable for the overplus, they not being able to compute to a ſhilling. And that if any of the pariſhioners refuſe to pay their proportion according to the rate, they may be libelled againſt in the ſpiritual court; and if the *libel alleges the rate to be pro reparatione eccleſiæ generally*, though in ſtrictneſs *eccleſia* contains both the body and chancel of the church, yet by the opinion both of the Court of C. B. and of the Exchequer, it *ſhall be intended* that the rate was only for *the body of the church;* but in this caſe it was made appear clearly, that the rate was only for the body, and that the miniſter was at the charge of the chancel. And both Courts agreed, that when a prohibition is moved and deſired, on purpoſe to ſtop ſo good a work as the building a church, the *Court will not compel the parties to take iſſue upon the ſuggeſtion*, when upon examination they find it to be falſe, and therefore will not grant a prohibition; for if the rate be unduly impoſed, the party grieved hath a remedy in the ſpiritual court, or may appeal if there be a ſentence againſt him. Afterwards the Court of B. R. was moved for a prohibition in this caſe, and it was denied. So that in this caſe there was the opinion of all the 3 courts. 2 Mod. 222, 223. Paſch. 29 Car. 2. in Scacc. St. Mary Magdalen Bermondſey church in Southwark.

15. A *libel* was in the eccleſiaſtical court of Hereford *againſt the parſon impropriate, to repair the chancel* of Bradwarden. Upon a *ſuggeſtion, that one J. S. had a ſeat there time out of mind* for him and

and his family, and privilege of burial there, *and that he time out of mind had uſed to repair* the chancel, a prohibition was granted, becauſe this is a preſcription triable at common law. Freem. Rep. 300. pl. 360. Trin. 1681. C. B. Anon.

16. The plaintiff being *ſued* in the eccleſiaſtical court *for repairs of the church ſuggeſted, that he had built an iſle, and repaired it at his own charges*, and moved for a prohibition. Cur. unleſs it be ſuggeſted, that he ſits in the iſle, and *hath no benefit of the navis eccleſiæ*, there is no cauſe for a prohibition, for a man may build an iſle for his conveniency. Freem. Rep. 301. pl. 363. Trin. 1681. C. B. Weeks v. Oxenden.

17. Prohibition was prayed to the conſiſtory court of London, becauſe ſuit there was againſt the maſter and wardens of the company of ----- for a tax impoſed upon the hall of the ſaid company for the repair of the pariſh church; and it was ſaid that the tax is not impoſed upon them in their natural capacity, but upon the lands of the body politic. Per Cur. a prohibition ſhall not iſſue; for the *land of* the *company* are *chargeable to* the *repairs*, and the ſpiritual court (who has the conuſance of the matter) has no other proceſs than citation, which cannot be executed upon an aggregate corporation, which is not viſible in law; ergo the *citation* of neceſſity *ought to iſſue againſt the officers of the corporation*, to whom it belongs to pay the tax, and allowance may be made to them upon their account. 2 Jo. 187. Hill. 33 & 34 Car. 2. B. R. Thurſfield v. Jones.

18. Libel was, that the *church and chancel* of D. *were out of repair*, and that the *churchwardens made a rate* upon the inhabitants *for the reparation of both*, and that they accordingly had *repaired both, and beautified the ſame with ornaments*. It was *ſuggeſted* for a prohibition, that of common right the chancel ſhould be repaired at the ſole charge of the parſon; and *that rates for repair of a pariſh church ſhould be made by the pariſhioners, or the major part* of them, *and not by the* † *churchwardens alone*. And by Holt Ch. J. by the civil and canon law the parſon is obliged to repair the whole church, and it is ſo in all chriſtian kingdoms but in England; for it is by the peculiar law of this nation, that * the pariſhioners are charged with the repairs of the body of the church; beſides, this is one entire rate as well for repairing the chancel, to which the pariſhioners are not liable, as for repairing the church to which they are liable, ſo as it cannot be diſtinguiſhed how much was aſſeſſed towards the repairs of the one and the other ſeparately; and for theſe reaſons a prohibition was granted generally to the whole ſuit upon this rate, though it was very much inſiſted on the other ſide, that the prohibition might go quoad the rate for repairs of the chancel only. Carth. 360. Mich. 7 W. 3. B. R. Hawkins v. Rous.

* [578] 12 Mod. 83. S.C. by name of Price v. Rouſe.— Salk. 165. S.C. by name of Pierce v. Prouſe.— 5 Mod. 389. Hawkins's caſe, and there the libel ſet forth an ancient cuſtom in the ſaid pariſh, that the adorning the inſide of the chancel had been done by the churchwardens at the charge of the owners and occupiers of houſes within the pariſh by a rate to be made with the conſent of the major part of the pariſhioners having reſpect to the annual value of the houſes, that the chancel wanted reparations and ornaments, and that the churchwardens with conſent, &c. made a rate confirmed by the biſhop, whereby the *defendant was rated 17 l. 1 s. for mills and racks*, within the ſaid pariſh, which was his due proportion according to the yearly value of the houſes there, and that he had not paid the ſame. The defendant denied the cuſtom, which was found for the plaintiff, but for the defendant it was found, that the rate was

was not made by the major part of parishioners. Per Curiam, *without a special custom the parishioners are not to repair the chancel*; the parson is bound to do it of common right; but *where a temporal inheritance is to be charged by a particular custom, the churchwardens must bring the defendants within the custom*, otherwise it is not good; for it is the custom that gives the jurisdiction: now in this case the custom was alleged for owners of houses to repair, and they have rated the defendant as owner of a mill, which cannot be intended a house; for in a præcipe quod reddat, a mill cannot be demanded by the name of domus, but it must be de molendino. Adjornatur.

† Libel was against the parish for not paying a rate made by the churchwardens only, and this being suggested for a prohibition, and that by the law the major part of the parish must join; it was said by Twisden J. that perhaps *no more of the parish would come together*; to which it was said by the counsel for the prohibition, that if that did appear it would be something. Mod. 79. Mich. 22 Car. 2. B. R. Anon. ——S. P. per Cur. Vent. 367. Trin. 35 Car. B. R. Thursfield v. Jones.

The spiritual court may compel the parishioners to repair their parish church if out of repair, and may *excommunicate every one till it be repaired*, and such as are willing to contribute must be absolved till the greater part of them agree to assess a tax, but the Court cannot assess them towards it; per North Ch. J. to which the others agreed, and that the churchwardens cannot; for none but a parliament can impose a tax; but the greater part of the parish may make a by-law, and to this purpose they are a corporation; *but if a tax be illegally imposed*, as by a † *commission from the bishop* to the parson and some of the parishioners to assess a tax, yet if it *be assented to, and confirmed by the major part of the parishioners*, they in the spiritual court may excommunicate such as refuse to pay it. Mod. 104. Hill. 26 & 27 Car. 2. C. B. pl. 25. Rogers v. Davenant.——S. P. And ‡ a prohibition was granted to a libel for a tax made by some parishioners by virtue of a commission from Dr. Exton the chancellor of London, because that way of taxation by commissioners is against law; and though the spiritual court may compel the parishioners to make a tax, yet they cannot constitute commissioners to make one. Freem. Rep. 286. pl. 330. Hill. 1674 Anon. but seems to be S. C.—S. P. 2 Mod. 223. Pasch. 29 Car. 2. in the Exchequer by North Ch. J. said it had been lately ruled so in C. B.——S. P. by Holt Ch. J. 12 Mod. 328. Mich. 12 W. 3. and that the spiritual court may excommunicate for not meeting and making a rate; and that though one, who sues in the spiritual court, *omits in his libel any matter which would make against him*, as was done in the principal case there, viz. that the rate was made by the commissioners of the ecclesiastical court, yet *they of the other side may suggest it*.

‖ Noy, 131. Heale v. the Churchwardens of Hobleton. § This is misprinted, and should be 136. and is Chambers's case. It was agreed in both the cases, that such rate is not good to bind the inheritance; but it was said in the first case that it is good by way of direction how and how much shall be levied.

19. *Libel* in the spiritual court *for not paying a parish rate for repairs* of the church, and suggested for a prohibition, that all parish rates were to be by *majority of parishioners*; and that every rate, after it is collected, becomes void; and that this rate was not by a majority, &c. and that the suit was to pay this in pursuance of an *old rate collected many years before*. Per Holt, here the suggestion recites an ancient rate, which they say was to be a standing order for all times to come; and that they have confirmed that rate, and that the libel is for want of a new payment according to it, and cited Noy, ‖ 131. § 126. in point, for a prohibition in this case, and said, that all that the spiritual court can do, is to *make an order* that the church be repaired, *but not to assess a quantum*. A prohibition was granted. 12 Mod. 327, 328. Mich. 11 W. 3. Blank v. Newcomb.

[579]

(I) Reparation. [*Chapel of Ease.*]

See (H) pl. 7, 8. Noy, 41. Churchwarden of Denford's case, and reports, that by the better opinion of the Court the prescrip-

[1. IF there be a parochial church and a chapel of ease in the same parish, and the *chapel of ease had time whereof memory all spiritual rites except* burial, and this has used to be done in the church parochial, *and because they who have used to go to the chapel of ease, have used* time out of mind *to repair a part of the wall of the church-yard of the parochial church*, and in consideration thereof, and because those who are of the chapel of ease have *used time out of mind to repair* the chapel of ease at their own costs, they have been time out of mind *discharged of the reparation of the parochial church*.

This

This is a good preſcription, and there if they are ſued in the ſpiritual court to repair the parochial church, a prohibition lies. Tr. 15 Ja. B. R. between the inhabitants of the pariſh of STRATFORD, and the inhabitants of the chapel of eaſe of LUDDINGTON, prohibition granted, and then was ſhewn a precedent. P. 44 El. Rot. 417. between MARSHALL AND ASHLEY. Prohibition granted for the chapel called DEUSFORD againſt the pariſh called RINGSTEAD.]

tion was not good; for the eaſe of ſame ſhall not be a diſeaſe to the reſt of the pariſhioners; for Popham ſaid, that the *aſſent is not requiſite to build a chapel of eaſe*; and then the ordinary and the pariſh cannot charge the pariſhioners with greater charge, yet now it was ordered that a prohibition be granted, and that defendants, if they pleaſe, might demur upon it. And cites 5 Jac. B. R. a Derbyſhire caſe, where a prohibition in ſuch caſes was denied.

Though a man, &c. time out of mind has repaired a chapel, yet if it be not a *predial chapel*, having chapel-wardens belonging to it, 'tis no reaſon to exempt him from a church-rate to repair; and if he repairs *leſs than his proportion*, it may be a queſtion, if it ought to diſcharge him. Per Holt, Farr. 122. Hill. 1 Ann. B. R. Anon.

[2. If a *chapel of eaſe has uſed* a tempore, &c. *to have all ſacraments except burial, and the inhabitants* within the chapel, alſo always have *repaired the chapel*, and *preſcribe in conſideration of 3s. and 4d. per annum, paid for reparation of the mother church to be diſcharged* of the reparation of the mother church. If the inhabitants of the chapel are ſued for reparation of the mother church, a prohibition lies upon this modus. P. 11 Car. B. R. between PENNELAND AND TOYE prohibition granted. GOOSEY was the chapel, and STANDFORD the mother church in the county of Berks. Tr. 11 Car. B. R. in the ſame caſe the prohibition confirmed, and ordered to be tried at the next aſſiſes. But Mich. 11 Car. a conſultation was granted in this caſe, becauſe the prohibition was granted *after ſentence in the ſpiritual court that there was not any ſuch cuſtom.*]

3. The inhabitants of a *chapelry within a pariſh* were libelled againſt for *not paying towards repairing the pariſh church*. The caſe as appeared upon the libel was, the inhabitants of this chapelry *had never hitherto contributed, but had always buried in the mother church, till H. 8th's time, when the biſhop conſecrated a burial-place* for them; *in conſideration whereof they agreed to pay towards the repairs of the mother church*. It was held by Holt. Ch. J. that by the common law, the pariſhioners of every pariſh are bound to repair their church; but by the canon law, the parſon is, and ſo it is in foreign countries. In London, the pariſhioners repair both church and chancel, though the freehold is in the parſon, and it is part of his glebe, for which he may bring an ejectment. In the principal caſe, thoſe of a *chapelry may preſcribe to be exempt* from repairing the mother church, *as where it buries or chriſtens within itſelf, and has never contributed* to the mother church; for in that caſe *it ſhall be intended co-eval*, and not a latter erection in eaſe of thoſe of the chapelry; but here it appears that the chapel could be only an erection in eaſe, and favour of them and the chapelry; for they of the chapelry buried at the mother church till H. 8th's time, and then undertook to contribute to the repairs of the mother church. 1 Salk. 164. pl. 2. Ball v. Croſs.

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(K) Juriſdiction. Reparation. *Ornaments.*

[1. IF a man be *rated* for the ornaments of the church *according to his land which he has in the pariſh*, a prohibition lies; becauſe he ought to be rated for them *according to his perſonal* eſtate. M. 20 Ja. B. R.]

S. P. Win. 53. Mich. 20 Jac. Anon. For ſuch taxation for ornaments is perſonal only. 2 Roll. Rep. 262. Mich. 20 Jac. B. R. Wilmore's caſe, and ſeems to be S. C.—S. P. by the Ch. J. to which Chamberlayne J. agreed, and none denied it. Ibid. 270. Hill. 20 Jac. B. R. The Churchwardens of . . . . . — See the laſt note to pl. 4.

[2. If a man who is *not an inhabitant* in the pariſh, but has land there, is *rated* for the ornaments of the church *according to the land*, a prohibition lies; for the inhabitants ought to be rated for them. M. 20 Ja. B. R. Per Curiam. Reſolved, and prohibition granted, this being moved by Maſter Yelverton, who ſaid that it had been divers times ſo reſolved.]

See (H) pl. 10. contra. But then it muſt be *alleged, that that plea was offered* in the eccleſiaſtical court, becauſe *reparation of churches* is proper for their cognizance. Vent. 308. Paſch. 29 Car. 2. B. R. Anon.

[3. If *all the pariſhioners are not rated* for the reparation of the church, but ſome are and ſome are not, and thoſe who are rated are ſued in the eccleſiaſtical court, a prohibition ſhall be granted. M. 11 Ja. B. R. Per Curiam.]

Poph. 197. S. C.—— The pariſh of B. levied a tax upon all the lands in the pariſh for new *caſting their bells, ſo much for every acre, but* they *excepted* 900 *acres of wood* of the biſhop of London, *pretending they were diſcharged by cuſtom.* A pariſhioner was ſued, and ſentence given againſt him in Paul's, and the ſentence affirmed upon appeal, and now he prays a prohibition. And Serj. Crew ſaid, that this cuſtom was *againſt law*; whereupon Doderidge and the Court ſaid to him, that he ſhould make his ſuggeſtion, and then he ſhould have a prohibition.

[4. If the *major part* of the pariſhioners of a pariſh, where there are 4 bells, *agree that there ſhall be a fifth bell*, and a 5th is made accordingly, *and* they *make a rate for payment* for it; this ſhall *bind the leſſer part* of the pariſhioners, though they do not agree to it; for otherwiſe any obſtinate perſons may hinder any thing intended, and which is fit for the ornament of the church. Mich. 2 Car. B. R. between per Curiam. Prohibition denied, it being moved by Maſter Wilde. This concerns the pariſhioners of BROMSGROVE in Worceſterſhire.]

Bells are only church ornaments, and are a *perſonal charge upon inhabitants*, and not upon thoſe who live elſewhere, though they occupy lands in that pariſh. 3 Mod. 211. Paſch. 4 Jac. 2. B. R. Woodward's caſe.—But 1 Salk. 164. Trin. 1 W. & M. B. R. S. C. by name of Woodward v. Makepeace it was held per Cur. that though he does not perſonally live in the pariſh, yet by having lands in his hands, he is taxable; and whereas it was pretended the bells were but ornaments, it was held, they were *more than mere ornaments*; that they were as *neceſſary as the ſteeple*, which is of no uſe without the bells; and Holt Ch. J. ſaid, if he be an inhabitant as to the church, which is confeſſed, how can he not be an inhabitant as to the ornaments of the church?

5. The churchwardens libelled for a rate made *to repair the church, and for dividing the church houſe (which did not belong to the church) into ſeveral rooms for the uſe of the poor, and for payments of the marſhalſea money, and for making new chimes.* It was ſuggeſted for a prohibition, that the things mentioned in the rate are jumbled together, and ſuch as are not cognizable in the ſpiritual

tual court, and that the chimes are only ornaments; but it was anſwered, that they are not only ornaments, but uſeful and convenient; and a prohibition was denied per tot. Cur. Lutw. 1019. Hill. 36 & 37 Car. 2. C. B. Watkins v. Seyman & Webb.

6. Rate to pay for ornaments in proportion to the yearly value of *racks* and *mills* is not good. 5 Mod. 391. Hill. 9 W. 3. Hawkins's caſe. See (H) 18. Marg.

7. A prohibition for libelling in the ſpiritual court for a pariſh rate for mending and cleanſing the pariſh *organs*, was granted. 12 Mod. 416. Mich. 12 W. 3. B. R. Anon. [581]

8. A rate was made at a veſtry *for building of a gallery*; and for refuſing to pay his part, a pariſhioner was ſued in the ſpiritual court, and thereupon he now prayed a prohibition, becauſe a pariſh could not be taxed for the building a gallery, which is neither uſeful nor ornamental to a church. But this was not much regarded by the Court. 10 Mod. 13. Mich. 9 Ann. B. R. Forte v. Buviere.

(L) *In what Caſes* it ſhall be *granted for a collateral Cauſe.*

[1. IF a ſuit be in the ſpiritual court to *try the bounds of a pariſh*, a prohibition ſhall be granted, for they ſhall not try it. Mich. 14 Ja. B. R. FISHER and CHAMBERLAINE. Reſolved H. 41 El. B. R. between PIPER and BARNABY. Adjudged and prohibition granted. H. 13 Ja. B. R. between * FOSTER and HYDE. Adjudged.] See (E) pl. 1. 3. —— * S.C. Roll. Rep. 332. pl. 39. And a prohibition was granted, becauſe they would try the bounds of a pariſh; and the plaintiff in the prohibition *ſhewed for title, that the parſonage appropriate came to the crown by the ſtatute of diſſolutions, and that queen Mary granted it* to a corporation, who leaſed it to the plaintiff for a certain term, but did *not ſhew the letters patents*, nor the deed of grant from the corporation; and thereupon it was demurred for a conſultation, for this was reſolved 10 Rep. in Dr. LEYFIELD's caſe, not to be good. And Coke Ch. J. ſaid, that they would have the letters patents and the deed ſhewn to them a latere; becauſe for the default of pleading them, a conſultation ſhall not be granted for the ſpiritual court to try the limits of the pariſh. And after they joined iſſue by conſent.

S. the plaintiff ſued in the ſpiritual court *for tithes* againſt the defendant *within the pariſh of C.* The *defendant ſaid, that the tithes are within the pariſh of A.* and the *parſon of A. came in pro intereſſe ſuo* and thereupon they proceeded to *ſentence*, and that was given *againſt S. who now ſued a prohibition*; and the queſtion was, if within ſuch a pariſh or ſuch a pariſh be triable by the law of the land, or by the law of the church? Wray Ch. J. ſaid, it hath been taken, that it is triable by our law. Fenner, the pope has not diſtinguiſhed pariſhes, but has ordained that tithes ſhall be paid within the pariſh. 3 Le. 129. pl. 182. Trin. 28 Eliz. in B. R. Stranſham v. Collington. —— S. C. Cro. Eliz. 228. pl. 17. a prohibition was granted; for the bounds of the pariſh are triable at common law.

The bounds of pariſhes, though coming in queſtion in a ſpiritual matter, ſhall be tried in the temporal court. This is a maxim in which all the books of common law are unanimous, though our provincial conſtitutions expreſsly mention limits parochiarum, among the matters quæ mere ad forum eccleſiaſticum pertinere noſcuntur, and quæ non poſſunt ad ſeculare forum aliquatenus pertinere. 1 Gibſ. Cod. 239.

The reaſon why bounds of pariſhes are triable at common law, is becauſe the preſcription is the ground thereof; per Hale Ch. J. and per tot. Cur. This is of right, and not to be denied where grantable. 3 Keb. 286. Paſch. 26 Car. 2. B. R. in the caſe of Brown and Bard v. Palfry.

But where prohibition was prayed, becauſe the bounds of 2 vills in the pariſh of A. came in queſtion, the prohibition was denied by all the Court; for though the bounds of a pariſh are not triable, *the bounds of a vill* in the ſame pariſh *are triable* in the eccleſiaſtical court. Lev. 78. Mich. 14 Car. 2. C. B. Petler v. Yaleman.

[2. If a *vicar* of a pariſh *libels againſt another to avoid his inſtitution to* the church of *D.* which he ſuppoſes to be a chapel of eaſe apper-

appertaining to his vicarage, and the *defendant ſuggeſts, that D. is a pariſh by itſelf, and not a chapel of eaſe*, a prohibition ſhall be granted; for they ſhall not try the *bounds of the pariſh*. Mich. 14 Ja. B. R. FISHER v. CHAMBERLAINE. Adjudged for the church of OAKELY and CLAPHAM; and yet there he alledged it, *ſubdole libellando*.]

[3. If the queſtion be in court chriſtian, *whether a church be* a *parochial* church *or but a chapel of eaſe*, a prohibition lies. Tr. 3 Ja. B. The Wardens of St. SAMPSON's caſe of Cornwall. P. 9 Car. B. R. between ELIE VICAR OF ALDERBURNE in the county of Wilts and COOKE. Prohibition granted, I being for the vicar;
[582] and upon this, iſſue joined, whether they were ſeveral pariſhes, and tried by verdict to be one pariſh.]

[4. If in a pariſh there be a *chapel of eaſe and a vicar thereof diſtinct from the parochial church*, and the vicar is *endowed of the tithes of the pariſhioners who are inhabiting within the chapel*, and the vicar ſues one of the pariſh who is not within the chapel, and he ſays, that he is of the pariſh and not of the chapel, a prohibition ſhall be granted; for now the *bounds of the chapel* come in queſtion. H. 15 Ja. B. R. between the vicar of the chapel of BOSTON in Cornwall and another of the pariſh of ———.]

[5. If the *churchwardens* of a pariſh *ſue a vill* for reparation of their church, *ſuppoſing the vill to be an hamlet within their pariſh, and the vill* [*pleads*] *that it is a pariſh of itſelf*, and not an hamlet
* Fol. 292. of the other * pariſh, a prohibition ſhall be granted; for now the *bounds of the pariſh* come in queſtion. Tr. 16 Ja. B. R. between PERRY and THOMAS plaintiffs, againſt . Prohibition granted.]

A prohibition ſhall *not* be granted *by a bare ſurmiſe* that he is ſued for tithes by the parſon of D. of lands in the pariſh of S. *unleſs it appears in the pleading* in the ſpiritual court; for they there ſhall not be judges of the bounds of the pariſh. By the Court. Noy, 147. Philips v. Slacke, cites 5 H. 5. 10. 22 E. 4. 24.

[6. If a ſuit be in the conſiſtory of Durham *for tithes* of land lying *in Berwick*, no prohibition ſhall be granted upon a *ſurmiſe that the land lies in Amerton in the kingdom of Scotland, and not in Berwick;* for though this be true, yet it may be that the parſon ought to have the tithes thereof. Tr. 11 Car. B. R. between MORTON and ROSDON. Per Curiam, after a prohibition upon ſuch ſuggeſtion made, a traverſe taken, that it does not lie in Amerton in the realm of Scotland, a conſultation granted; and it ſeems it was partly in reſpect to the ſaid realms of Scotland and England in *point of ſtate*.]

[7. If a man who *has land by deſcent ſues* another in the eccleſiaſtical court *for calling him baſtard*, a prohibition ſhall be granted; for it tends to temporal diſinheritance. M. 3 Ja. B. R. per Curiam.]

If a ſuit be in the ſpiritual court for a matter whereof they have juriſdiction, and therein a plea is pleaded which is triable at the common law, yet if they will *allow the plea*, they ſhall have juriſdiction thereof, and try it; otherwiſe a prohibition lies. Agreed per Curiam. Cro. E. 595. pl. 38. Mich. 39 & 40 Eliz. C. B. in the caſe of Somerſet v. Markham.

[8. If a man ſues for a *legacy* in the ſpiritual court againſt an *executor*, and he there *pleads that he has not aſſets but for debts;* if the court diſallows this plea, a prohibition ſhall be granted. Paſch. 15 Ja. B. R. between SINGLETON and WADE. A prohibition granted accordingly.]

If

If goods are *deviſed to B. as ſon and heir of A.* and B. ſues the executors in the ſpiritual court for the goods, and the *executors ſay, that B. is not ſon and heir of A.* and thereupon they are at iſſue; it was held, that the ſpiritual court ſhall have juriſdiction, becauſe it *is dependent on the firſt matter*; beſides B. would otherwiſe be remedileſs, for he cannot ſue for the goods ſo deviſed in the temporal court. Kelw. 110. a. pl. 33. Caſus incerti temporis.

So if deviſee of goods ſues for them in the ſpiritual court, and the *executor pleads ne deviſa pas*, this ſhall be tried in the ſame court; becauſe the principal thing is merely ſpiritual, and this iſſue depending upon the principal, ſhall enſue the ſame courſe, and be tried in the ſame court. Kelw. 110. b. pl. 33. Caſus incerti temporis.

So if A. deviſes goods to B. and dies, and B. ſues in the ſpiritual court for the goods, and the *defendant ſays that the property of the goods is his*; this property ſhall be tried in the ſpiritual court, and yet it is a temporal thing. Kelw. 110. b. pl. 34. Caſus incerti temporis. Per Huſſey.

So if the parſon ſues in the ſpiritual court *for a mortuary*, and the *iſſue is taken upon the property*; and ſo of all iſſues, being upon the ſame thing, they ſhall be tried by the ſpiritual court. Kelw. 110. b. pl. 34. Per Huſſey.

But if teſtator deviſes goods to B. and the *executors forge a new will, in which there is no ſuch deviſe*, the action upon the ſtatute 1 H. 5. cap. 2. againſt the executors, ſhall be in the king's court, becauſe the ſuit is upon a thing which merely concerns his court. Kelw. 110. b. pl. 33. Per Grantham. Per caſus incerti temporis.

In a *ſuit for a legacy in the ſpiritual court* they were at *iſſue* there *upon a point of covin*, as touching matter there alleged, in diſcharge of a legacy; upon this a prohibition was prayed, and denied, and a conſultation granted, becauſe *they had conuſance of the principal*, and *therefore they* have cauſe alſo there to *determine of the acceſſary*, being covin, concerning the legacy; it was adjudged for the conſultation, * and the prohibition denied. 3 Bulſt. 314. Mich. 1 Car. B. R. in the caſe of Dickes and Uxor. v. Browne.—cites Paſch. 13 Jac. B. R. Wallis v. Leyde.

An *executor of an executor was ſued*, who *pleaded riens enter maines*; the ſpiritual court refuſed that plea; upon which a prohibition was awarded out of B. R. Noy, 77. Dixye v. Brown.—S. C. Palm. 422. Paſch. 1 Car. B. R.—— S. C. and reported in almoſt the ſame words. Lat. 114. by the name of Watkins's caſe.——— 3 Bulſt. 314. Dickes v. Brown, S. C. but ſays, that the prohibition was granted upon a miſopening the ſuggeſtion to the Court. And per Cur. we do here try *fully adminiſtered* or not, by a jury; they there try this per teſtes, and they have conuſance thereof; but if they, in their proceedings, refuſe ſuch a proof for fully adminiſtered in diſcharge of the party, which is allowable at common law, a prohibition then is to be granted; but here nothing is in this ſuggeſtion, but that they there went to iſſue only upon fully adminiſtered or not, the which of itſelf is no cauſe to have a prohibition.—— If they *refuſe to accept of the plea* of *plene adminiſtravit*, the party ought to *appeal*, becauſe they proceed otherwiſe than they ought. Sid. 249. Trin. 17 Car. 2. Anon.

* [583]

9. Libel for not repairing part of the church-wall, which by *cuſtom* he was bound to do. A prohibition was granted *after ſentence*; becauſe a cuſtom is not triable in that court. Carth. 33. Paſch. 1 W. & M. B. R. Tyler v. Manſel.

(M) In what Caſes they ſhall *not have Juriſdiction* for a collateral Cauſe.

[1. IF *A.* be *preſented by J. S.* to a benefice, [and is] admitted, inſtituted, and *inducted, and after the king preſents* his clerk to the ſame church, ſuppoſing A. to be preſented by *ſimony, and his clerk is* inſtituted and *inducted*. Upon which *A. ſues* in the eccleſiaſtical court againſt the clerk of the king, ſuppoſing that he did not come in by ſimony, and ſo prays, *that the ſuper-admiſſion*, inſtitution, and induction of him *be repealed*, a prohibition ſhall be granted for the clerk of the king upon his *ſuggeſtion, that A. was preſented by ſimony*. For now the only queſtion between them is whether the church was void or not at the time of the preſentment of the king, which is triable only by the temporal court. Tr. 16 Ja. B. R. between SARISON nnd BATHOE. Reſolved per Curiam, and a prohibition granted, but after the prohibition was ſtayed. But Hill. 16 Ja. B. R. the prohibition was granted, though

though it was ſaid, that they *only queſtioned the inſtitution* in the eccleſiaſtical court; for this is not to be allowed *after induction*.]

2 Bulſt. 182. S. C. Hill. 11 Jac. And there Coke Ch. J. ſaid, that we are not to take notice of any

[2. The *patron* of a benefice may be *ſued* in the eccleſiaſtical court for preſenting of his clerk (who is now inducted) *for ſimony*; for the ſtatute of ſimony doth not take away the eccleſiaſtical juriſdiction to puniſh the party *pro ſalute animæ*. H. 11 Ja. B. R. Sir WILLIAM BOIER's caſe. Reſolved.]

ſimony, this being puniſhable in the ſpiritual court, and if they meddle only pro ſalute animæ, they are not to be prohibited; nor is a prohibition to be granted in this caſe, by reaſon that they examined *upon oath touching the ſimony*; and this is clear, becauſe it was ſo done voluntarily; and notwithſtanding the incumbent be dead, yet the crime remains and is living, and the examination here by them was only pro ſalute animæ. *But if there be any article to be examined upon, which any ways draws the* † *right* and title *of the benefice into queſtion*, then clearly a prohibition is to be granted, but not otherwiſe; and ſo no prohibition was granted. —— † S. P. Bulſt. 179. 9 Jac. in Holt's caſe. —— S. P. 2 Le. 168. pl. 205. Patch. 26 Eliz. C. B. in Gerard's caſe. ——— 3 Le. 98. pl. 140. S. C.

* [584] Roll. Rep. 62. S.C. accordingly.— P. an incumbent of a church *travelled to Achaia and other parts of Greece, and it was not known whether he was alive or dead*; whereupon G. was inſtituted and inducted.

[3. If *A. recovers in quare impedit againſt the ordinary and the incumbent*, and the *incumbent brings writ of error*, in which the *judgment is affirmed, and a writ to the biſhop* is granted for A. upon which A. preſents his clerk to the biſhop before any actual remotion of the firſt incumbent, and his clerk is admitted and inſtituted, upon which the firſt incumbent appeals to the audience for a * *ſuper-inſtitution* before that he was removed, a prohibition ſhall be granted; for the *firſt incumbent was removed in law by the judgment*, though he continued incumbent de facto till the laſt incumbent was preſented; and this laſt inſtitution was by force of the king's writ, and therefore no appeal may be from it. M. 12 Ja. B. R. between WHISTLER and SINGLETON. Adjudged, and prohibition granted.]

Afterwards the procurators of P. libelled againſt G. in the eccleſiaſtical court to try the ſuper-inſtitution. It was *ſuggeſted* for a prohibition, *that after induction the eccleſiaſtical court cannot try the ſuper-inſtitution, and that G. was now in his firſt fruits*, and that therefore the Court may grant a prohibition; and it was granted. Litt. Rep. 140. Mich. 4 Car. in the Exchequer. Pettie's caſe.

Prohibition. The plaintiff declared, that pleas of advowſons belong to the common law, and not to the ſpiritual court; and that he was inſtituted to the church of D. and the defendant

‡ Fol. 293.

[4. If A. be inſtituted and inducted to a church, and after he is ſued in the high commiſſion court, becauſe one B. was inſtituted and inducted before, and ‡ after A. was *ſuper-inſtituted and inducted*, by which by the canon law he is an intruder, and *is to be puniſhed as an intruder*, to which A. anſwers, that he did not know that B. was inſtituted and inducted before him, by which he excuſes himſelf of any crime, a prohibition ſhall be granted; for they ſhall not *try which of them has the better right after* ‖ *inſtitution and induction*, but this ſhall be tried at the common law. But the ordinary may puniſh any ſuch clerk, who procures himſelf to be ſuper-inſtituted and inducted, *knowing the inſtitution and induction of another*. M. 16 Car. B. R. between MADDOCKS and CHIVAL. Per Curiam, a prohibition granted to the high commiſſion court.]

libelled in the ſpiritual court, *that he himſelf was inſtituted* to the ſaid church, *and inducted* before the plaintiff, who had obtained a ſuper-inſtitution upon him; which being ſcandalous to his title, he *ſued there to ſet the ſuper-inſtitution aſide*, but the ſpiritual court proceeded notwithſtanding, and though the induction belong to the common law; the defendant pleaded, that he did not proſecute contra prohibitionem, but pro conſultatione habenda he demurred; and per Cur. he ought to have it; for though the defendant was inducted, yet it doth *not appear that the plaintiff was inducted*, and ſo the plea ſtands only upon the ſuper-inſtitution, which is proper for the ſpiritual court; but *afterwards* it being *ſhewn to the Court, that the plaintiff was inducted alſo*, the conſultation was ſtayed, that the plaintiff

plaintiff might declare de novo upon his inſtitution and induction. But upon the preſent declaration the prohibition cannot ſtand. 2 Lev. 125. Hill. 26 & 27 Car. 2. B. R. Monday v. Porton.

‖ Where the firſt incumbent comes in by *ſimony*, there can be no ſuper-inſtitution; for in ſuch caſe the church is void de jure & de facto, and they cannot meddle with the inſtitution; but with the ſimony they may. Per Cur. Litt. Rep. 176. Mich. 4 Car. C. B. in the caſe of Stevens v. Cripps.—And per Williams J. matter of induction and the validity thereof is determinable at common law, and not in their court; and the whole Court agreed with him, and a prohibition was granted. Bulſt. 179. 9 Jac. Holt's caſe.

[5. If the *parſon* of B. *takes a ſecond benefice within the ſtatute without diſpenſation.*, by which the firſt benefice is void, which is of the patronage of the king, and after ad uberiorem cautelam & ad tollendum omne dubium, *he obtains a new preſentment of the king*, and upon this requires the biſhop to admit and ſuper-inſtitute him, the biſhop takes time to be adviſed, and *in the mean time the king preſents another who is inſtituted and inducted.* And after the *firſt parſon ſues the biſhop for injuſtice* in the ſpiritual court; a prohibition ſhall be granted; for thoſe of the ſpiritual court ought not to examine the * *right of preſentations.* M. 3 Ja. B. Williams caſe adjudged, and conſultation denied.]

* Where the ſpiritual court would by any article draw the right and title of the benefice into queſtion, a prohibition is to be granted. 2 Bulſt. 183. in Sir William Boier's caſe. —— And ſee the notes upon pl. 4.

[6. If a man ſues in the court chriſtian to have *account for the profits of a benefice*, a prohibition lies, becauſe this belongs to the common law. H. 3 Ja. B. adjudged.]

[7. *But* if the ſuit be there for the profits *taken in time of ſequeſtration*, no prohibition lies. H. 3 Ja. B. adjudged.]

[8. If *two churches* are *united* by patron, ordinary, and the king *by the ſtatute of* 37 *H.* 8. *upon a ſurmiſe that the* 2 *churches are not diſtant more than a mile* the one from the other, and after the *pariſhioners are ſued* in the ſpiritual court *to come to the one church*, a prohibition lies upon a *ſurmiſe that the churches are diſtant more than a mile* the one from the other. Mich. 10 Car. B. R. between Dobson and Sir Robert Mordaunt, a rule for a prohibition granted; the churches united were Wellesborough and Walten Devell in the county of Warwick. But after P. 11 Car. B. R. the prohibition denied, becauſe there was not any ſuit depending againſt the pariſhioners, nor any other ſuit in the ſpiritual court to be prohibited.] [585]

[9. If the *parſon libels* in the ſpiritual court *for a modus decimandi*, if the *defendant ſuggeſts that he has miſtaken the modus, and ſhews another modus*, he ſhall have a prohibition, becauſe they ſhall not try the modus by which his inheritance ſhall be bound. And an *uſage for* 10 *years is good cuſtom by the ſpiritual law*; and if this ſhall be ſuffered, they will defeat the temporal court of all juriſdiction. My Reports, 14 Ja. Goslin and Harden adjudged.]

See (F) pl. 17. (Q) pl. 14. 15.— S. C. Roll. Rep. 419. accordingly. And Mountague Ch. J. ſaid that the ſpiritual court never had juriſdiction of the matter, by reaſon of their having miſtaken the modus.—— S. C. 3 Bulſt. 241.

A parſon libelled for the 10th ſhock, and alleged it to be the cuſtom time out of mind, to ſet the corn out in that manner. The pariſhioner ſuggeſted that the cuſtom was to ſet out the 10th ſheaf and not the 10th ſhock; and that though he had alleged this, they had refuſed the plea. A prohibition was granted, and afterwards a conſultation was denied. The Court agreed that a modus decimandi was ſuable for in the ſpiritual court, but when it is denied they ought to ſurceaſe. Whitlock J. ſaid, that here is no title made for a conſultation, but yet he thought it good enough in this caſe, becauſe the *right of the tithes is not denied, but the manner of ſetting forth*; that they vary not upon the *modo decimandi*,

mandi, but upon the *modo expensendi*; but the other juſtices ſaid nothing to this point. Palm. 440. Paſch. 2 Car. B. R. Steward's caſe.

Mo. 861. pl. 1182. S. C. accordingly, by the name of ROWTH v. the Biſhop of CHESTER, and ſays, that if the juſtices ſee cauſe, they may write to the biſhop to certify concerning the inſtitution. —— S. C. accordingly. Hob. 15. where the ſuggeſtion to avoid the inſtitution was, that it was made without warrant, it being made by the archbiſhop at London, he being there in parliament-time, and ſo being made out of the dioceſs was a nullity. But it was held, that the induction being a temporal act, was not to be avoided but by a quare impedit or the like at common law. And though the king ſignified his pleaſure by ſeveral to have a conſultation granted, yet they anſwered that they could not do it by the law, and ſo after many meſſages the matter ſtood.

[10. If a man *preſents to the biſhop, and upon refuſal ſues to the archbiſhop, who after monition*, citation, and default *of the biſhop, admits and inſtitutes* the incumbent, upon which he is *alſo inducted*, and after the *biſhop ſues his double quarrel*, appealing from the ſaid ſentence *to the delegates*, to annul the admiſſion and inſtitution, a prohibition ſhall be granted, becauſe after induction the admiſſion and inſtitution ought not to be drawn in queſtion in the ſpiritual court. M. 12 Ja. B. between Sir TIMOTHY HUTTEN and the BISHOP OF CHESTER. Per Curiam.]

† Fol. 294.

[11. If *upon a reſignation* of the incumbent, *another be* preſented and *inſtituted, and after he who reſigned libels* in the eccleſiaſtical court againſt the new incumbent, *pretending that he did not reſign*, and after makes a leaſe upon which iſſue is joined, whether he was parſon at the time of the *leaſe made to try the title*, yet no prohibition ſhall be granted, becauſe the queſtion there is † only upon the reſignation, which properly appertains to the eccleſiaſtical court. Mich. 10 Ja. B. MANKNOLL's caſe, per Curiam.]

See pl. 10. The defendant in the quare impedit was inſtituted and inducted pending the action. The plaintiff in the quare impedit ſued in the ſpiritual court to remove him; but upon ſuggeſtion that the defendant was inducted, a prohibition was granted. Lat. 205. Oliver v. Huſſey.—Pending a jure patronatus, the biſhop admitted one of the preſentees; whereupon the patron of the other preſentee libelled in the ſpiritual court; but a prohibition was granted, and a conſultation afterwards denied. 2 Le. 168. pl. 205. Paſch. 26 Eliz. C. B. Gerard's caſe. —— 3 Le. 98. pl. 140. S. C.

[12. If a man *pending a quare impedit libels* in the ſpiritual court *to avoid the inſtitution of the clerk* of the ſame church *after he is inducted*, a prohibition ſhall be granted; for otherwiſe they will prevent the quare impedit. Mich. 14 Ja. B. R. between FISHER AND * CHAMBERLAIN, ſo held by Dodderidge; and he ſaid that this had been ſo adjudged diverſe times in Bank.]

*[586]

S. P. But if the ſuit to repeal the inſtitution had been before the induction, no prohibition ſhould be granted. Sid. 293. Trin. 18 Car. 2. B. R. in caſe of Offley v. Beſt. —— ‡ S. P. for if the inſtitution was not good, the induction is not good. Hob. 15. in Hutton's caſe.

[13. *So* ſhall it be if *after induction, where no quare impedit is pending*, if the ſuit be there to avoid the inſtitution, a prohibition ſhall be granted; for by the induction it is become temporal, which draws the ſpiritualty to it; for ‡ if they avoid the inſtitution, they ſhall avoid by conſequence the induction. Contra 14 Ja. B. R. between FISHER AND CHAMBERLAINE, a prohibition denied for the church of CLAPHAM.]

The induction is temporal, and the ſpiritual court cannot fruſtrate it; and though they ſhould give ſentence againſt the induction, yet it remains good. Per Richardſon, quod fuit conceſſum. And per Cur. they cannot meddle with the inſtitution after induction. And by 3 J. a prohibition may be granted, though no ſuit was depending here, and though the induction was utterly void, [as in caſe of ſimony, as the principal caſe was] as well as where a church was lawfully full before. And prohibition was granted niſi cauſa. Litt. Rep. 165. Mich. 4 Car. C. B. Stevens v. Cripps.

[14. If

[14. If I *preſent* my clerk, and he is admitted and *inſtituted, and before induction a caveat is entered* by a ſtranger in the ſpiritual court, that he ſhall not be inducted, and thereupon an *inhibition* is granted to the archdeacon, that he ſhall not induct him. In this caſe a prohibition ſhall be granted, becauſe when he is inſtituted he has an inception to the lay fee, and the church is full againſt all, except the king; and if this ſhall be ſuffered, all trials by quare impedit ſhall be ouſted. H. 14 Ja. B. prohibition granted.] S. P. Litt. Rep. 165. per Cur. in caſe of Stevens v. Cripps.

[15. If a *biſhop collates*, pretending a lapſe, and thereupon the *patron preſents, and in a quare impedit recovers, and has a writ to the biſhop*, and *before* his preſentee has *inſtitution ſealed, the archbiſhop ſends an inhibition* that he ſhall not be inſtituted, and thereupon *ſentence is given in the arches that he ſhall not be inſtituted*, a prohibition ſhall be granted upon this; for they ſhall not try again that which is before tried at common law, and draw in queſtion the recovery; for otherwiſe recoveries at common law would be of little force. H. 4 Ja. B. R. between FLETCHER AND BAKER. Per Curiam.] If the *king collates, or recovers the collation to any prebend*, and *his clerk is admitted*, and afterwards the *clerk who is vexed ſues* in the ſpiritual court by *appeal*, &c. by which the title of the collation may come in debate, the king ſhall have a prohibition. And if the king recovers his collation or preſentation to any church, and after execution is diſturbed by appeals, &c. *or if the king's clerk after induction is vexed by appeals*, &c. then the king ſhall have a writ directed to all ſheriffs, &c. to take and arreſt the bodies of thoſe who make ſuch impediments to diſturb the execution of the judgment, or of ſuch preſentations or collations made by the king; and alſo ſhall have a prohibition to the biſhops, &c. And alſo the king may ſue ſuch prohibition to the party himſelf who ſues ſuch appeals, &c. that they do not ſue ſuch, or permit ſuch appeals, &c to be. F. N. B. 42. (M) 43. (N).

If the *king recovers his preſentment* to a church, *and has a writ* to the biſhop, &c. *to remove* the others incumbent, for which the *incumbent ſues an appeal* in the archbiſhop's court, &c. by reaſon whereof the *archbiſhop ſends a prohibition* that he do not admit the king's clerk pending the appeal, &c. the king ſhall have a writ to the archbiſhop and his officers to take off his inhibition, and that they do nothing, nor ſuffer any thing to be done in derogation of the king's right, and ſhall have another writ againſt the incumbent, that he follow not ſuch appeals, &c. and alſo the king may have an attachment directed unto the ſheriff againſt ſuch incumbent, if he go on there after ſuch prohibition directed unto him. F. N. B. 43. (A.)

And it appears by the Regiſter, that another *common perſon* who recovers his preſentment, or has title to preſent, ſhall have ſuch writs of prohibition unto the ſpiritual judges, or the party, that they ſhall not proceed, or purſue ſuch appeals, &c. and alſo attachment againſt them if they do, &c. F. N. B. 43. (B).

* And if the *king recovers* his preſentment, and has a writ unto the biſhop, and his clerk is inſtituted and inducted, if the biſhop, at the ſuit of others, hath provocations or other inſtruments to cite the king's incumbent to the court of Rome, &c. the king ſhall have a prohibition to the biſhop, and an attachment upon it, if, &c. *And* it ſeems that the king ſhall have a prohibition *without any recovery* had before, *if his preſentee be inſtituted*, &c. And *ſo* it ſeems *a common perſon* ſhall have and ſue ſuch a prohibition, *when the ſuit is to try the title of the preſentment* or collation; yet the writs in the Regiſter are and ſpeak of a recovery. F. N. B. 43. (C).

* [587]

[16. If a *patron preſents A.* his clerk to his church, and the *biſhop delays him for examination for more than two months*, whereas by the late canons he ought not to delay him for more than a month, whereupon *A.* fearing that lapſe will incur *ſues a duplex querela* in the court of audience, thereby *to inhibit the biſhop to preſent*, and *after the* 6 *months the court of audience gives judgement for him*, and after the *biſhop*, notwithſtanding this, *collates by lapſe*; and thereupon in the court of B. R. prayed a prohibition to the court of audience. The prohibition ſhall be granted; for now if it be a lapſe, the eccleſiaſtical law will not remove him, the church being full. And if the biſhop be a diſturber, then his

clerk ſhall be *removed*, notwithſtanding the plenarty by 6 months before the writ purchaſed; for collation without title does not make an uſurpation; and therefore quacunque via data, it does not appertain to the eccleſiaſtical law to proceed in the duplex querela. Tr. 3 Ja. B. R. between PALMER AND SMITH, prohibition granted, and conſultation denied.]

17. The defendant *ſuggeſted* for a prohibition *to a libel for defamation in the arches, that he is an inhabitant within the dioceſs of London, and ſo the proſecution is contra formam ſtatuti* 23 *H.* 8. *cap.* 9. it was argued againſt the prohibition, that it ought not to go, becauſe there had been a *compoſition between the biſhop of London and the archbiſhop* for this juriſdiction; and for that reaſon the archbiſhop doth not viſit in the dioceſs of London, and that ſo is GOBBET's caſe, Cro. Car. 339. But per Keeling J. the dioceſs of London is not within the juriſdiction of the arches, but the archbiſhop hath a peculiar juriſdiction there, conſiſting of 14 pariſhes. And Twiſden J. ſaid that *the compoſition* between the ordinaries *cannot prejudice the people* for whoſe benefit that ſtatute was made; and the reaſon in Gobbett's caſe is not good; for the Biſhop of London cannot agree that the archbiſhop ſhall not viſit. The Court was divided. Raym. 91. Hill. 15 & 16 Car. 2. B. R. Ford v. Welden.

18. A citizen of Briſtol had a country houſe, and *frequently received the ſacrament in the pariſh church in the country*, likewiſe he received it frequently *in the cathedral church* in Briſtol, *but not in his own pariſh church in Briſtol*; for which cauſe he was cited into the eccleſiaſtical court, and admoniſhed; and afterwards for not obeying and receiving in his pariſh church, according to the monition, he was excommunicated, though one of the ſurrogates of the court but the Sunday before had with his own hand given him the ſacrament; and though he there pleaded this, and likewiſe his receiving in the country at his own pariſh there, they would not allow it; upon this matter appearing to the Court, a prohibition was awarded. Skin. 101. Hill. 35 Car. 2. B. R. Anon.

19. A woman was libelled againſt in the ſpiritual court for *incontinency with a man ſince dead.* It was ſuggeſted for a prohibition, that the man was her huſband: and now the ſpiritual court could not examine whether he had been her huſband or not, becauſe that would tend to *baſtardize the children*, and diſſolve the marriage after death of party. Holt ſaid, if there were a *marriage de facto*, though illegal, yet they ſhall not libel to avoid it after huſband's death; but if there was none, the death of the man ought not to protect her from a proſecution for her whoredom. 12 Mod. 419. Mich. 12 W. 3. Anon.

[588] 20. One having 2 *wives* died, and one of them libelled againſt the other for *jactitation of marriage*; and ſhe ſuggeſted, that it was to avoid her marriage, and a prohibition granted, per Holt Ch. J. 12 Mod. 432. Mich. 12 W. 3. In the caſe of Hemming v. Price. ——Cites 7 Co. 43. b. 44. a. Kenn's caſe.——Sty. 10.

So where A. marries B. and after turns her off, and takes L. to wife, by whom he has iſſue, and dies; after his death, the former ſues the 2d wife to avoid the marriage, and held it could not be, becauſe the huſband was dead. Per Holt Ch. J. 12 Mod. 432. in the caſe of Hemming v. Price.——Cites Ed. 4. Fitz. Conſultation, pl. 5.

21. A libel was *by a biſhop for a penſion.* It was *ſuggeſted* for a prohibition, *that he ſued before his own commiſſary*, and ſo would be judge in his own cauſe: but a prohibition was denied; for per Holt Ch. J. and Eyre J. a ſuit lies before a chancellor in ſuch caſe, like the caſe in Dyer, where the lord ſued before his ſteward. Comb. 131. 1 W. & M. B. R. Anon. Vent. 3. Mich. 20 Car. 2. B. R. The Biſhop of Lincoln v. Smith.

(N) *What* ſhall be ſaid *a* † *Defamation ſpiritual* to maintain a Suit in the Eccleſiaſtical Court.

† As to defamations determinable in the ſpiritual court, it was reſolved, that ſuch defamation ought to have 3 *incidents.* 1ſt, That it *concern matter merely of eccleſiaſtical cognizance*; as for calling the plaintiff heretic, adulterer, ſchiſmatic, &c. 2dly, It muſt *concern matter merely ſpiritual only*; for if it relates to any thing determinable at common law, the eccleſiaſtical judge ſhall not have cognizance thereof. 3dly, Though the defamation be merely and only ſpiritual, yet the perſon defamed cannot ſue there for amends or damages, but the *ſuit ought to be only to puniſh the ſin & pro ſalute animæ.* 4 Rep. 20. pl. 17. Trin. 25 Eliz. B. R. Palmer v. Thorpe.——S. P. 2 Inſt. 492, 493.——F. N. B. 51. (I) in the new notes there (a) cites 22 E. 4. 10. & 2 E. 4. 10. that the offence in this caſe ought to be merely ſpiritual.

‡ Fol. 295.

[1. REGISTER, fol. 54. b. title Conſultatio. Conſultation granted to proceed in court chriſtian *in cauſa defamationis, videlicet as well for the crime of* *as alſo* becauſe the juriſdiction of the ſpiritual court *per tumultum & rixas executiones que* ‡ *ſuas in hac parte debite faciendas nequita impedivit, ex officio ad animæ ſuæ correctionem proceſſit.*]

[2. If a man libels in the ſpiritual court againſt another for ſaying that he was a *witch*, or the *ſon of a witch*, though no action lies for this at common law, yet no prohibition ſhall be granted; for perhaps he may have ſome ſpiritual prejudice thereby, if he be the ſon of a witch, as that he cannot be a prieſt, or ſuch like; (for it ſeems all the force of the words conſiſts in the laſt words, they being ſpoke in the disjunctive.) My Reports, 14 Ja. B. adjudged.] Roll. Rep. 407. pl. 44. S. C. ſays, that a prohibition was granted, and afterwards a conſultation, for the reaſons here mentioned.

——Mo. 906. pl. 1263. Trin. 29 Eliz. MORRICE v. SMITH, a prohibition was granted to a libel for calling one witch; and afterwards a conſultation, becauſe an action does not lie for it at common law, unleſs where death enſues. But the book ſays, quære now ſince the ſtatute of 1 Jac. for it has been adjudged, that an action upon the caſe lies ſince that ſtatute.—4 Le. 92. pl. 190. S. C. where the words are *veneficam, ſortilegam & incantatricem dæmoniorum.* And after a prohibition a conſultation was awarded; and it was held there, that to call one *witch generally* an action lies not in our law, as has been adjudged. But to ſay, *ſhe hath bewitched ſuch a one*, an action lies. And per Wray, witchcraft, which is made felony by any ſtatute, is not puniſhable by the eccleſiaſtical law; but in caſe of ſlander upon ſuch a witchcraft, ſuch ſlandrous words are of eccleſiaſtical juriſdiction; and for witchcraft, which is not felony, the eccleſiaſtical court ſhall puniſh the party; and afterwards, in the principal caſe, a conſultation was awarded.

Error of a judgment in C. B. in an action for words (viz.) *ſhe is a bawd, and has bewitched him by witchcraft and ſorcery.* It was held by Jones & Croke J. that the action well lies for the laſt words, (and has bewitched him, &c.) but for the firſt words it was doubted; wherefore cæteris abſentibus a rule was given, that judgment ſhould be affirmed. Cro. C. 261. pl. 5. Trin. 8 Car. Hix v. Hollingſhed.

[3. If a man libel in the eccleſiaſtical court againſt another for ſaying certain *words* of him, *which would maintain an action of the* * *caſe at common law*, a prohibition lies. H. 4 Ja. B. R. TURNAIN AND THORN, per Cur. M. 38, 39 El. B. R. between BUTLER AND BARTLETT adjudged.] *[589] This was held to be no certain rule, and inſtanced in that of laying violent hands on a parſon, and of a penſion by preſcription, &c. 3 Lev. 17. Cranden v. Walden. Jones

Jones J. thought theſe *differences* ought to be obſerved, viz. *where* a man calls a woman whore, or ſuch like ſlander, for which a *ſuit lies in the eccleſiaſtical court* againſt the party, (if the thing be true,) there no prohibition ſhall be granted; *but where no ſuit lies for the principal in the ſpiritual court; but the ſlander is puniſhable at common law, as for calling a man thief, traitor*, &c. there if the ſuit is in the ſpiritual court, a prohibition lies. But if the ſlander be ſuch as hinders her marriage, ſhe may ſue either in the ſpiritual court or at common law. So if words are ſpoke, which are only words of reproach, action lies not at law, neither do they concern any thing whereof the ſpiritual court has conuſance, therefore for ſuch a prohibition lies, as knave, drunkard, &c. quære de eco. The Chief J. agreed to this, but the other juſtices ſaid nothing. Jo. 246. pl. 5. Trin. 7 Car. B. R. Anon.

The words muſt be taken together, and ſhall not be ſplit. Per Holt. Farr. 81.

[4. *So if only* the *words* which are *proper for the juriſdiction of the eccleſiaſtical court are put in the libel*, and which would not maintain an action at common law by themſelves, yet *upon ſuggeſtion* to the temporal court *of the reſidue* of the words, by *which* they *would maintain an action at common law*, a prohibition lies. M. 38, 39 El. between BUTLER AND BARTLETT adjudged.]

2 Brownl. 272. S. C. in an action brought at common law againſt the parſon for ſlander, where the words ſpoke by him are, viz. thou art drunk, and I never held up my hand at the bar as thou haſt done. —— Libel was for ſaying, *you lie like a knaviſh perſon, and you brought one to ſwear and forſwear.* A prohibition was denied; for they are irreverend words, and the ſpiritual court only can puniſh them pro reformatione morum. Litt. Rep. 217. Mich. 4 Car. C. B. Proctor v. Barley.

[5. If a parſon of a church calls A. *drunkard*, upon which A. anſwers, *thou lieſt*; if the parſon ſues A. in the eccleſiaſtical court for giving him the lie, a prohibition lies; becauſe the reaſon why he gave him the lie was not ſpiritual, but depending upon a temporal thing precedent. M. 7 Ja. B. between SIMPSON AND WATERS. Per Cur.]

One ſaid to a clerk, a ſpiritual perſon, *thou art a woodcock and a fool*; and for thoſe words the clerk ſued him in the ſpiritual court, but a prohibition was awarded. Arg. Godb. 447. pl. 514. in the caſe of Hye v. Dr. Wells.—Cites Trin. 42 Eliz. Lovegrove v. Brewens.

[6. If a clergyman be a bailiff of the manor of J. S. and he oppreſſes the tenants of the manor, and one of the tenants ſays to him, *thou art a knave, and fitter to wear a white cloak than a black*; if the clergyman ſues him for theſe words in court chriſtian, a prohibition ſhall be granted. B. R. adjudged, cited M. 7 Ja. B.]

S. C. Hob. 246. pl. 313. SMITH v. PANNEL. For the cauſe belongs to the leet, except it were in the church, or the like. Het. 132. S. C. & P. or unleſs it were any ways tending to the eccleſiaſtical rites.

[7. If a man ſays of J. S. *he is a railor and ſower of ſedition among his neighbours*, he cannot be ſued for theſe words in the eccleſiaſtical court, becauſe they are not in any reſpect ſpiritual, nor trench to any ſpiritual defamation, but are merely temporal. Mich. 16 Ja. B. PANNEL AND SMITH reſolved, and a prohibition granted.]

But Mich. 20 Car. 2. B. R. A prohibition niſi, &c. was granted to a libel for calling a parſon knave, Sid. 393. pl. 26. Mich. 20 Car. 2. B. R. Anon. —— Vent. 2. Anon. ſeems to be S. C. and the prohibition was granted, becauſe *it did not appear to relate to any thing concerning his function.* —— S. P. 12 Mod. 104. Mich. 8 W. 3. Nelſon v. Hawkins (dean of Chicheſter.) —— And Twiſden J. ſaid, that it was adjudged about 41 Eliz. that a prohibition ſhould be granted to a libel for ſaying, *ſir prieſt, you are a knave.* Sid. 393. pl. 26.—S. C. cited Vent. 2. in S. C. —— *So* where the prior of L. libelled againſt R. and L. for *calling the prior churliſh, rotten churl*, and *cankered churl*, a prohibition was granted; for the words concerned no ſpiritual matter, and therefore

[8. If a man calls a miniſter *knave*, he may be ſued for this in the eccleſiaſtical court, and no prohibition ſhall be granted. H. 7 Ja. B. per Coke.]

therefore he could not ſue for them in the eccleſiaſtical court, neither could he have any action for them at the common law. 2 Inſt. 493.

* So a prohibition was granted to a ſuit by a parſon for calling him *fool, aſs, and gooſe*, for they are merely words of heat, and *do not touch him in his profeſſion*. 2 Lev. 49. Paſch. 24 Car. 2. B. R. Newman v. Kingerby.——3 Keb. 28. pl. 49. S. C.

But where the words ſpoken *of a clergyman* were (viz.) *thou art, or you are, a pitiful pimping raſcal.* It was ſuggeſted for a prohibition, that the words were ſpoken in paſſion, he being provoked by the parſon, who ſaid, he was a beggar, and was going to run his country, and was uſed to ſteal his neighbours ducks, &c. and that he had alleged this matter in the ſpiritual court, but it was refuſed. A conſultation was granted upon debate. Lutw. 1053. Paſch. 10 W. 3. Oſborne v. Poole.

[9. If a man ſays, that *he will not hear ſermons made by thoſe who are made miniſters by biſhops*, he may be ſued for this in court chriſtian, and no prohibition ſhall be granted. H. 7 Ja. B. per Cur. adjudged.]

So where a motion was for a prohibition to the ſpiritual court, the plaintiff being proſecuted there, for ſaying *he would not be of the communion of the church of England upon any conſideration, for he believed if he was he ſhould be damned*; and the reaſon offered for the prohibition was, becauſe the libel was for a contempt againſt the *common prayer-book*, whereas this was not ſuch an offence. The court was of opinion, that though it is not an offence againſt the *common prayer-book*, yet it is certainly of ſpiritual cognizance, therefore the prohibition was denied. 8 Mod. 338. Mich. 11 Geo. 1725. Sweetnam v. Archer.

[10. If a man ſays of a feme covert, *ſhe will be a-meddling with a thing*, he may be ſued for it in the eccleſiaſtical court, and no prohibition ſhall be granted, becauſe this is a ſpiritual defamation. M. 9 Ja. B. per Cur. Prohibition denied.]

A libel was for theſe words, *ſhe will turn tail to tail with any man*, intimating that ſhe would be naught with any man. But a prohibition was granted, becauſe they are idle words, and not puniſhable in the ſpiritual court. Het. 167. Paſch. 7 Car. C. B. Crompton v. Waterford.—Litt. Rep. 365. Anon. but is S. C. and reported exactly the ſame, only that the one is in French and the other in Engliſh.

[11. If a man ſays of another, that *he keeps a bawdy-houſe*, and is ſued for this in the ſpiritual court, though he may have action at common law, yet the ſpiritual law has a concurrent juriſdiction therein, and the words are mixed, and therefore no prohibition lies. 27 H. 8. 14. b. per Fitzherbert.]

It is not an offence puniſhable at common law, but only by the *cuſtom of London*, and ſo the action ſhould have been in the ſpiritual court. Cro. El. 643. Anon.——Theſe words are actionable, becauſe the party may be indicted for it. Per Cur. Palm. 379. Trin. 21 Jac. B. R. in an anonymous caſe.

D. ſued T. in the ſpiritual court, becauſe though ſhe was of good fame, and kept a victualling-houſe in good order, yet the ſaid T. had publiſhed, that D. *kept an houſe of bawdry*. T. now brought a prohibition, and well; per Cur. for D. might have had an action for that at the common law; eſpecially where ſhe *kept a victualling-houſe as her trade*. And the juſtices ſaid, that the keeping a brothel-houſe is inquirable in the leet, and ſo was a temporal offence; and ſo was the opinion of the Court. T. 7 Car. B. R. Mrs. HOLLAND's caſe. Noy, 117. Thorne v. Alice Durham.

Libel was in the ſpiritual court for calling a woman *whore*; and ſaying, *that ſhe kept a bawdy-houſe*, and after ſentence prohibition was moved for; and urged contra, that they ſhould have alleged below, that the words were ſpoke at one and the ſame time, and then they might be prohibited; but now that they have juriſdiction below for calling a woman *whore*, and that was all they gave ſentence for, they would not grant a prohibition. 12 Mod. 236. Mich. 10 W. 3. Anon.

[12. If a man ſays of another that *he is the pander of J. S.* he may be † ſued in the eccleſiaſtical court; becauſe the ſignification of this word is well known, and it ſounds to a ſpiritual defamation. M. 2 Car. Lewes & Whitley, per Dodderidge and Jones contra Whitlock.]

† Fol. 296.

S. C. Noy, 85.—S. C. Lat. 155.—S. C. cited Mar. 66. in pl. 103.

Jo. 246. S.P. Anon. but ſeems to be S. C. Trin. 7 Car. B. R. And there by Jones J. for calling one bawd, ſuit lies either in the ſpiritual court, or at common law, and prohibition does not lie, for ſhe has an election to ſue in either, and took a diverſity between ſuch words and words of reproach, as knave, drunkard, &c. To which the Ch. J. agreed, but the others ſaid nothing.

[13. If a man ſays to another, *thou art a bawd, a filthy bawd, and a common bawd*, and for this he is ſued in court chriſtian, no prohibition lies, becauſe he cannot be indicted for this, if it be true, becauſe he did not ſay, that he *kept a bawdy-houſe*, which would be preſentable in a leet. Mich. 7 Car. between HOLLINSHED and HICKS. * Per Cur. Conſultation granted after prohibition. Mich. 8 Car. B. R. between YATES AND GLOVER. Prohibition was denied where it was ſaid, *he was a bawd, and would die ſo.*]

Libel was for ſaying, *thou art a bawd, and there were two couple upon one bed in thy houſe.* The Court ſaid, that the words, thou art a bawd, is a thing ſpiritual, and therefore no prohibition ſhall be granted thereupon. Palm. 379. Trin. 21 Jac. B. R. Anon.

Libel was for ſaying, *thou art an old bawd*; and thereupon a prohibition was granted. But it was moved for a conſultation, for that it had been adjudged, 15 Jac. that for ſaying, thou art a *bawd*, no action lay at common law; but otherwiſe, if he had ſaid, thou keepeſt a *bawdy-houſe*. Whereupon a conſultation was granted. Palm. 521. Hill. 3 Car. B. R. Roberts v. Brown. —— The ſame diverſity was taken per Cur. Palm. 379. Trin. Car. B. R. in an anonymous caſe —— Same difference, Cro. C. 229. Mich. 7 Car. B. R. in HOLINGSHEAD's caſe; where the words were, *thou art a bawd, and I will prove thee a bawd*; and becauſe no action lay at common law, a prohibition was denied.

A prohibition was moved for to the ſpiritual court upon a libel there for calling the plaintiff a *bawd*. But the Court, after argument and time taken to conſider thereof, reſolved, that a prohibition did not lie becauſe the word is not actionable at common law. Mich. 12 Geo. 2. B. R. Locky v. Dangerfield. —— And denied the caſe in Raym. 115. Ward v. Marſh. —— A prohibition was denied for the words, *thou art a* † *bawd*, notwithſtanding it was objected, that the words were *ſpoken at Weſtminſter*, and that the city of Weſtminſter is an ancient city, and that there is an ancient cuſtom within the ſaid city that whores ſhall be puniſhed by impriſonment; and alſo that an *action had been brought for theſe words* in the marſhal's court; *and judgment for the plaintiff*. 10 Mod. 384. Hill. 3 Geo. 1. B. R. Savil v. Kirby.

† S. P. 2 Salk. 552. pl. 15. Mich. 1 Ann. B. R. in the caſe of Galizard v. Rigault.

[14. If a woman ſues another for ſaying to her theſe words, *thou art a queane*, a prohibition lies; becauſe it is not well known *what is intended by the word queane*, and it is but a word of anger. Tr. 3 Car. B. R. between BLACKSHAW and STEPHENS, per Cur. prohibition was granted. Mich. 8 Car. B. R. between YATES and GLOVER, a prohibition was granted.]

Prohibition was prayed to the eccleſiaſtical court for calling one *rogue and raſcal and ſon of a whore*, becauſe they are only words of heat and paſſion, and for that purpoſe this caſe of Lownes v. Herbert was cited; but the prohibition was denied per tot. Cur. for the words import, that his mother is a whore and he a baſtard; but in the caſe in Rolls, the words coupled with *(thy mother is a bitch)* makes all the words inſenſible; but here they are an eccleſiaſtical ſcandal. And in another ſuit by the mother for the ſame words, a prohibition was denied, for both the mother and ſon are ſcandalized by the words. 3 Lev. 119. Trin. 35 Car. 2. C. B. Vincent v. Alpy. ——S. C. cited and approved. 11 Mod. 117. Trin. 6 Ann. B. R. in the caſe of MAY v. HORSE. Where *libel* was in the ſpiritual court by the mother and ſon *for calling the ſon baſtard and his mother a whore by implication*; and prohibition was denied.

[15. If a man ſays to another, *thou art the ſon of a whore, and thy mother was a bitch*, and he ſues in the eccleſiaſtical court for this, a prohibition lies, becauſe thoſe are but words of anger. Mich. 3 Car. between LOWNES and SIR ARNOLD HERBERT, a prohibition granted.]

Prohibition lies for calling one *whoreſon*. Per Richardſon; Lat. 156. in the caſe of Lewis v. Whitton cites Mich. 6 Jac. B. R. Craiock v. Thomas.

A libel, &c. for theſe words, *thou art the ſon of a whore, and thy mother ſtood in a white ſheet for a baſtard*, * *or words to that effect*. It was moved for a prohibition, becauſe theſe are only words of heat and paſſion. But to that the Court anſwered, that if it had been only for the firſt words, (viz.) thou art the ſon of a whore, theſe would have been only words of heat; but here he comes to particulars, viz. (ſtood in a white ſheet); then it was moved, that here it is not a poſitive affirmation in the libel of ſpeaking the words, but theſe, or *words to that effect*. But to that the Court anſwered, that

that this *is their usual form* in the ſpiritual court; and ſo for time they ſay, in the months of January, February, &c. all the months of the year. But Atkins inclined, that that was naught; but all the reſt contra, and ſo they would grant no prohibition. Freem. Rep. 295. pl. 347. Trin. 1678. C. B. Anon.——See (P) pl. 2.

It was ſaid by Holt Ch. J. that if A. calls B. a *ſon of a whore*, he cannot libel in the ſpiritual court, but his mother may; becauſe in this caſe it is *no ſpiritual defamation to the ſon, but it is to the mother*. 11 Mod. 112, 113. Paſch. 6 Ann. B. R. Hoſkins v. Lee.

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[16. If a man ſays to a woman, *thou art a whore and thy children are baſtards*, and for this the woman ſues in court chriſtian, no prohibition lies, for the ſtatute El. of baſtards * ſaves the eccleſiaſtical juriſdiction. Mich. 3 Car. B. R. between WALLIS and PROCTER. Per Cur. Prohibition was denied.]

But where libel was, &c. for ſaying, thou art a *whore, and a bawd, and keepeſt a bawdy-houſe*, a prohibition was granted per tot. Cur. for ſaying, thou art a bawd, and keepeſt a bawdy-houſe, is puniſhable by the common law; and for ſaying, thou art a *whore, without* making *mention in particular*, is not to be puniſhed in the ſpiritual court; and a precedent was ſhewn. Mich. 3 Jac. NICHOLS's caſe, that a prohibition lies for ſaying, thou art *a whore, and a tainted whore, and a dirty whore*. Jo. 44. Mich. 21 Jac. C. B. Binch v. Wood.——*So* it was held per Cur. that ſaying thou art *a whore and a thief*, or thou keepeſt a bawdy-houſe, are temporal matters, and the party ſhall not proceed in the ſpiritual court; whereas if it were only, *thou art a whore, a libel lies* in the ſpiritual court. 2 Salk. 552. pl. 15. Mich. 1 Ann. B. R. Gallizard v. Rigault.

Libel was for calling a woman *impudent whore*. It was objected, that it was only a word of paſſion, and that later opinions have been, that unleſs ſome act of fornication was expreſſed, a prohibition ſhould be granted. But it was denied, becauſe whoredom is an offence of ſpiritual cognizance. 1 Vent. 7. Hill. 20 & 21 Car. 2. B. R. Herbert v. Merit.—Sid. 404. S. C. by name of MELLET v. HERBERT, ſays, this caſe was ruled upon view of precedents, which formerly were, that prohibition ſhould go, but of late that it ſhould not.

So prohibition was prayed to ſtay a ſuit for calling a woman *whore*, but upon conſideration, after two arguments at the bar, and on the bench, it was denied; for it is an eccleſiaſtical ſlander, and examinable and puniſhable in the eccleſiaſtical court, and not to be conſidered only as words of ſcolding and heat. 2 Lev. 63. Trin. 24 Car. 2. B. R. Betniff v. Pepple.——S. P. Freem. Rep. 43. pl. 51. Trin. 1672. B. R. Medliff & Ux. v. Buckhold & Ux. and it ſeems to be S. C.——S. C. of BETNIFF v. PEPPLE. Vent 220. ſays, it was for words ſpoken of the miſtreſs to her ſervant, (viz.) *go tell thy miſtreſs whore, ſhe is a whore, and I will prove it*. Hale Ch. J. ſaid, that they cannot be words of heat, as if ſpoken when the parties had been ſcolding, but were ſpoken deliberately to the ſervant in the party's abſence; and ſaid, that formerly they would not prohibit unleſs the words implied ſome act done, as in caſe of EATON v. AYLOFFE, Cro. C. 110. but it is reaſonable this ſuit ſhould proceed, it being for matter of ſlander, which is to be puniſhed by public penance; ſo no prohibition was granted.——But Trin. 1678. B. R. a prohibition was granted to a ſuit for calling a woman whore, becauſe only a word of heat and paſſion. Freem. Rep. 296. pl. 347. Anon.

Where the words were, *you are a whore and ply in Moorfields*; the ſuggeſtion for a prohibition was, that the words were *ſpoke in London*, where an action lies for ſuch words; and a prohibition was granted for that reaſon; for otherwiſe ſuits might have been in the ſpiritual court for ſuch words, though not ſingly for the word whore, it being a common word of brawling; but otherwiſe where joined with other words, which ſhew the intent to defame in that kind. Vent. 343. Mich. 31 Car. 2. B. R. Anon. *But* for ſaying *you are a common woman*, and *ſuch women as your are, never have any children*, the ſuggeſtion for a prohibition was, that there was a cuſtom in London to puniſh whores by carting and whipping, &c. and averred, that if any ſuch words were ſpoken by him, they were ſpoken in London, &c. a prohibition was denied per tot. Cur. becauſe this cuſtom extends only where the woman is directly called whore, and not to words from which it may be collected that ſhe is a whore. 2 Lutw. 1039. Hill. 3 W. 3. Houblin v. Milner.——*So* where a libel was for ſaying, *thou art a cuckoldly old dog, call down the bitch your wife*, it was ſuggeſted here as in the caſe above about the cuſtom of London, whereupon prohibition was granted, and it was now moved for a conſultation, upon the reaſons in the abovementioned caſe, that the words muſt be directly and expreſsly defamatory, and inſiſted upon the ſaid caſe; but per Cur. that caſe hath been denied to be law by this court, and it hath been ruled, that any words, which are defamatory and puniſhable in the ſpiritual court, are triable in London by the cuſtom there in an action on the caſe, wherein damages may be recovered, ſo in the principal caſe the prohibition was held good, and the conſultation was denied. 8 Mod. 115. Hill. 9 Geo. 1723. Hotchkis v. Corbett.——Upon ſuggeſtion of the words being actionable in London by the cuſtom for calling a woman whore, the Court would not grant a prohibition, *without oath made, that if any ſuch words were ſpoke, they were ſpoke in London and not elſewhere*. 4 Mod. 367. 6 W. & M. B. R. Anon.

Libel, &c. for theſe words, *you are a damned bitch whore, and a pocky whore, and if you have not the itch you have the pox*; and moved for a prohibition, becauſe an action lies at common law; and a difference was taken, where the word *pox* could not be intended but of the *French pox*, by the words that were ſpoken with it, there action lies; and Holt ſaid, that where the word *pox* was joined with the word *whore*, it ſhould be intended of the *French pox*, and prohibition granted.

12 Mod. 242. Mich. 10 W. 3. Grimes v. Lovel.——S. P. in the ſame term. 12 Mod. 248. Whitfield v. Powel.

But where words were, you are a *brandy-noſed whore, and you ſtink of brandy*; it was moved for a prohibition that the words rather charged intemperance than incontinency, but the prohibition was denied. 2 Salk. 693. Paſch. 4 Annæ B. R. Acebury v. Barton.——11 Mod. 48. pl. 15. S. C.

Libel, &c. for theſe words, S. F. wife of R. F. is a *whore*, and *her huſband is a cuckold, and* that *ſhe brought up his daughter to follow the ſame trade, and to be a whore like herſelf*, a prohibition was moved for, and granted niſi, but afterwards was diſcharged. Lutw. 1037. Mich. 5 W. & M. Moore v. Fawcet.

A libel was for ſaying, *ſhe had a child at S.* a prohibition was prayed for, but denied, it being a kind of fornication. 2 Keb. 335. pl. 63. Hill. 19 & 20 Car. 2. B. R. Hodſon v. Brown.

So for theſe words *ſpoken in London* (viz.) *thou haſt a baſtard after thy huſband's death.* It being after ſentence, Court doubted whether to grant a prohibition, and yet per Cur. the plaintiff, notwithſtanding the ſentence, may bring an action in London for the ſame words, to which this ſentence cannot be pleaded in bar; and ſo the party be doubly puniſhed for one and the ſame thing. Curia adviſare vult. Carth. 213. Hill. 3 W. & M. B. R. Hawkins v. Cook.——Show. 237. S. C. by name of Coke v. Hawkins.

* Rule was to ſhew cauſe why a prohibition ſhould not go to a ſuit, &c. for theſe words, *ſhe was never married, and never had a huſband* (and *what is her hopeful ſon*) *innuendo*, that *ſhe was a whore*; and upon debate the rule was diſcharged, for the Court was clear in opinion, that theſe words were a ſpiritual defamation. Carth. 498. Mich. 11 W. 3. B. R. Pliſs v. Smith.

A. ſaid to B. that *ſhe made her huſband a cuckold*; B. libelled againſt A. in the ſpiritual court; and it was moved, that the words were *ſpoken in London*, and that though it is not *calling her whore* directly, yet it is calling her ſo *by implication*. Per Holt Ch. J. if the cuſtom of London extends to puniſh a woman that makes her huſband a cuckold, then a prohibition may be granted; for the foundation to grant a prohibition for calling a woman whore in London is, becauſe they by cuſtom puniſh whores there by carting them, and an action lies there for calling a woman whore; and afterwards, at another day this term, they granted a prohibition, becauſe theſe words are actionable in London. 11 Mod. 195. Mich. 7 Ann. B. R. Bennet v. King.

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† Cro. C. 285. Cucko v. Starre, S. C. And 3 Juſtices were for the prohibition, for the words are but *convitium temporale, and a common phraſe of brawling*; but Richardſon doubted, becauſe either court might meddle with drunkenneſs to puniſh it; ſo that it is not merely temporal; but he aſſented to the grant of a prohibition, and the party may, if he will, after declaration, demur thereto. And a prohibition was granted.——Jo. 305. pl. 14. S. C. And Jones ſaid, that when he was Juſtice in C. B. a prohibition was awarded for ſuch words in Martin Colthorp's caſe.—— S. C. Cro. C. 309. by name of Starre v. Buckhold, a prohibition was awarded, becauſe theſe word *tend to, and are puniſhable as a temporal offence*, and not in the eccleſiaſtical court..

[17. If a man ſays to another, *thou art a drunkard, or a drunken fellow, or an idle drunken fellow*, if a ſuit be in the ſpiritual court for this, a prohibition lies; for this is not ſpiritual ſlander. Mich. 8 Car. B. R. † between Starr and Cuckow. Prohibition was granted; for they are words of heat and paſſion, and not any ſpiritual defamation. P. 15 Car. B. R. ‡ between Haynes and Poynter, the words were, *thou art a drunkard, and drunk* 3 *times a week*; prohibition was granted againſt the opinion of Barkley. But after Mich. 15 Car. it was moved again, and per Cur. prohibition was granted; for the Court ſaid they ſhould not hold plea of a defamation, where they have not original and direct cognizance of the fact whereof he is accuſed, as they have not of drunkenneſs, unleſs as an offence againſt the ten commandments, as all ſins are.]

‡ Jo. 441. Mich. 15 Car. B. R. Swayne's caſe ſeems to be S. C. where the words were, *thou art a common drunkard*, and a prohibition was granted.——Mar. 6. pl. 11. Anon. but is S. C.——Ibid. 66. pl. 103 S. C.——Per Jones J. if one libels for calling him a *drunkard*, a prohibition does not lie; but otherwiſe it is for ſaying, that *he was drunk*. Richardſon ſaid quære if not for another reaſon [viz.] becauſe the act is puniſhable by the ſtatute. Lat. 155, 156. in caſe of Lewen v. Whitton.

Where a libel was for ſaying to a parſon, viz. *thou art a pitiful drunken parſon and a drunken puppy*, a prohibition was granted, notwithſtanding they were ſpoke of a parſon. 3 Salk. 288. pl. 9. Paſch. 2 Ann. Brown v. Tanner.

Cro. C. 339. Gobbet's caſe. S. C. accordingly.

[18. If a man ſays to another, *thou art a cuckoldly knave*, and for this he and his wife ſue in the ſpiritual court for defamation, no prohibition lies; becauſe the words amount to a ſpiritual defa-

defamation, to wit, *that the wife was incontinent.* Hill. 9 Car. B. R. between ILES AND COBBET, per Curiam, a prohibition was denied.]

——Prohibition was granted to a libel for calling another *cuckold*; for they are words of paſſion, and the ſpeaking of them not puniſhable there. Sid. 248. pl. 14. Paſch. 17 Car. 2. Knight v. Jacob.——Keb. 890. pl. 53. S. C. Twiſden and Keeling J. held clearly that it was grantable; but Hyde and Windham doubted, but ordered cauſe to be ſhewn why it ſhould not be granted.

Defendant was ſued in the ſpiritual court for ſpeaking theſe words, (viz.) he is a *cuckold and a wittal*, which is *worſe than a cuckold, and J. S. hath lain with A.'s wife*; it was alleged that for ſuch words of ſpleen prohibitions have uſually been granted; but upon adviſement the Court all agreed that no prohibition ſhould be granted; for though the firſt words are too general, yet being coupled with a particular charge as to a particular perſon, they are now not words of ſpleen or uſual diſcourſe, but a defamation ſuable in the ſpiritual court. And ſo a prohibition was denied. Cro. C. 110. Paſch. 4 Car. C. B. Eaton v. Ayloff.

So where the words were, thou art a *cuckold, and a cuckoldly knave, and a cuckoldly rogue*; a prohibition was moved for; and cited 1 Cro. 110. But it was denied per Curiam; for there cannot be a higher defamation; becauſe it does not only defame the huſband but alſo ſcandal the wife; for if the words be true ſhe muſt neceſſarily be a whore; but if the words had been ſpoken *adjectively only*, as *cuckoldly knave*, there perhaps it might have been otherwiſe. Freem. Rep. 44 pl. 53. Trin. 1672. C. B. Davie v. Dorie.——In ſuch a caſe prohibition was granted niſi cauſa. Cauſe was ſhewn that the *baron and feme joining in the ſuit*, no prohibition ſhould go; otherwiſe if he had ſued alone; for the words charge her with incontinency, and ſo it is reaſonable that ſhe ſhould have this ſuit in the ſpiritual court to puniſh the defamation which ſubjects her to penance in the eccleſiaſtical court; but if the baron had ſued alone, a prohibition ſhould go, becauſe he incurs no ſuch danger by * the ſpeaking of the words. And of that opinion was the Court, and diſcharged the rule for the prohibition. 2 Lev. 66. Mich. 24 Car. 2. B R. Tozer et Ux. v. Davis.——Ibid. ſays that a prohibition was denied the next term in a like caſe, between Luchin and Lightbridge.——S. P. ruled by Holt Ch. J. 3 Salk. 288. Hill. 13 W. 3. Anon.

So where the words were, *he is a cuckold, with* an *averment that* in that country *it ſignifies* that *the wife is a whore*; and a prohibition denied. Comb. 312. Hill. 6 W. 3. B. R. Meriel & Uxor. v. Kendal.

*[594]

[19. If a man ſays to another, *thou art a knave, a paltry knave, and a pockey-faced knave*, and a ſuit is in the ſpiritual court for theſe words, a prohibition lies. P. 11 Car. B. R. between PACKER AND MOORE, a prohibition was granted.]

So for calling one *falſe knave*; for knave ab initio was no name of reproach, but ſignified a man-ſervant. 2 Inſt. 493. ſays it was the caſe of March v. Beale.——*So* where it was for calling a man *knave, and a knave indeed*, becauſe the words could not make him ſubject to any eccleſiaſtical cenſure. 2 Salk. 548. Hill. 8 W. 3. B. R. Hawkins caſe.

Note, it was denied by all that the ſpiritual court hath any juriſdiction to maintain any ſuit for calling a man *knave*, as pro reformatione morum. Sid. 149. pl. 12. Trin. 15 Car. 2. Anon.——A prohibition was granted niſi, &c. Sid. 393. pl. 26. Mich. 20 Car. 2. B. R. Anon.

[20. If J. B. ſays to J. D. *it is reported that J. N. did, or does keep in his houſe a man or boy to bugger*, to which J. D. anſwers, *he, vile villain, would have done as much to me*; if J. N. ſues J. D. for this defamation, averring himſelf to be a miniſter, a prohibition lies; becauſe this is not any ſpiritual defamation, and buggery is made felony by the ſtatute. Mich. 8 Car. B. R. between HIGGON AND COPPINGER, † a prohibition being granted before, a conſultation was denied, and after a demurrer was joined upon the declaration, and adjudged per Curiam, that the prohibition is well granted. Intratur, H. 8 Car. Rot. 129. though the ſuit in the ſpiritual court was for words.]

S. C. Jo. 320. But there the words are, that he did keep a boy to bugger him, *and that he did bugger him*; and a prohibition was granted by three juſtices, abſente the Chief Juſtice.

† Fol. 297.

21. If A. ſues B. in the ſpiritual court for a defamation, ſcilicet for ſaying theſe words, *that A. was falſe forſworn before the judges, in that he ſwore that J. S. was no tinner*; a prohibition lies, for

But where libel, &c. was for theſe words, (viz.

thou art a *forſworn knave*, for thou *madeſt a falſe account when thou waſt churchwarden*; the defendant ſuggeſted for a prohibition, that the diſcuſſing of perjury belonged to the temporal courts; but a conſultation was granted, becauſe the perjury was ſuppoſed to be committed about the execution of his office of a churchwarden, which belongs to the ſpiritual juriſdiction. But otherwiſe had it been ſuggeſted to be done concerning a feoffment, or other temporal act. Goldib. 113. pl. 2. Mich. 39 & 40 Eliz. Brown v. Lother. —— * See pl. 3.

for an * action lies at common law for theſe words if it be well laid. Mich. 8 Car. B. R. between ROBINSON AND TAYLOR, prohibition granted per Curiam.]

[22. If A. a ſurrogate, ſues in the ſpiritual court againſt B. *ex officio pro ſalute animæ & morum reformatione ex promotione* C. becauſe C. being a proctor of the ſpiritual court, and a maſter of arts, the ſaid B. ſaid to him, *thou art, or he is a ſcabbed knave and a pickerel bum-bailiff*; or thus, *I ſcorn to be abuſed by ſuch a ſcabbed knave, or ſuch a pickerel bum-bailiff as thou art*; and avers, that he ſaid this to defame C. and to contemn the eccleſiaſtical juriſdiction, a prohibition lies; for this is not any ſpiritual ſlander, nor any defamation of the court. Mich. 8 Car B. R. between CORY AND WARD, per Curiam. And a prohibition being before granted upon this, and a plea and demurrer for conſultation, the Court ſeemed now of opinion, that no conſultation ought to be granted. But before this was determined, Cory died.]

* [595] Godb. 226. pl. 314. Trin. 8 Car. B.R. S.C. but not ſo fully ſtated; et adjornatur. —A. (a parſon) ſued the plaintiff in the ſpiritual court for theſe words, *thou art a knave, a liar, and a raſcal.* It was moved for a prohibition, becauſe they are only words of heat and ſcolding; and cited 2 Roll. 296. No. 19. 297. No. 22, 23. And if he had ſaid he had been a *common liar*, it had been cauſe of deprivation. And per Ellis, then certainly it had been good cauſe to ſue in the ſpiritual court; per Atkins, he is a liar if he tell but one lie, and why ſhould we intend it in the worſt ſenſe of a common liar? ſo that the queſtion is, how it ſhall be intended? Vaughan ſaid, that caſe in Roll. 297. charges him with one particular act only, viz. of lying upon the ſubject matter. Sed adjornatur. Freem. Rep. 80, 81. pl. 100. Paſch. 1673. Gloyne v. Gilbert.

[23. If a ſuit be in the ſpiritual court *ex officio pro reformatione morum*, becauſe J. S. was a doctor of divinity, and parſon of Shipling in the county of and J. D. ſaid to J. S. *You were twice overthrown by the pariſhioners of Shipling. J. D.* * *replied, he lied, it was but once; whereupon J. D. replied, he lied, and that he was as good a man as J. S. for that he was but a blackſmith's ſon, or the ſon of a blackſmith*, a prohibition lies; for here is not any ſpiritual ſlander, and but a returning the lie upon the doctor, who gave it firſt. Mich. 8 Car. B. R. between HYE AND DOCTOR WELLS. Per Curiam, except Richardſon, a prohibition before granted, and now demurrer for a conſultation, the prohibition ſhall ſtand. Mich. 9 Car. this being moved again, per Curiam it ſeems that the prohibition ſhall ſtand.]

A libel was for ſaying of a parſon, *he preaches nothing but lies and make in the pulpit.* It was moved for a prohibition, becauſe the words are actionable at law, and it was granted; but afterwards a conſultation was granted, becauſe they concern an eccleſiaſtical matter and perſon, and are fit to be tried there. 3 Lev. 17. Paſch. 33 Car. 2. C. B. Cranden v. Walden. —— *But* where the words in the libel were laid to be, that the ſaid Price (a parſon) *behaved himſelf grouſly and inſolently*, and *that he was*

[24. If A. B. a feme, ſays of J. S. a miniſter, *he is a worthy preacher, he preaches againſt pride and brings a trullerud to church with him, (innuendo his wife) my huſband will not ſuffer me to be abuſed by ſuch a knave*; this is a ſpiritual defamation, for which, if a ſuit be in the ſpiritual court, no prohibition ſhall be granted. P. 11 Car. B. R. between VAUGHAN AND DANTSEY, per Curiam. Prohibition denied.]

on

an impudent, ignorant blockhead; and that he alſo ſaid and declared, *that the advice and exhortations, and other ſpiritual directions of him the ſaid* Price *from the pulpit, are not fit to be taken*, and *that he was not fit to give the ſacrament*; and *that he the ſaid* clerk, *ſpeaking to a third perſon, ſaid you would not receive the ſacrament from ſuch a puppy as the ſaid* Price *was, was you to live never ſo long in his pariſh*. To prevent a prohibition it was urged, that theſe were not words of heat but of deliberation, and highly touched him in his function; and cited the caſe of CRANDON AND WALDEN, 3 Lev. 17. But Holt Ch. J. ſaid, (to which the Court did not diſagree,) that though theſe words did reflect on him in his profeſſion, yet ſeeing they do *not charge him with any thing for which he is obnoxious to the ſpiritual court*, therefore a prohibition was granted, and it was ordered to come before the court of B. R. by declaration and demurrer. 11 Mod. 140. Mich. 6 Ann. B. R. Clerk v. Price.——Afterwards in Hill. 7 Ann. this cauſe came on again, but adjornatur.——Ibid. 208. S. C. but no judgment.

[25. If A. a woman, ſues B. in the ſpiritual court, for ſaying of her, thou art a *Welch jade*, averring in the libel, that the ſaid words ſignify as much as if he ſaid of her that ſhe was a whore, no prohibition ſhall be granted; for this is a ſpiritual defamation. P. 11 Car. B. R. a conſultation granted; after a prohibition before granted, upon ſhewing of a libel for ſaying, *thou art a* * *thief, and a Welch jade*, but now the proctor comes into Court, and certifies the Court; that the word *thief* was not in the record in the ſpiritual court, and upon this a conſultation was granted, between JEFFERIES AND PUE, per Curiam.

S. C. Cro. C. 456. Paſch. 12 Car. B. R. Pew v. Jeffries.—— The huſband libelled for ſaying of his wife, *ſhe is a drunken jade, a cheating jade, and a ſtinking jade*;

and ſuggeſted in the libel that jade ſignified whore. A prohibition was denied per tot. Cur. becauſe the words are malicious. 2 Show. 487, 488. pl. 453. Mich. 2 Jac. 2. B. R. Warwick v. Skinner & al.——But the reporter adds, ſed quære vim rationis; for an averment ſeems neceſſary. And ſays that Mr. Powell (the counſel that moved for the prohibition) informed him that the next day they had a prohibition granted in C. B.

* Where the words *are complicated, ſo that action will lie for part* in the temporal court, prohibition will go for all; as if it had been for ſaying, thou art a whore and a thief, the ſuit in the ſpiritual court ſhall not be ſtayed for the word thief only but for the whole. Per Twiſden J. Sid. 404. in the caſe of Mellet v. Herbert.

26. 9 *E.* 2. *cap.* 4. enacts, That *in defamations the prelates may correct notwithſtanding the king's prohibition.* See 2 Inſt. 260.

27. A man may ſue in the ſpiritual court for calling him *falſifier, adulterer*, or *uſurer*, &c. F. N. B. 51. (I). S. C. cited Mar. 66.

28. If a man *give evidence to an inqueſt to indict one*, he cannot ſue for this defamation in court chriſtian. 2 Inſt. 493. [596]

29. If a man call one a *perjured* man, he muſt take his remedy at the common law. 2 Inſt. 493.

30. C. libelled againſt A. for calling him *baſtard-maker*. The defendant juſtified, becauſe he was proved to be ſo before two juſtices of peace, according to the ſtatute 18 Eliz. which plea the judges in the eccleſiaſtical court refuſed, whereupon a prohibition was awarded. But per Haughton, if the defendant had not pleaded the conviction, but had only juſtified, and offered to prove it, and they had refuſed his plea, no prohibition ſhould be granted; but his remedy had been by appeal. 2 Roll. Rep. 82. Paſch. 17 Jac. B. R. Cooke's caſe. The defendant ſued the plaintiff in the ſpiritual court for ſaying *he was the father of a baſtard-child*. The plaintiff *ſays, he ſpoke the words at the*

ſeſſions, where the defendant was *adjudged to be the father*, and to maintain the child. The defendant ſays he ſpoke them out of ſeſſions. And the plaintiff demurs, and had the prohibition, per Curiam; for by the ſtatute of the ſeſſions are made judges of the father of baſtard children; and therefore they ſhall not try it over again in the ſpiritual court; for he is legally convicted; and it is like as if a man be convicted of perjury, any man may call him perjured, and juſtify. Freem. Rep. 283. pl. 325. Trin. 1673. in B. R. Thornton v. Pickering.

31. The

3 Lev. 18. Paſch. 33 Car. 2. C.B. S. C. by name of Yates v. Lodge, but reports them as ſpoken of a *parſon*, and ſays the prohibition was denied, for the words are very ſcandalous, being ſpoken of a parſon, though not actionable at common law.

31. The plaintiff ſpoke of the defendant theſe words: A. is a *lying fellow, and has lain with all the women between H. and B. and lies with ſo many* women, *that he ſcarce lies with his wife.* The plaintiff was ſued for theſe words in the eccleſiaſtical court. A prohibition was prayed, becauſe theſe words import a thing impoſſible, and are too general. But denied per Curiam, becauſe they import him to be an adulterer; and this is a matter properly in the conuſance of the eccleſiaſtical court. Freem. Rep. 300. pl. 362. Trin. 1681. C. B. Lodge v. Yates.

32. I *will not venture myſelf with her,* (being ſpoke of a *midwife licenſed,*) ſhe is a *whore and will kill me, and bury me in the garden, as ſhe did her baſtard;* for which words a ſuit was in the eccleſiaſtical court, and prohibition prayed, and upon cauſe ſhewn denied; the court taking them not to be actionable at common law. Skin. 86. Hill. 35 Car. 2. B. R. Anon.

33. A libel was for theſe words, *viz.* ſhe is a *bitch*, a *whore*, and an *old bawd.* A prohibition was prayed, becauſe ſome of the words are actionable at law, and ſome puniſhable in the ſpiritual court, and ſo prayed a prohibition quoad thoſe words that are actionable at law; and it was granted, becauſe the words were an intire ſentence, and ſpoken altogether; and if a prohibition ſhould not be granted, the plaintiff might be doubly vexed. 3 Mod. 74. Mich. 1 Jac. 2. B. R. Anon.

34. A libel was for ſaying, *you are a rogue and a raſcal, and have hired fellows to ſwear falſe.* It was ſuggeſted for a prohibition, that though the words ſhould not be deemed words of heat, &c. but adviſed and malicious, then they import an offence againſt a ſtatute law, and, that where no ſuit lies for the principal in that court, no libel can be there for defamation in the charging ſuch offence. And a prohibition was granted. 2 Show. 454. pl. 417. Mich. 1 Jac. 2. B. R. Venners v. Allen.

35. Prohibition was granted to the ſpiritual court upon a libel, for calling him *rogue and raſcal*, and ſaying that he *kept a whore in his houſe*, and thereupon the plaintiff there had ſentence. The defendant appealed to the arches, where the ſentence was affirmed and remanded, and then appealed to the delegates, and was thence remanded for non-proſecution there. Upon a motion to diſcharge the prohibition it was inſiſted, that the words were only of heat and ſcolding; and to ſay that the plaintiff kept a whore in his houſe, [597] ſhall not be underſtood that he knew her not to be ſo, but that he kept her as a whore, eſpecially being after ſentence, and of that opinion was the Court, and granted a conſultation. 3 Lev. 350. Paſch. 5 W. & M. C. B. Elliot v. Chamberlain.

S. C. Comb. 226. Dolben ſaid, that a prohibition had often been denied for calling one whore,

36. A libel was for theſe words, you are a *rogue, raſcal, whore-maſter, and ſon of a perjured affidavit bitch.* A prohibition being moved for, all the words were waived but that of whore-maſter; and it was urged, that this was only a word of heat. But per Holt Ch. J. to ſay ſo of a man is the ſame as calling a woman whore, which is an eccleſiaſtical ſlander; that to call a man *cuckold*

cuckold was not eccleſiaſtical ſlander, but *wittal* was, for that imports his knowledge and conſent to the adultery of his wife; but to call a man *impudent brazen-faced Belzebub* were words of paſſion, and import no crime nor diſcredit any more than *devil* or *prince of darkneſs*. 2 Salk. 692. Mich. 5 W. & M. B. R. Smith v. Wood. and there was the like reaſon for whoremaſter; and cited 1 Cro. 110. Sid. 248. and 1 Cro. 332. But Fyre J. ſaid that that caſe had been ſince exploded. ——S. C. Skin. 390. And that the prohibition was denied per tot. Cur. and they ſaid they would not encourage defamatory words.

37. Libel was for theſe words ſpoken *of a parſon*, he *has no ſenſe*, he *is a dunce and a blockhead*, and *he wondered the biſhop would lay his hands on ſuch a fellow*, and that he *deſerved to have his gown pulled over his ears*. A prohibition was granted; for a parſon is not puniſhable in the ſpiritual court for being a blockhead more than another man; it being urged, that he might be deprived for want of learning, Holt Ch. J. ſaid, if that be his caſe, he muſt bring his action at law, becauſe deprivation is a temporal damage. And a prohibition was granted. 2 Salk. 692. pl. 3. Hill. 10 W. 3. B. R. Coxeter v. Parſons. S. C. 12 Mod. 231. accordingly.

38. A motion was made for a prohibition to the ſpiritual court, upon a libel there for theſe words, *he is a great rogue, as great a rogue as ever was hanged, and deſerves to be hanged more than Dr. Pims*; a prohibition was granted, becauſe no ſpiritual defamation. 11 Mod. 112. Paſch. 6 Ann. B. R. Hoſkins v. Lee.

(O) Where the *Spiritual and Common Law differ*, if the Suit be according to the Spiritual Law, a Prohibition ſhall be granted. *In the Matter.*

Fol. 298.

[1. IF a man *buys wood, and expends it in his houſe*, though the vendee may be ſued for tithes of it by the ſpiritual law at the election of the parſon, yet ſince he ought not by the common law, becauſe he expends it in his houſe, a prohibition ſhall be granted, as was granted P. 14 Ja. B. between Parſon ELLIS. AND DRAKE.] See Diſmes, (Z).

[2. *So* if a *leſſee of paſture* rendering rent be ſued *for tithes of the rent* and *not in kind*, a prohibition lies, becauſe it is againſt the common law; for he ought to ſue for tithes in kind, as was adjudged, 14 Ja. ELLIS AND DRAKE before.] See Diſmes, (S) (T) pl. 1. S. C.

[3. If A. gives a *legacy to B.* and makes C. his *executor*, and dies, and after C. *dies inteſtate*, and D. takes letters of adminiſtration of the goods of C. and after *B. ſues D. as adminiſtrator of C.* for this legacy, *ſuppoſing C.* when he was executor, *to have waſted the goods* of A. a prohibition lies; becauſe by the common law this was a *perſonal tort* for which the adminiſtrator cannot be charged. P. 11 Car. B. R. between AMEND AND FOTHERBY by 2 Juſtices againſt one.] But ſince this caſe adminiſtrators of rightful executors, &c. have been made chargeable by ſtatutes, for which ſee Devaſtavit.

4. Where a man *grants the tenth part over and above the tithes, which he ought to pay to the church*, there, of this the lay court ſhall have juriſdiction. Br. Diſmes, &c. pl. 1. cites 44 E. 3. 5. [598]

5. The

5. The *defendant in a quare impedit (pending the ſuit in B. R.) libelled againſt S.* one of the pariſhioners of the church in queſtion *for tithes*, and de jure rectoriæ, *alleging, that he is verus & indubitatus rector*, &c. *S. pleaded* there, *that G. was not parſon, but that M. was*; which plea they refuſed, and gave ſentence againſt S. and S. prayed a prohibition, for that it *appears* to the Court of B. R. *by a verdict given here, that M. and not G. is the true parſon.* Coke Ch. J. thought a prohibition ſhould be granted; for ſhould G. have the tithes, M. might alſo charge S. and ſo S. would be twice charged; and it appears to the Court, that M. is the true parſon, and yet they of the ſpiritual court will certainly ſentence G. to be the true parſon, becauſe they look upon M.'s inſtitution to be void by reaſon of a caveat entered, in which reſpect our law and theirs differ ex oppoſito; for the libel is, that G. is verus & indubitatus rector, and that the ſuit is de jure & titulo rectoriæ, whereas parſon or not parſon is triable by the common law; quod fuit conceſſum per Doderidge, who ſaid, that parſon or not parſon comprehends induction; which Coke granted, and a prohibition was granted. 1 Roll. Rep. 228. pl. 36. Trin. 13 Jac. B. R. Glover v. Shedd.

6. It was agreed per Cur. that *real compoſitions of endowment of vicarages* ſhall be expounded by the judges of the common law, and therefore if the ſpiritual court meddles with it a prohibition lies. Litt. Rep. 263. Paſch. 5 Car. C. B. caſe of vicarages.

Gill v. William. Keb. 845. pl. 39. Adjornatur. But ibid. 877, 878. pl. 29. Prohibition was denied; and per Hyde, in ſuit for a legacy againſt adminiſtrator of executor on deviſe by the firſt teſtator, if by their law adminiſtrator to executor be ſo to the firſt teſtator, they have at worſt proceeded inverſo ordine, in which caſe it is proper to appeal.

7. A. made 2 *executors B. and C.* and died; *B made J. N. his executor* and died; *C. died inteſtate*; a *legatee of A. ſued J. N. in the ſpiritual court for his legacy*; who pleaded this matter, but they there refuſed the plea; whereupon he prayed a prohibition, but it was denied, becauſe the matter is teſtamentary; and perhaps J. N. has all the goods in his hands, and is executor de ſon tort, and that there is nobody elſe in this caſe to be ſued to recover the legacy from; and though the ſurvivor by our law ſhall have all, it is not ſo perhaps in their law, to which this matter belongs; and if they proceed ill he ought to appeal, but this Court will not prohibit them; and a prohibition was denied. Lev. 164. Paſch. 17 Car. 2. B. R. Guillan v. Gill.

8. When a queſtion ariſes concerning the juriſdiction of the ſpiritual court, as whether they ought to have the *probate of ſuch a will?* whether ſuch a diſpoſition of a perſonal eſtate be a *will or not?* whether ſuch a will ought *to be proved before a peculiar or before the ordinary?* whether *by the archbiſhop of one province or another*, or both? and what ſhall be *bona notabilia?* in theſe or the like caſes the common law retains the juriſdiction of determining. Per North Ch. J. 1 Mod. 211. pl. 44. Paſch. 28 Car. 2. in C. B. Anon.

(P) Where the Temporal and Spiritual Law differ *in the Manner of the Suit.*

[1. IF baron and feme are *divorced cauſa adulterii*, and after the *feme ſues alone* without the baron *for a defamation*; though the divorce does not diſſolve the marriage, yet becauſe the feme may by the courſe of the ſpiritual law ſue alone in ſuch caſe, no prohibition ſhall be granted, though it be contrary to the uſage of our law. My Reports. MOTAM AND MOTAM adjudged.]

Roll. Rep. 426. pl. 19. Mich. 14 Jac. S. C. See (Q) pl. 10.—By the rules of the * ſpiritual court, a feme covert may ſue alone in every one of the following caſes, viz. when ſhe is *executer* or *adminiſtrater*, or *legatee* or *legatary*, or *defaming* or *defamed*. Per Dr. Pinſold. 10 Mod. 64. Mich. 10 Ann. B. R. in caſe of D'acth v. Baux.

* [599]

[2. If a man libels in eccleſiaſtical court *for ſaying of certain words (naming them) aut in effectu conſimilia*; though ſuch declaration be not good at the common law, yet ſuch libel is good by uſage there, and therefore no prohibition ſhall be granted. Hill. 11 Ja. B. R. † Palmer's caſe.]

S. P. And held good by all the Court, except Atkins, who inclined that it was naught; but the others held it good, becauſe it is their uſual form. Freem. Rep. 295. pl. 347. Trin. 1678. C. B. Anon.——† S. C. cited Arg. Show. 159. in caſe of Shatter v. Friend.

[3. If a *feme covert* be *ſued* in the ſpiritual court *for ſcolding in the church-yard*, and condemned, and coſts taxed, *the baron not being party to any thing thereof*, yet becauſe it is the cuſtom of the ſpiritual court, no prohibition ſhall be granted. Hill. 14 B. R. BENNET's caſe. Prohibition denied.]

[4. If a man be *ſued* in the high commiſſion court *ad inſtantiam partis for inceſt*, and there it *appears that there was a fact committed*, and a feme and one witneſs that the defendant was guilty thereof, yet *becauſe there were not 2 witneſſes he was put to his purgation*, becauſe there a man cannot be condemned by one witneſs and he purged himſelf accordingly, and yet there they *gave coſts to the party who proſecuted this ſuit*, according to their uſage there in ſuch caſes no prohibition ſhall be granted; for though he eſcapes the cenſure of the court by the ſtrictneſs of their law for want of a witneſs, yet for the *preſumption that he is guilty*, they may well give coſts according to their law. P. 11 Ja. B. R. COORTNOL's caſe reſolved.]

S. C. cited Arg. Show. 159. in caſe of Chatter v. Friend.

[5.] [8. Upon a ſuit * in the eccleſiaſtical court *ad inſtantiam partis*, if the *defendant pleads the king's pardon*, and after *coſts are taxed for the plaintiff*, becauſe the pardon is in manner a confeſſion of the fact, though this be their cuſtom there, yet a prohibition ſhall be granted, for inaſmuch as the matter and ſuit is pardoned, the coſts alſo are gone. H. 11 Ja. B. R. WATSON's caſe. Reſolved.]

Fol. 299.

[6.] [9. If a *baron and feme* are *ſued* in the eccleſiaſtical court *for polygamy*, and there it *appears that the feme was married before* to J. S. *within the age of conſent, and after diſagreed* at the age of conſent, and married the defendant, and ſo the court acquitted the defendants, yet if they *tax coſts to the plaintiff*, no prohibition ſhall

S. C. 2 Brownl. 36. ſays, that a prohibition was granted; for that it was in-

juſtice to allow coſts to one that had vexed him without cauſe, and when they had given ſentence againſt the informer.

ſhall be granted, inaſmuch as they have juriſdiction of the cauſe, and it is their uſage to tax coſts, where the plaintiff *had cauſam litigandi.* Mich. 8 Ja. B. BLACKDON's caſe. Prohibition denied.]

2 Watſ. Comp. Inc. 8vo. 1122. cap. 57. cites S. C.

[7] [10. If a *parſon ſues upon the ſtatute of* 2 *E.* 6. in the ſpiritual court *for the double value for not ſetting forth of tithes*, and the defendant ſurmiſes that he ſet them forth, and that they *would not admit the proof of it there by one witneſs.* No prohibition lies, becauſe they have conuſance of the matter. Hill. 9 Car. B. R. between YOLLE and Sir Edward POWEL. Per Curiam. Prohibition denied.]

Mar. 73. ſeems to be S. C.—— The *churchwardens* of a parish, at the end of their year *cited the pariſhioners into the ſpiritual court* to hear their accounts paſſed and audited. The pariſhioners appeared, and objected to part of the account, which after ſome variation the Judge allowed, and ordered the *pariſh to pay* 65 *l. coſts* of ſuit. The pariſh appealed from this ſentence to the court of arches, and pending the appeal moved for a prohibition; and it was argued, that though the ordinary at the inſtance of the pariſhioners *may cite* churchwardens to bring in their accounts, as being officers amenable to him, yet he *cannot take the accounts* between them, as he has done here, at the peril of coſts to the pariſhioners; but the pariſh muſt ſettle it among themſelves, or at a veſtry; and that it had been ſo determined ſeveral times. And of this opinion was the Court. And held that where it appears upon the face of the proceedings that the Court had no juriſdiction, a prohibition may be granted after ſentence. And accordingly a prohibition was granted. Trin. 13 & 14 Geo. 2. B. R. Adams v. Rudge.

[8] [11. If the *pariſhioners ſue the churchwardens* of the pariſh *to make an account* in the eccleſiaſtical court, and in this ſuit *coſts* of ſuit *are taxed for the pariſhioners* againſt the churchwardens, and after the *churchwardens pay the coſts to one of the pariſhioners*, and thereupon he, who receives it, *gives a releaſe* to the churchwardens of the coſts, and *this releaſe is afterwards pleaded* by the churchwardens againſt the other pariſhioners in the eccleſiaſtical court, *and is diſallowed* there, yet no prohibition ſhall be granted, becauſe they having conuſance of the original (to wit) of the coſts, they ſhall have conuſance alſo what ſhall be a ſufficient payment of them. Mich. * 15 Car. B. R. between HOMES and GODWIN. Per Curiam, a prohibition denied.]

*[600]

9. *Treſpaſs of* 2 *loads of underwood taken in D.* the *defendant ſaid, that the plaintiff is parſon of D. and he is vicar there, and the underwoods were tithes ſevered from the* 9 *parts, and that the vicars have had it time out of mind, and that the plaintiff came and claimed them as parcel of his tithes, and the defendant took them as his tithes*, which is the ſame treſpaſs, judgment, &c. and becauſe it was *after imparlance* the defendant could not plead to the juriſdiction as he might at firſt, becauſe it is between parſon and vicar, and yet becauſe it appeared to the court that it is between *parſon and vicar*, and the *lay court uſes one* manner of *preſcription, and ſpiritual court another*, therefore the court *ex officio ouſted them* of juriſdiction by award; quod nota. Br. Juriſdiction, pl. 79. cites 22 E. 4. 23.

10. One libelled in the ſpiritual court for tithes, and *died, and his executors revived the ſuit.* Doderidge J. ſaid, that the ſuit being lawfully commenced ſhall continue; for by the civil law the death of the plaintiff or defendant is not any abatement of the libel; but *they have a reviver, as the common law has a re-ſummons*

in raviſhment of ward, and where a court is once lawfully poſſeſſed of a cauſe, and has juriſdiction, it would be hard to grant a prohibition, and prohibition was denied. Per tot. Cur. Cro. J. 483. pl. 20. Paſch. 16 Jac. B. R. the Biſhop of Carliſle's caſe.

11. A prohibition was prayed to ſtay a ſuit againſt J. S. leſſee of a rectory, out of which a penſion was demanded. It was ſuggeſted, that the Lord Biron had 3 parts in 4 of this rectory, upon which the penſion was chargeable, and that the *ſuit againſt one alone* ought not to be, as in an aſſiſe for rent-charge all the tertenants are to be named, and here the party has an election to ſue a writ of annuity, and if ſo, he muſt have named all that had been chargeable. Per Cur. it is true, in our law it were a good plea in abatement, but perhaps their law and courſe is otherwiſe, and here they have juriſdiction, and may proceed according to their own rules, or if not, you may have an appeal; whereupon a prohibition was denied. Vent. 335. Paſch. 31 Car. 2. B. R. Anon.

12. M. being proſecuted in the ſpiritual court by a proctor for his fees in a ſuit brought by the ſaid M. againſt her then huſband Young to be divorced, prays a prohibition; ſuggeſting, that ſhe was feme covert, and as ſuch not liable to be ſued ſingly to pay the fees. Per Parker Ch. J. if the ſpiritual court has the juriſdiction, perhaps it is not neceſſary by the forms of their law, for the huſband to be named in the ſuit, as in the caſe of an executrix. And the reaſon of the difference between the common law and the civil law is this, that in the ſpiritual court the huſband, though not named, may come in pro intereſſe ſuo, and make defence himſelf, ſhould the wife deſert the cauſe. 10 Mod. 261 & 264. Mich. 1 Geo. 1. B. R. Clerk v. Lee.

13. Where a prohibition is granted *pro defectu triationis*, it is upon *ſuppoſition of different rules* eſtabliſhed by the ſpiritual and common law, as in caſe of preſcription. Per Cur. 10 Mod. 272. Mich. 1 Geo. 1. B. R. in the caſe of Cottingham and Lofts.

END OF THE SEVENTEENTH VOLUME.